

*Draft Response to Press Queries to DOJ Legal Opinion on
ANG Issue*

DCN: 12229

Q1. Has the Commission received DOJ's legal opinion?

A1. Yes

Q2. I understand that the Commission forwarded two of its own opinions to DOJ for consideration. Why two and do they agree?

A2 DOJ requested that Commission provide some views that it could consider in preparing its legal opinion. The Commission forwarded two views for consideration. One, an internal General Counsel document, provided rationale supporting the view that a Governor's consent is required before the DoD can close an ANG facility. Another view, prepared by a law firm, provided rationale that the BRAC law supersedes the consent law. The Commission has not adopted either view.

Q3. If the Commission has not adopted either of these views, does it regard the DOJ opinion as binding on the Commission.

A3. The Commission is an independent body. As such, it is not bound by the DOJ opinion. The Commission regards the opinion as advisory in nature.

Q4. Isn't the Commission placing itself at risk of a law suit for acting on DoD recommendations that may close ANG facilities?

Q5. The Commission has not made any ANG recommendations yet. It has been directed by law, the Base Closure and Realignment Act of 1990 as amended, to determine whether the Secretary of Defense has substantially deviated or not in each of his recommendations from the force structure plan and the criteria established in the BRAC law. That is how the Commission intends to proceed.

Q6. What is the name of the law firm that provided the second opinion?

A6. Wiley, Rein and Fielding

Q7. What did it cost the Commission for the opinion?

A7. We have not received a bill.

Jones, Audrey, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Wednesday, July 27, 2005 4:28 PM
To: Schaefer, James, CIV, WSO-BRAC; McCreary, Robert, CIV, WSO-BRAC; Jones, Audrey, CIV, WSO-BRAC

Jim -

FYI

V/R

Dan

From: Daniel Else [mailto:DELSE@crs.loc.gov]
Sent: Wednesday, July 27, 2005 11:26 AM
To: Dan.Cowhig@wso.whs.mil
Subject:

Note the amendment proposed for the National Defense Authorization Act for 06:

SA 1513. Mr. BYRD (for himself, Mr. BIDEN, Mr. ROCKEFELLER, Mr. LIEBERMAN, Mrs. CLINTON, Mr. OBAMA, and Mr. SCHUMER) submitted an amendment intended to be proposed by him to the bill S. 1042, to authorize appropriations for fiscal year 2006 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes; which was ordered to lie on the table; as follows:

On page 371, between lines 8 and 9, insert the following:

SEC. 2887. SENSE OF THE SENATE CONCURRING WITH THE BASE CLOSURE AND REALIGNMENT

COMMISSION LEGAL

OPINION ON EXISTENCE OF LEGAL

IMPEDIMENTS TO CLOSURE OR REALIGNMENT

OF AIR NATIONAL

GUARD ASSETS.

It is the sense of the Senate that the Senate concurs with the conclusion that legal impediments exist to the closure or realignment of Air National Guard assets, as stated in the memorandum entitled: Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations issued on July 14, 2005, by the Office of General Counsel of the Base Closure and Realignment Commission.

Jones, Audrey, CIV, WSO-BRAC

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, July 27, 2005 5:00 PM
To: Jones, Audrey, CIV, WSO-BRAC
Subject: RE: Official Position on TAG Issue?

Audry,

We asked the AG for an opinion in May regarding the BRAC Commission's authority to take certain actions that impact the ANG and NG -- our letter to the AG is on the Web. DOJ, through its Office of Legal Counsel, has in turn asked us for our official legal position on the issue. We gave them an unofficial position -- the white paper of 11 July. We may soon give them our official opinion. That is the status of matters now.

David

-----Original Message-----

From: Jones, Audrey, CIV, WSO-BRAC
Sent: Wednesday, July 27, 2005 3:18 PM
To: Hague, David, CIV, WSO-BRAC
Subject: Official Position on TAG Issue?

Gen. Hague:

Jim mentioned that the Attny. Gen. had requested an official position from the Commission re: the TAG issue. Is that something that we have submitted, and if so, have we received the AG's position in return? Please let me know if I am misunderstanding what it is that we are doing with this right now. Thanks!

Audrey C. Jones
Associate Director of Communications
BRAC Commission
(703) 699-2963

Jones, Audrey, CIV, WSO-BRAC

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, July 27, 2005 5:02 PM
To: Jones, Audrey, CIV, WSO-BRAC
Subject: RE:

Two civil actions have been initiated: PA against SECDEF -- PA recently asked the federal district court for expedited processing of their suit; IL, which unlike PA, has named SECDEF and the nine BRAC commissioners as defendants. Both suits are pending. David

From: Jones, Audrey, CIV, WSO-BRAC
Sent: Wednesday, July 27, 2005 3:19 PM
To: Hague, David, CIV, WSO-BRAC
Cc: Cowhig, Dan, CIV, WSO-BRAC
Subject:

Would you be able to give me an update on the suits that were filed against the Commission, as well? Thanks so much!

Audrey C. Jones
Associate Director of Communications
BRAC Commission
(703) 699-2963

Media → coverages

- Active discussion upon Commission.
- ⇒ Working on offer of legal council to address the Q.
↳ add'lly, req. views of Gen. Council of DoD.
- Pres. → req. op'n. of Atty. Gen. on this matter
in a letter sent several wks ago → anticipated
resp.
- ⇒ Expect prog. of Commission finalized next wk.
~~_____~~

BRAC INFORMATIONAL HEARING

KEY TALKING POINTS

JULY 29, 2005

What is the purpose of the DoD's testimony at the Informational Hearing?

- Prior to adding installations to the original recommendation list, The Base Closure and Realignment Commission is required by Section 2914(d)(3) of the Defense Base Closure and Realignment Act of 1990, as amended, to seek an explanation from the Secretary of Defense as to why certain installations were not included on the original recommendation list.

What is the purpose of the Overseas Basing Commission testimony at the Informational Hearing?

- The Overseas Basing Commission (OBC) was established to assess the applicability and feasibility of the proposed global basing structure for U.S. forces.
- The OBC's testimony at the Informational hearing is intended to raise/address issues concerning the inherent synergy between these two efforts.

What is the purpose of the General Accounting Office's (GAO) testimony at the Informational Hearing?

- Law requires that GAO issue a report on the Department of Defense's BRAC recommendations and selection process. In doing so, GAO's objectives were to (1) determine the extent to which DoD's proposals achieved its stated BRAC goals, (2) analyze whether the process for developing recommendations was logical and reasoned, and (3) identify issues with the recommendations that may warrant further attention.
- The hearing allows GAO to present its findings in a public forum.
- The BRAC Commission will carefully review these GAO findings as it prepares its analysis of DoD's proposals.

What is the Commission's position on the recent legal allegations concerning BRAC & National Guard Assets?

- The memo is an internal working document—a starting point for discussion.
- The Commissioners have NOT deliberated on it.
- The views expressed in the memo are those of the author and NOT of the Commission.
- The Commission has requested that the Department of Justice provide the Commission a legal opinion on the issue of the authorities of the Department of Defense and those of Governors on the Air National Guard.

BRAC INFORMATIONAL HEARING
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- When the legal opinion of the DoJ is provided to the Commission, it will be posted on the website (www.brac.gov).

BRAC INFORMATIONAL HEARING
ANTICIPATED Qs & As REGARDING DEPUTY COUNSEL DAN COWHIG'S
MEMORANDUM ADDRESSING THE BRAC PROCESS AND THE NATIONAL
GUARD.

JULY 29, 2005

Q1. Is Mr. Cowhig's memorandum the official position of the BRAC Commission?

A1. No. Mr. Cowhig's memorandum is an expression of legal opinion. As such, the memorandum is an internal working document that will serve as an impetus for deliberation amongst the Commissioners.

Q2. Have there ever been similar challenges to BRAC recommendations in the previous four rounds-1988, 1991, 1993, and 1995? And if so, have those challenges set a precedence that would influence the current lawsuits being filed by various states?

A2. The Commission has requested that the Department of Justice provide the Commission a legal opinion on the issue of the authorities of the Department of Defense and those of Governors on the Air National Guard.

Q3. Why was the Air National Guard ignored in BRAC deliberations while the Army National Guard took part in several events prior to the release of the DoD's BRAC recommendations?

A3. The Commission is fully informed and equally concerned by the alleged lack of collaboration between the DoD and various Governors on issues of Air National Guard resources. The Commission will conduct a full investigation on this issue.

Q4. Concurrent to the BRAC process, there are several other efforts going ahead concerning the future of the nation's military. These include: the 2005 Quadrennial Defense Review, the Air Force's Future Total Force study, the Commission on Review of the Overseas Military Facility Structure of the United States ("Overseas Basing Commission"), and various other ongoing budgetary and capabilities studies. Does the Commission understand the inherent synergy between all of these recommendations? How will the Commission weigh these factors in its final recommendations?

A4. The Commission is sympathetic to the synergy between these various efforts and many of the concerns expressed regarding this issue. The Commission will take every effort to conduct an analysis that incorporates many of the central concepts of these various efforts.

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Q5. Recently, various Governors have raised the issue that the BRAC recommendations are an attempt to supersede the governors' role as Commander-in-Chief of the National Guard assets of a state. What is the Commission's understanding of the correct chain-of-command with regard to this issue?

A5. The Commission is fully aware of the concerns expressed by various Governors. As such, the Commission has asked the Department of Justice to provide it with a legal opinion on the issue of the authorities of the Department of Defense and those of Governors on the Air National Guard. Be assured, that the opinion provided by the Department of Justice will be posted on the BRAC website when it becomes available.

Q6. Does the Commission view the DoD's BRAC recommendations as an effort to address an imbalance in the active-reserve force mix?

A6. The Commission is aware of this concern. For this reason, the Commission has tasked the DoJ to provide it with a legal opinion concerning the authorities of the Department of Defense and those of Governors on National Guard assets. It is the hope of the Commission that this legal opinion will fully characterize the scope of authorities granted to various bodies under the Constitution, the National Defense Act of 1916, Title 32 of U.S. Code, and the Base Closure Act—as well as any other pertinent legal doctrine.

Q7. The United States Constitution recognizes that the National Guard is a partnership between the federal and state governments. As such, Congress has mandated that command, control, and oversight of the Guard involve a process of collaboration, coordination, and mutual consent. The current lawsuits allege that this collaboration was lacking in the DoD BRAC recommendations. How will the Commission address this lack of communication regarding National Guard assets in its final recommendation to the President?

A7. The Commission is aware of the legal allegations central to these lawsuits. Be assured that these issues will be fully deliberated within the Commission prior to delivery of the final recommendations to the President on Sept. 8th.

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ANTICIPATED QS & AS REGARDING DEPUTY COUNSEL DAN COWHIG'S
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Q8. The current legal issues that have arisen concerning the National Guard seemingly threaten the entire BRAC process. If in fact, the DoD overstretched the scope of the original Base Closure Act then the President or Congress may reject the Commission's final recommendations. Presently, is this a serious concern within the Commission?

A8. The Commission is fully cognizant of and concerned with the current legal issues. The BRAC process is an important and difficult undertaking that addresses issues of national security and affects the livelihood of countless Americans. The Commission will take every step to thoroughly, accurately, objectively, and exhaustingly evaluate the DoD's BRAC recommendations to ensure that they conform with the standards set forth in statute.

Q9. Currently, the Governors and Senators from Illinois and Pennsylvania have filed suit against the Department of Defense. Several other Governors whose Air National Guard assets are threatened have expressed the possibility filing similar lawsuits. Will the Commission's recommendations be driven by the political influence of these various leaders?

A9. Congress established the Commission as a non-partisan and independent body charged with the responsibility of reviewing the Department of Defense's recommendations under the Base Closure Act. As such the Commission will perform and thorough, accurate, and objective analysis of the DoD's recommendations to ensure that they comply with the intent and standards set forth in statute. Any legal concerns that arise will be reviewed on an objective basis in accordance with legal jurisprudence and will not be influenced in any way by political factors.

Q10. In addition to the current legal wrangles regarding the DoD's BRAC recommendations, will the Commission evaluate the Homeland Defense/Homeland Security implications of these Air National Guard recommendations?

A10. The Commission will review the HLD/HLS concerns expressed regarding these ANG recommendations. Central to the evaluation process is the idea of military value. One of the primary criteria determining an installations military value is an analysis of its role in the changing global threat paradigm.

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BRAC-NATIONAL GUARD

LEGAL ISSUES

National Articles

BRAC commission lawyer: States must approve Guard changes

Pennsylvania, Illinois take legal steps to halt base closures

Leaders from the active-duty Air Force, Air Reserve Command and National Guard Bureau spoke recently about the direction of the Air Force's Future Total Force.

Taking the "Air" Out of "Air National Guard": BRAC and the Air Force

Local Articles

BRAC lawyer says Pentagon can't close Air Guard units

Base closing authority questioned: Relocation of Otis could be ruled illegal
MANG cuts may be disallowed: BRAC legal counsel says plan to streamline Air National Guard could exceed authority

Memo highlights legal problems in Air Guard closures

Internal memo challenges recommendations for Niagara Falls base

Legal problem may prevent Pentagon from closing Air Guard units

Lawyer outlines BRAC missteps

PA State Adjutant General Major General Jessica Wright Comments on Editorial Regarding Lawsuit Filed to Save Willow Grove and the 111th Fighter Wing, Pennsylvania Air National Guard

Battle Creek Air National Guard Base may stay open

State files lawsuit over Willow Grove closing

Rumsfeld asked to explain 130th transfer

Officer: Court must end BRAC flap
Decide which law has priority, Lt. Gen. Blum says

Editorial Articles

National Articles

BRAC commission lawyer: States must approve Guard changes

GovExec.com

Megan Scully

July 15, 2005

A lawyer for the Base Realignment and Closure commission says the Defense Department's plans to strip all planes from 23 Air Guard units around the country might be unconstitutional.

The argument, outlined in a document dated Thursday and obtained by *CongressDaily*, comes as the legal debate is heating up over whether the Pentagon has the authority to stand down or alter National Guard units without the consent of the a state's governor, who has the right to maintain militias as spelled out in the Constitution.

Any move to withdraw, disband or change the organization of Air National Guard units would require the commission to "alter core defense policies," including the National Defense Act of 1916 and Title 32 of the U.S. Code, according to the 37-page paper authored by BRAC deputy counsel Dan Cowhig.

"Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are an expression of core constitutional law and national policy," the paper states.

As such, the independent commission does not have the right to approve the Pentagon's extensive Air National Guard recommendations if individual governors do not consent to the aircraft moves.

Cowhig's conclusions still must be considered by the nine BRAC commissioners, who have until Sept. 8 to evaluate Defense Secretary Donald Rumsfeld's base closure recommendations and submit their own list to the White House.

While not officially adopted by the commission, the paper might spell victory for nearly two dozen states fighting to keep their Guard aircraft and have presented essentially the same argument to the BRAC commission during public hearings and closed-door meetings over the last two months.

Indeed, the paper seems to back what Pennsylvania's top lawmakers contend in a court case filed Monday to shield the 111th Fighter Wing of the state's Air Guard from deactivation. The unit is based at the Willow Grove Naval Air Station, slated for closure in this BRAC round.

"If the courts agree with us, the Pentagon does not have the unilateral ability to shut down a Guard unit," said Adrian King, Pennsylvania Democratic Gov. Ed Rendell's deputy chief of staff and the director of the Pennsylvania Emergency Management Agency.

Pennsylvania has a history of challenging BRAC recommendations, with another suit filed by Sen. Arlen Specter, R-Pa., against the Pentagon more than a decade ago to save the Philadelphia Naval Shipyard.

In the suit, Specter alleged in federal court that the Pentagon's decision-making process was flawed and officials concealed information from Congress, necessitating another review. Specter ultimately argued his case before the Supreme Court in 1994, but the court unanimously rejected his plea.

This time around, the state is not presenting an argument over process, but rather arguing that the Constitution and other states supercede BRAC law, proponents said.

"We're not challenging the BRAC process whatsoever because we think that if the BRAC Commission revisits its look or DoD's look at Willow Grove, they will keep it open," said Peter Murphy, one of a team of attorneys representing the state. "We're not arguing that. We're arguing that the secretary of Defense needed to consult and get the consent of the governor."

No hearing date has been set for the Pennsylvania suit, Murphy said.

The nine BRAC commissioners will meet with Pentagon leaders Monday to receive more detail on recommendations requested by the commission in a July 1 memorandum to Rumsfeld.

In the memo, BRAC Chairman Anthony Principi pressed Rumsfeld on whether the Pentagon consulted state adjutants general and governors before making the Air Guard decisions, as well as the impact relocating aircraft would have on homeland security and defense missions.

National Guard leaders across the country have criticized the Air Force for shutting them out of base-closure discussions affecting the Air Guard. In contrast, the Army National Guard took part in several of the service's BRAC deliberations, sources have said.

Pennsylvania, Illinois take legal steps to halt base closures

GovExec.com

July 12, 2005

Pennsylvania and Illinois took legal action Monday to halt the proposed closure or transfer of military bases in their states.

Pennsylvania Gov. Ed Rendell joined with Attorney General Tom Corbett to announce the filing of a lawsuit to stop the deactivation of an Air National Guard unit at the Willow Grove air base, the *Philadelphia Inquirer* reported. Nine of the 15 planes there would be moved to Maryland, Idaho and Michigan, with the remaining six taken out of service.

Rendell and Corbett cited federal law that indicates no such changes can be made without the consent of the governor of the state affected. "I was never consulted and never consented," Rendell said.

Meanwhile, Illinois Gov. Rod Blagojevich wrote Defense Secretary Donald Rumsfeld and Defense Base Closure and Realignment Commission Chairman Anthony Principi that he would not consent to the transfer of F-16 fighters from Springfield, Ill., to Indiana, the *St. Louis Post-Dispatch* reported.

"This lack of consultation compromises the integrity of the process used to develop the BRAC recommendations and disregards my role as commander-in-chief of the Illinois National Guard," Blagojevich wrote.

A Defense Department spokesman said the Pentagon assumed when making its recommendations that the base closing law supersedes other laws.

Leaders from the active-duty Air Force, Air Reserve Command and National Guard Bureau spoke recently about the direction of the Air Force's Future Total Force.

I-Newswire.com

(I-Newswire) - The future of the Air Force will be determined not only by the Future Total Force plan, but also the 2005 Base Realignment and Closure recommendations, the 2005 Quadrennial Defense Review, ongoing capabilities studies and annual budget deliberations, said the Air Force director of plans and programs.

"We must keep in mind that there will always be moving parts," said Lt. Gen. Stephen G. Wood. "The Future Total Force planning process is a dynamic one."

General Wood said the FTF plan comprises two parts: a well-analyzed, cost-constrained force structure and innovative organizational structures that synergize the strengths of active-duty and citizen Airmen.

Lt. Gen. John A. Bradley, chief of Air Force Reserve and commander of Air Force Reserve Command; Army Lt. Gen. H. Steven Blum, chief of the National Guard Bureau; and Brig. Gen. Allison Hickey, director of the FTF directorate, accompanied General Wood to highlight the unity among the three components in forging ahead on the future plans of the Air Force.

"We have been working with our Air National Guard and active-duty partners on this Future Total Force (plan) from day one," General Bradley said. "It's going to make us a much more operationally effective Air Force in the future."

"The Air National Guard and Air Force Reserve will not be excluded from any mission set for any of the weapons systems for the Future Total Force," General Blum said.

“There are great opportunities ... that exist for (the Guard and Reserve) to deliver the capabilities that this nation needs.”

These capabilities include Homeland Defense, which, according to General Blum, “must be capability number one for the Air National Guard.” He also said that retaining expeditionary combat support capabilities are “hugely essential” and will provide support in their federal role, as well as give the governors the capabilities they need during state emergencies. These capabilities include medical, civil engineering, communications and security.

The six FTF initiatives originally proposed in December 2004 continue to move ahead, while all components work closely together to expand and plan for future emerging missions.

“We will continue to work with all stakeholders in this process to work through emerging mission priorities while assessing the resulting budget, manpower and training impacts,” General Hickey said.

As BRAC and QDR move forward, the Air Force will be responsive to changes and address new strategy and capability requirements, General Wood said.

“BRAC does not dictate the number of airplanes, it deals strictly with basing,” General Bradley said about the effect of potential changes to BRAC recommendations. “If the direction coming out of BRAC changes, we will work together to make the necessary adjustments.”

“It is important to remember ... there will never be a ‘final’ Future Total Force plan,” General Wood said. “Like the evolutionary nature of our air (and space) expeditionary force, we must retain the ability to adapt our plan.”

General Blum and General Bradley agreed, stating the FTF plan would be the Air Force priority regardless of ongoing studies or external events. The plan reinvests savings from divestiture of older weapon systems to allow future capabilities.

“We need to be postured for the future instead of stuck in the past,” General Blum said. “We will continue to work together -- active duty, Air National Guard, and Air Force Reserve -- to reach our goals without ever compromising the capabilities we bring to the fight.”

Taking the “Air” Out of “Air National Guard”: BRAC and the Air Force

Center for Defense Information (CDI)

July 8, 2005

The BRAC Process

The Base Realignment and Closing (BRAC) Commission was created in 1977 as part of a congressional effort to increase control over the shrinking and closing of major military bases. Since the passage of this law, there have been four rounds of BRAC – 1988, 1991, 1993 and 1995 – with a fifth round nearing completion this year. As the current process draws to a close, the political, military, and National Guard leadership of the Air Force have been drawn into an increasingly heated debate over the proposed cuts.

BRAC 2005 and the Air Force

The BRAC Commission has several options when deciding a base's fate. It may add jobs and assets from other military bases, or it may close the base entirely. Between these two extremes is realignment, where personnel, units, and other resources are transferred but the base remains open.

As a part of the latest BRAC round, the Air Force examined the capabilities of its existing infrastructure and recommended changes based on four goals:

- Transform by maximizing warfighting capability of each squadron;
- Transform by realigning Air Force infrastructure with future defense strategy;
- Maximize operational capability by eliminating excess physical capacity; and
- Capitalize on opportunities for joint activity.

In practice, three themes emerged from these goals:

- Aircraft will be consolidated into larger units located at fewer bases;
- Bases will operate fewer different types of aircraft; and
- Research and support operations will be relocated into fewer, larger centers with more focused missions.

Based on these principles, the BRAC Commission recommended the closure of 14 Air Force facilities and the realignment of 47 Air Force bases, at a cost of 14,000 military and civilian jobs. Another 68 bases will gain the personnel, aircraft, and programs being moved into more consolidated units and facilities. In conjunction with its cuts in infrastructure and personnel, the Air Force will be retiring over 250 aircraft – primarily older C-130s, F-16s, and KC-135s – in anticipation of its Future Total Force modernization program.

BRAC 2005 and the Air National Guard

Although the closure of several major airbases has attracted attention from senior political officials, BRAC's impact on the Air National Guard (ANG) has also generated serious problems for the Air Force in the current round. While the National Guard leadership accepts that the ANG will lose resources as a part of BRAC 2005, it has been angered by the Air Force's reliance on the "enclave" concept to achieve its goals.

Under the enclave concept, a base with a strategic location but no essential mission may have most of its aircraft and associated assets transferred elsewhere. However, an

Expeditionary Combat Support (ECS) element will remain behind to maintain a presence at the base. Should these enclaves be needed in the future, the ECS element will enable the base to quickly return to operation. Developed specifically for the Air National Guard, the Air Force believes enclaves will allow governors to retain some capabilities for homeland security missions and emergencies while still saving money. According to the National Guard Association of the United States (NGAUS), BRAC 2005 will relocate all aircraft and associated capabilities from 23 bases, turning them into enclaves. In the process, seven states (Connecticut, Delaware, Montana, Nevada, North Dakota, Virginia, and Washington) will be left without any ANG aircraft. Sources disagree on the exact number of bases and states which will be affected, but it will certainly be significant.

The leadership of the ANG has been incensed by the proposed changes. It argues that the Air Force will destroy the ANG by leaving some states without any aircraft – taking the “Air” out of “Air National Guard” – and presents several reasons why this would hurt the U.S. military. First, it fears the loss of aircraft will make recruiting nearly impossible and cause veteran Guardsmen to quit and take their valuable experience with them. Next, it thinks “enclaves” will be too small to preserve a governor’s ability to respond to homeland security crises and other emergencies. Finally, it believes the proposed realignments are designed to relegate the ANG to supporting the active duty Air Force. In doing so, it feels the Air Force fails to consider the Guard’s unique capabilities and duties.

The ANG leadership believes these results came about because, unlike the Army and Navy, the Air Force did not consult it during the beginning of the BRAC process. While acknowledging that some bases must be closed, the adjutants general want the Air Force to reexamine its initial conclusions and create a list better suited to their vision of the ANG and its mission. Several governors and state attorneys general have gone so far as to threaten legal action if the current plan is implemented, arguing that any movement of National Guard forces requires the consent of state authorities. These protests seem to be gaining traction, as the BRAC Commission recently sent a letter to Secretary of Defense Donald Rumsfeld asking for information on the Air Force’s BRAC process and held a hearing to address the concerns of the National Guard leadership.

Recommendations

As is to be expected, some of the ANG’s criticisms have little basis in fact, stemming instead from political frustration at losing jobs. For example, of the seven states which will be left with no ANG aircraft, three (Connecticut, North Dakota, and Virginia) currently have only combat aircraft. Yet in the modern era, combat aircraft are of little use to a governor. There is no chance a state would ever face an emergency where it had to shoot down a plane or bomb a target without involving the federal government. With so many large airbases and geographically small states, some East Coast governors can certainly afford to lose their aircraft. If this is a serious problem, it should be easy for the Air Force and neighboring states to arrange shared control of transports and combat aircraft, retaining governors’ emergency capabilities while generating cost savings. As

for the sparsely populated states of the Midwest and Northwest, they are unlikely to need any significant airlift or aerospace defense capabilities in the near future.

The transfer of aircraft out of the West and into the center of the country is more problematic. As East Asia becomes increasingly important to the United States, it seems prudent to leave airlift and refueling capabilities on the West Coast.

The most realistic objection is the impact that transferring aircraft will have on recruiting and retention. The enclave concept is likely to prove disastrous for ANG recruiting, dooming enclave bases to closure in the long term. The ANG forces stationed at enclaves will be reduced to administrative staffs which have little or no contact with aircraft. Yet primary mission of the Air National Guard is flying, and most personnel join to work with aircraft. With little to offer beyond administrative duties, bases without aircraft will probably wither away. The Air Force should consider its need for the capabilities these enclaves and ANG forces offer, and if they are truly important, it should reconsider its current plans.

The exclusion of the ANG leadership from the BRAC process has generated a great deal of unnecessary friction. The Air Force should reconsider its most contentious closings, and accept that the enclave concept is simply not viable. In return, the ANG must realize that in the post-Cold War world, there is no threat that can justify a flying unit in every state. Sharing crucial emergency airlift and domestic defense capabilities will allow for cost savings while preserving the ANG's ability to carry out vital missions.

Local Articles

BRAC lawyer says Pentagon can't close Air Guard units

RENO GAZETTE-JOURNAL

7/15/2005

The Defense Department doesn't have authority to close Air National Guard bases, according to a legal memo from an attorney for the Base Realignment and Closure Commission.

Dan Cowhig, deputy general counsel for the commission, said "the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit" and "to transfer aircraft from a unit of the Air Guard of one state or territory to that of another ... presents a significant policy concern or an outright legal bar" to the commission. If the commission is unable to address the concern, the memo says the panel "must act to strike the recommendation from the (base closure) list."

The commission has recommended closing the Nevada Air National Guard base at Reno-Tahoe International Airport and transferring the eight C-130 Hercules cargo aircraft from the 152nd Airlift Wing to other units in other states. The nine-member commission has until Sept. 8 to send a final base-closing list to President Bush.

The president-appointed panel is reviewing the Pentagon's plans to close 33 major U.S. bases and restructure 29 others. Part of the restructuring plan includes shutting down or moving planes from Air National Guard units across the country, including in Delaware, Idaho, Ohio and Tennessee.

Commanders of Air National Guard units across the country went to a base closing hearing last month in Atlanta to protest the plan, saying it would leave large sections of the country without protection from the Air Force and would weaken governors' ability to respond to state emergencies such as wildfires and hurricanes.

They also said the move would hurt the National Guard's ability to recruit and retain members.

The commission raised some of those issues in a letter this month to Defense Secretary Donald Rumsfeld. Military officials are expected to defend the plan at the base commission hearings Monday and Tuesday in Washington, D.C.

Cowhig is a major in the Army's Judge Advocate General Corps assigned to work with the BRAC commission.

The legal opinion is still subject to review, including by Pentagon officials. It is not necessarily binding on BRAC commissioners.

"I believe this advisory opinion to the commission from its deputy counsel is well reasoned and is consistent with the arguments that those of trying to save the 179th Airlift Wing in Mansfield have been making from the beginning," said Rep. Michael Oxley, R-Ohio.

The Pentagon recommended closing the 179th Airlift Wing, in Oxley's district, and moving its planes to Air Force bases in Arkansas and Alabama.

Cowhig said that withdrawing, disbanding or changing the organization of the Air National Guard as recommended by the Air Force "would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the commission to alter core defense policies."

Base closing authority questioned: Relocation of Otis could be ruled illegal

The Boston Globe

Bryan Bender

July 15, 2005

WASHINGTON -- A top lawyer for the base closure commission is questioning whether the Pentagon has the legal authority to close Air National Guard bases around the country, including Otis Air Guard Base on Cape Cod, concluding that shuttering or relocating certain units "presents a significant policy concern or outright legal bar."

At issue is a series of recommendations made by the Pentagon in May that would result in the largest reorganization in the history of the Air National Guard, the flying units that during peacetime are under the command of state governors.

The internal memo from Dan Cowhig, deputy general counsel for the Base Realignment and Closure Commission, indicates that the independent panel reviewing the Pentagon's list of proposed closures may have no choice but to overturn Secretary of Defense Donald H. Rumsfeld's recommendation to close Otis.

Under the Pentagon plan, the 102d Fighter Wing's 12 F-15 fighter jets would be relocated from Cape Cod to bases in Florida and New Jersey. But the memo questions whether the commission has the legal authority to order the shifting of forces from one place to another.

"Where the commission finds substantial deviation or a legal bar, it must act to amend the [Pentagon's] recommendation, where possible, to correct the substantial deviation or overcome the legal bar," Cowhig wrote in a memo dated yesterday, a copy of which was obtained by the Globe.

The Pentagon recommended grounding 29, or about one-third, of the Air National Guard units across the country and relocating hundreds of aircraft as part of a nationwide overhaul of all active-duty and National Guard facilities.

But the Defense Department and the BRAC commission may not have the power to make such changes, according to Cowhig's memo, which was approved by his boss, BRAC general counsel David Hague. Relocating aircraft may be particularly problematic, according to the memo. It said that Congress must decide to change the size or structure of the Air National Guard. The Base Closure Act does not permit such changes.

"Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air Guard of a particular state or territory, the commission may not approve any recommendation action that would contravene the intent of Congress," the memo said.

It added, "Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act."

Earlier this month, at a public hearing in Boston, Massachusetts officials told commission members that the closure of Otis would seriously undermine state emergency preparedness plans and leave New England vulnerable in the event of a terrorist attack or disaster. The move would leave the region with only two fighter planes on alert within a 175-mile radius of Boston, what Governor Mitt Romney called "impractical" and "potentially dangerous."

James Bilbray, one of nine BRAC commissioners, said last night that they are considering reversing at least some of the Pentagon's recommendations on the Air National Guard. The panel will issue its recommendations to the president and Congress in September.

"We're going to make some changes," he said in a telephone interview, citing conversations he has had with commissioners. "It's just how many and to what extent." He said some planes would probably be transferred, but not nearly as many as the Pentagon has proposed.

"The Pentagon has managed to make about 30 governors really mad," he said. "That's pretty hard to do. But they've done it." He added: "It's a big fight right now," but predicted that "after the BRAC finishes, most of them will be happy."

Many governors, including Romney, have complained that they were not consulted before the Pentagon made its recommendations. On Monday, Governor Ed Rendell of Pennsylvania filed a lawsuit against Rumsfeld for seeking to move the 111th Fighter Wing of the Pennsylvania Air National Guard without seeking approval of the "Commander-in-chief of the Pennsylvania National Guard" -- the governor.

"I am very concerned that neither I nor my adjunct general was consulted in the Air Force process," Romney said last week. "Because the wing and the base are part of the Massachusetts Air National Guard, and because they form a critical component of my state's homeland security plan, our involvement should clearly have been sought and considered."

MANG cuts may be disallowed: BRAC legal counsel says plan to streamline Air National Guard could exceed authority

Great Falls Tribune

JO DEE BLACK

July 15, 2005

The Pentagon's broad proposal to shut down or shift Air National Guard units across the country may not be allowed under the ongoing round of military base closings, according to an internal memo prepared by the general counsel's office of the Base Realignment and Closure Commission.

The memo could stymie the Defense Department's efforts to streamline or eliminate as many as 30 Air Guard flying units from Montana to Maine.

Dated Thursday, the legal opinion said the use of the base closure law to relocate, disband or move Air Guard units from one state to another could be outside the scope of the BRAC Commission. And it said that in some cases, the proposals could present legal problems and deviate from the criteria in the base closure law.

"It appears to mean they can't do what they want to do," Sen. Conrad Burns, R-Mont., said in a news release.

"Ever since the Pentagon announced their intent to take away our fighters, we've been asking questions about the propriety of it, and it seems we were right," Burns said. "It looks like they're going to have to find another way to try to take away the F-16s from Great Falls, and we'll fight 'em there, too."

The BRAC report recommends moving six F-16 jets from the Montana Air National Guard 120th Fighter Wing at Great Falls to Guard units in Alabama and Iowa and retiring the other nine.

The Pentagon said that would mean a loss of 107 jobs, but MANG officials have said pulling their primary mission could result in the loss of as many as 500 jobs. MANG provides about 1,000 jobs, of which 350 are full-time.

Of 88 Air Guard flying units across the country, 28 are slated to lose their planes.

"The next step will be to see how the BRAC Commission reacts to their legal counsel," said James Pendleton, Burns' spokesman. "This is just a legal opinion, but it's still significant in that their lawyers are saying, 'You can't do this.'"

It's the same opinion expressed by Gov. Brian Schweitzer in May after the BRAC list was released.

Schweitzer and other governors argued that they are the commander-in-chiefs of the National Guards in their respective states, and the Pentagon's authority to realign those missions is questionable.

"This is exactly what we have been saying the whole time," said Sarah Elliott, Schweitzer's spokeswoman. "We are glad to see the commission's counsel agrees with us."

Schweitzer said he would consider joining other governors in legal action to block the proposed Air National Guard cuts.

"We have not taken that action, but we have not ruled it out," Elliott said.

Commanders of Air National Guard units across the country went to a base closing hearing last month in Atlanta to protest the plan, saying it would leave large sections of the country without protection from the Air Force and would weaken governors' ability to respond to state emergencies such as wildfires and hurricanes.

They also said the move would hurt the National Guard's ability to recruit and retain members.

"Clearly this is good news for Montana. Max has felt all along that MANG was treated unfairly in this process," said Barrett Kaiser, spokesman for Sen. Max Baucus, D-Mont. "This legal opinion will help us continue to make that case."

Great Falls International Airport Director Cynthia Schultz had yet to see the memo, but was pleased with the news.

"If this turns out to be true, that would be wonderful," she said.

Schultz is one of several community leaders in the Building Alliances for Strategic Enhancement group working to keep the F-16s in Great Falls and gain more military missions for the state.

The legal opinion is still subject to review, including by Pentagon officials. It is not necessarily binding on BRAC commissioners.

The nine-member panel has until Sept. 8 to send a final base-closure list to President Bush.

Memo highlights legal problems in Air Guard closures

Associated Press-Connecticut

LOLITA C. BALDOR

July 14, 2005

WASHINGTON -- The Pentagon's broad proposal to shut down or shift Air National Guard units across the country may not be allowed under the ongoing round of military base closings, according to an internal memo obtained by The Associated Press.

The memo, prepared by the general counsel's office of the independent commission reviewing the base closings, could stymie the Defense Department's efforts to streamline or eliminate as many as 30 Air Guard flying units from Maine and Connecticut to Texas.

Dated Thursday, the legal opinion said the use of the base closure law to relocate, disband or move Air Guard units from one state to another could be outside the scope of the Base Closure and Realignment Commission. And it said that in some cases the proposals could present legal problems and deviate from the criteria in the base closure law.

Officials reading the memo declared it good news for states that are trying to keep their guard units in place. BRAC officials could not be reached for immediate comment.

"Report of this memo is certainly welcome news to the state of Connecticut," said Rep. Rob Simmons, R-Conn. "The BRAC Commission is asking the right questions about whether the Pentagon has the legal right to take away planes and equipment from National Guard facilities without the consent of the states."

One of the plans was to move nine of the 17 A-10 Thunderbolts based at Bradley International Airport in Windsor Locks, Conn., to Barnes Municipal Airport in Westfield, Massachusetts, about 30 miles away. The rest of the planes would be retired.

The memo backs up complaints made by state officials in several of the BRAC hearings, and could bolster a lawsuit filed by the state of Pennsylvania.

"In our conversations with the BRAC Commission, we've raised the same concerns about the Air Force's failure to consult with both the Massachusetts National Guard and the Coast Guard," said Sen. Edward M. Kennedy, D-Mass. "We're confident that the BRAC Commission will correct the errors made in this process to follow the true intent of the BRAC law."

The memo also notes that the Pentagon already has the authority to reposition aircraft within the Air Force, but any changes in location of Air National Guard aircraft must have the consent of the state's governor.

Massachusetts officials, who have been fighting the proposal to close Otis Air National Guard Base on Cape Cod, said the memo echoed their own arguments.

"This raises very serious questions about the whole rationale for the Otis closure recommendation," said Steve Schwartron, chief of staff for Rep. William Delahunt, D-Mass.

State officials have blasted the proposed Air Guard restructuring, saying the Pentagon trod on state's rights. And they have warned that the shifts could erode homeland security.

Pennsylvania officials filed a lawsuit against the Pentagon over the planned closure of the Willow Grove Naval Air Station, arguing that only the governor has the authority to deactivate the Air National Guard unit.

Internal memo challenges recommendations for Niagara Falls base

Associated Press-NY

DEVLIN BARRETT

July 14, 2005

WASHINGTON -- The Pentagon's decision to close Niagara Falls Air Reserve Station may open up a legal can of worms that could cripple the entire national base-closing process, according to a new internal memo prepared by a lawyer for the base closure commission.

A Thursday legal memorandum obtained by The Associated Press argues the Pentagon may have so fine-tuned some of the suggested changes within the military that the moves fall outside the authority of the process known as Base Closure and Realignment.

A nine-member BRAC commission is reviewing the Pentagon's plans, which include closing the base in Niagara Falls, to present their recommendations to President Bush in September.

As part of the review, BRAC commission lawyer Dan Cowhig wrote a 20-page memo outlining potential pitfalls in the recommendations related to the Air Force _ using the Niagara Falls base as a case study.

Cowhig alerted commissioners to "less obvious constraints on commission action," such as a specific recommendation that directs eight tankers currently based in Niagara Falls to move to Bangor, Maine.

"Recommendations like those ... will place significant constraints on the future operations of the Air Force," the lawyer wrote.

Cowhig also argued that such specific, detailed realignment instructions are not provided for in the law that created BRAC and that could lead to bigger problems down the road if they are implemented.

"The inclusions of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts," he wrote.

The shifting of planes from Niagara Falls to Bangor was offered by the Pentagon for the purpose of fixing a "documented imbalance" in the mix of active and reserve personnel flying such planes _ but the lawyer argues that BRAC was never designed to address those sort of policy concerns.

The BRAC process, Cowhig wrote, is designed to shift installations, not individual units or relatively small groups of equipment.

That analysis is similar to arguments Sen. Hillary Rodham Clinton has made against the recommendation to close the base in western New York.

Asked for comment, Clinton issued a statement that said: "It's all too clear that the Pentagon and the Air Force are circumventing the legislative process and improperly using BRAC to rebalance the force between the active duty and the Reserves. I am hopeful that the BRAC commissioners will consider this analysis closely when they deliberate over the recommendation to close Niagara Falls."

But Air Force officials have maintained that consolidating military bases is a more cost-effective way to maintain an aging aircraft fleet.

Even if the commission accepted all of the lawyer's arguments, members could still recommend closing Niagara Falls and leave the decision of where to send particular planes to the Defense Department, as Cowhig suggests.

In a footnote, Cowhig also said the Air Force has overestimated the amount of savings created by moving the 107th Air Refueling Wing out of Niagara Falls, because officials failed to realize that the manpower costs would just be transferred to another location.

Legal problem may prevent Pentagon from closing Air Guard units

KESQ News-California

WASHINGTON A legal hitch may prevent the Pentagon from closing Air National Guard units as it shuts down various military bases across the country.

An internal memo obtained by The Associated Press says air guard units may be outside the scope of the base closure law. The memo was written by the general counsel's office of the independent commission reviewing the base closings. The boundaries of the base closure law could interfere with the Defense Department's efforts to streamline or eliminate as many as 30 air guard flying units from Maine to Texas.

The memo is good news for states that are engaged in a legal fight with the Pentagon over the planned closures of the air guard units.

Lawyer outlines BRAC missteps

The Buffalo News

JERRY ZREMSKI

July 15, 2005

WASHINGTON - A lawyer for the base-closure commission Thursday issued a memo using the proposed shutdown of the Niagara Falls Air Reserve Station as the central example of what the Air Force did wrong in drawing up its base-closure plan.

The 20-page document stops short of recommending that the Base Realignment and Closure Commission overturn the recommendation to close the Niagara base. But it said the proposed Niagara shutdown "includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the commission."

Most notably, the memo indicates the Pentagon overstepped its legal authority by using the base-closure process to reshape the Air Force. That's one of the key points supporters of the Niagara base have been making since the Pentagon recommended its closing May 13.

Under the base closure plan, the Air Force Reserve's 914th Airlift Wing in Niagara Falls would lose its planes to an active-duty base in Little Rock, Ark. Air Force officers said that move was made in part because active-duty forces should be handling more of the Air Force's cargo-hauling capacity.

But in his memo, Dan Cowhig, deputy general counsel for the commission, said the base-closure process is supposed to be used just to close bases, not to reorganize units.

"The Base Closure Act does not grant the commission the authority to change how a unit is equipped and organized," Cowhig wrote. "Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft or to address an imbalance in the active-reserve force mix are outside the authority granted by the act.

"The commission must act to remove such provisions from the recommendations," Cowhig added.

Cowhig's memo also criticized the Air Force plan to close Air National Guard units like the 107th Air Refueling Wing in Niagara Falls.

Such units cannot be abandoned without approval from the state's governor, since National Guard units are constitutionally created as state-based militias, Cowhig said.

"When the practical result of an Air Force recommendation would be to withdraw, disband or change the organization of an Air National Guard unit, the commission may not approve such a recommendation without the consent of the governor concerned," he wrote.

Gov. George E. Pataki has been fighting to keep the base open, as has the Western New York congressional delegation.

Cowhig stressed that his memo was merely guidance for the commission, which has until Sept. 8 to accept or reject the Pentagon's proposed base closures.

"This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or that of the commission," he wrote.

Sources said it's likely the nine commissioners had not seen the document yet. The Buffalo News obtained the memo, which was dated July 14, from sources close to the commission.

The document also circulated on Capitol Hill, where the Air Force plan to close National Guard units has caused widespread concern.

Sen. Hillary Rodham Clinton, D-N.Y., said the memo bolsters the case to keep the Niagara base open.

"As I stated during the recent BRAC Commission regional hearing in Buffalo, it is all too clear that the Pentagon and the Air Force are circumventing the legislative process and improperly using BRAC to rebalance the force between the active duty and the Reserves."

In his memo, Cowhig said the proposed Niagara closing also raises several other concerns that BRAC will have to consider, such as:

- The requirement that certain planes be based in specific locations - a move that appears to go beyond the scope of the base-closure law passed by Congress.
- The use of the base-closure law to retire aircraft contrary to the will of Congress, which in its annual defense authorization bills has ordered the Air Force to keep using the kind of KC-135 refueling tankers and C-130 cargo planes based in Niagara.

- The proposal to move Air National Guard planes from one state to another.
- The use of the base-closure process to make moves that the Air Force could make on its own.

"The commission should analyze each recommendation for the presence of these issues," Cowhig wrote.

In doing so, he said, the commission should look for "substantial deviation" from the criteria set up to guide the base closure process, which focuses largely on each base's military value.

"Where the commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible," he wrote. "Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the commission must act to strike the recommendation from the list."

PA State Adjutant General Major General Jessica Wright Comments on Editorial Regarding Lawsuit Filed to Save Willow Grove and the 111th Fighter Wing, Pennsylvania Air National Guard

Pennsylvania Department of Military and Veterans Affairs
July 15, 2005

HARRISBURG, Pa., July 15 /PRNewswire/ -- Pennsylvania Adjutant General Major General Jessica Wright released a letter to the editor of the Philadelphia Inquirer in response to a July 13 editorial that she believes unfairly criticized Gov. Edward G. Rendell, Attorney General Thomas Corbett and U.S. Sens. Arlen Specter and Rick Santorum for defending the Willow Grove 111th Fighter Wing, Pennsylvania Air National Guard.

The lawsuit concerns the status of the National Guard in our federal system of government. The United States Constitution recognizes that the National Guard is a partnership between the federal and state governments. Congress has mandated that command, control and oversight of the Guard involve a process of collaboration, coordination and mutual consent. Federal law provides that changes to the branch, organization or allotment of Guard units require the approval of the Governor. State Guard units may not be withdrawn or relocated without the Governor's consent. These laws and this cooperative process were completely ignored by the Department of Defense (DoD) when it proposed deactivating the 111th Fighter Wing.

The 111th is one of three major flying units in the Pennsylvania Guard. Its brave men and women have deployed to Iraq, Kuwait and Afghanistan as part of the ongoing Global War on Terrorism. Most importantly for the purposes of the lawsuit, the 111th provides one-quarter of the mission-ready Air Guard forces available to the Governor to respond to state emergencies such as floods, severe snowstorms and homeland security-related incidents.

A copy of General Wright's letter is attached.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF MILITARY AND VETERANS AFFAIRS
THE ADJUTANT GENERAL BUILDING S-0-47
FORT INDIANTOWN GAP ANNVILLE, PENNSYLVANIA 17003-5002

July 14, 2005

Editor Philadelphia Inquirer
Box 41075 Philadelphia, PA 19101

Dear Editor:

Your July 13 editorial criticizes the lawsuit filed by Governor Ed Rendell and U.S. Senators Arlen Specter and Rick Santorum over the proposed deactivation of the Pennsylvania Air National Guard's 111th Fighter Wing, calling it a "misguided suit" to block the closure of Willow Grove Naval Air Station. In fact, the suit is not about the closure of Willow Grove, but instead about the rights of the Governor as Commander-in-Chief of the Commonwealth's National Guard. The editorial misstates the nature and purpose of the lawsuit and betrays a stunning misunderstanding of the history, role and status of the Guard in our federal system of government.

The United States Constitution recognizes that the National Guard is a partnership between the federal and state governments. In longstanding legislation, Congress recognized that command, control and oversight of our Guard involve a process of collaboration, coordination and mutual consent. Federal law provides that changes to the branch, organization or allotment of Guard units require the approval of the Governor. State Guard units may not be withdrawn or relocated without the Governor's consent.

These laws and this cooperative process were totally ignored by the Department of Defense (DoD) when it proposed deactivating the 111th Fighter Wing. That's why it's so important that our Governor, Senators and Attorney General have decided to stand up for the Guard and the people of Pennsylvania and take action. The lawsuit is not a sign of weakness but a recognition that important legal principles need to be addressed to preserve and defend the Congressionally mandated balance between the state and federal governments with regard to Guard units.

Your editorial portrays this lawsuit as a challenge to the BRAC Commission and/or to the BRAC process itself. That is simply not correct. Pennsylvania is not attacking BRAC. In fact, when Governor Rendell announced the lawsuit, he specifically stated that Pennsylvania was not challenging the BRAC process and that he believed the Commonwealth had presented more than enough factual evidence to reverse the Defense Department's recommended closure of Willow Grove. Remember, Governor Rendell has a keen understanding of the BRAC process having led Philadelphia's successful appeal during a prior BRAC round that overturned the DoD's recommended closing of the City's Naval Inventory Control Point and Defense Supply Center during his time as Mayor. At the same time, the Governor (then Mayor) did not challenge the closing of military facilities in the City that legitimately allowed DoD to achieve the most cost efficient and effective military force possible.

Your description of how the Guard has been federalized in the past actually supports the Governor's position. The U.S. Government federalized Guard units in appropriate circumstances to carry out federal missions; it never deactivated or abolished the units without first getting the consent of the Governor. Just as Governor Rendell could not eliminate a Pennsylvania Guard unit without getting the approval of the President, so too should Secretary Rumsfeld have asked for, and received, the Governor's consent before trying to take out the 111th Fighter Wing. This is the law, plain and simple. The 111th is one of three major flying units in the Pennsylvania Guard. Its brave men and women have deployed to Iraq, Kuwait and Afghanistan as part of the ongoing Global War on Terrorism. More importantly for the purposes of the lawsuit, the 111th provides one-quarter of the mission-ready Air Guard forces available to the Governor to respond to state emergencies such as floods, severe snowstorms, and homeland security related incidents. If a terrorist attack was launched by plane against Independence Hall, don't Pennsylvanians have the right to expect a response from a Pennsylvania National Guard unit stationed nearby at Willow Grove? Where is the Inquirer's concern that elimination of this important resource has been undertaken without any input from the Commonwealth, let alone the legally required consent?

Members of the National Guard from across America are applauding the highly principled action taken by Governor Rendell, Senators Specter and Santorum and Attorney General Corbett. The Inquirer should applaud, too.

Sincerely,
Jessica L. Wright
Major General, PAARNG
The Adjutant General

CONTACT: Joan Nissley, Pennsylvania Department of Military and Veterans Affairs, +1-717-861-8352.

Battle Creek Air National Guard Base may stay open

WOODTV.com

(Update, Battle Creek, July 15, 2005, 12:04 p.m.) The Base Realignment and Closure (BRAC) Commission has slated the Battle Creek Air National Guard Base for closure. But there is a glimmer of hope for the city, as the facility may not shut down after all.

The plan would shift the 110th Fighter Wing to Selfridge Air National Guard Base in Macomb County. But an internal memo obtained by the Associated Press says the Pentagon may not have the authority to shut down or shift Air National Guard units.

Right now, the Battle Creek unit stands to lose 300 jobs under the re-organization set for later this year.

The memo, prepared by the General Counsel's Office of the BRAC Commission, says the closings could present legal problems for the defense department's effort to streamline or eliminate up to 30 Air Guard units.

The city is fighting hard to keep the base and the jobs. Late last month, a group of officials traveled to St. Louis to appeal to the BRAC Commission. Congressman Joe Schwarz, R-Battle Creek, led the group to Washington, D.C. to meet with two members of the commission. One of those members, Sam Skinner, will visit Battle Creek at the end of the month.

24 Hour News 8 will talk with Congressman Schwarz later today.

Stay with us for continuing coverage of the fight to keep the Battle Creek base open.

State files lawsuit over Willow Grove closing

Associated Press

MARYCLAIRE DALE

Jul. 12, 2005

PHILADELPHIA - Pennsylvania's governor and U.S. senators are suing the Pentagon over the planned closure of the Willow Grove Naval Air Station, arguing the governor alone has the power to deactivate the base's Air National Guard unit.

Gov. Ed Rendell believes Willow Grove should survive on military merits alone, but said Monday he would mount a parallel legal challenge invoking the Constitution's militia clause to save the base.

The sprawling base, which is about 15 miles north of Philadelphia, is one of about 180 military installations targeted by a Pentagon base closure commission in May.

Rendell's lawsuit involves the 111th Fighter Wing of the Pennsylvania National Guard, which employs 1,023 people - 274 of them full-time - and is one of several military units at Willow Grove.

"(N)o change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor," the suit states, quoting from the U.S. Code.

Rendell said that if he prevails and the Guard unit stays, it would make sense to keep the Air Force reserves and perhaps other military units at Willow Grove as well.

The suit was filed Monday in federal court in Philadelphia, according to Rendell's staff. U.S. Senators Arlen Specter and Rick Santorum, both Republicans, joined the Democratic governor as plaintiffs.

Santorum scolded the Pentagon for what he called a "third-rate" analysis of Willow Grove's military value. The panel failed to consider that it already operates joint exercises among the various military branches, a key goal of the realignment commission, the base's supporters say.

"It shows almost the comedy of errors the Air Force has committed when analyzing Willow Grove," Santorum said in a conference call from Washington. "They've just done shoddy work."

Robert McCreary, a base closure commission spokesman, did not immediately return telephone messages Monday.

Rendell said Pennsylvania needs the 111th's pilots and planes to protect the state's assets, from its citizens to its nuclear plants to its national historic sites, such as the Liberty Bell.

"I want those planes to be at the ready for homeland security and everything else," Rendell said.

Rendell said the state would be willing to operate the 111th Fighter Wing if the Pentagon will not - although he acknowledged the federal government would still be responsible for the tab.

The base, with an annual operating budget of about \$225 million, including about \$46 million for the Air National Guard, has a huge economic impact in the area.

The state currently pays just \$250,000 a year toward the Guard's operational budget, said Major Gen. Jim Skiff, commander of the Pennsylvania Air National Guard.

The Pentagon also recommended closing 12 smaller military installations and centers in Pennsylvania, downsizing five and adding jobs to five, for a net loss of more than 1,600 civilian and military jobs.

The 111th Fighter Wing flies the A-10 Thunderbolt II, also known as the Warthog. It currently has 15 A-10s and says its primary mission is to provide air support for ground forces.

Willow Grove is also home to the 913th Airlift Wing, which trains and equips reservists. The base also provides air logistic support for active and reserve Navy units.

Rumsfeld asked to explain 130th transfer

The Charleston Gazette

Rick Steelhammer

July 14, 2005

An explanation of the proposed transfer of the 130th Airlift Wing's eight C-130 aircraft from Charleston to Fayetteville, N.C., will be sought from Defense Secretary Donald Rumsfeld during a hearing Monday in Washington.

In a letter from Base Realignment and Closure Commission Chairman Anthony J. Principi, Rumsfeld was asked to explain a number of issues regarding proposed closures at a number of bases.

Among questions BRAC commissioners want answered is why aging Pope Air Force Base in North Carolina was not recommended for closure, allowing the 130th Airlift Wing to keep its aircraft at Charleston's Yeager Airport.

BRAC commissioners also want to know whether state adjutants general and governors were consulted in the reallocation of Air National Guard aircraft, personnel, facilities and missions away from their states.

"Many of the Air Force's recommendations address Air National Guard installations," Principi stated in his letter.

"While only four of these installations will completely close, many Guard installations will lose aircraft and personnel leaving only an 'expeditionary combat support' unit remaining, with several states losing their entire flying missions. Many of these aircraft will relocate to other locations, which may negatively impact personnel recruiting and retention as well as state and Homeland Security missions."

"The BRAC Commission is asking the right questions about Secretary Rumsfeld's base closure plan," Sen. Robert C. Byrd, D-W.Va., said in a statement released Wednesday. "The men and women of the National Guard — including those in the 130th Airlift Wing — deserve answers about why the Pentagon is targeting some of the National Guard's best units for closure."

"West Virginians and the members of the 130th deserve fair and honest answers from Secretary Rumsfeld and the Defense Department," said Sen. Jay Rockefeller, D-W.Va. "The 130th has repeatedly been recognized as one of the best units in the entire United States Air Force, and they have played a key role in numerous conflicts, including Iraq and Afghanistan."

Rockefeller added that the Department of Defense did not take into account the 130th's mission in the event of "another 9/11-like attack" on Washington.

"The Pentagon low-balled the number of planes that can be based in Charleston," said Byrd. "The efficiency and cost-effectiveness of the 130th Airlift Wing was not accurately portrayed. And the fact that it will actually cost the Defense Department much more to move and maintain these planes at Pope Air Force Base has been ignored by Pentagon planners."

Officer: Court must end BRAC flap
Decide which law has priority, Lt. Gen. Blum says

Springfield State Journal Register
OTTO KREISHER

WASHINGTON - The nation's top National Guard officer said Tuesday it will be up to the courts to decide the dispute between state governors and the Pentagon over changes in Guard units during the Base Realignment and Closure process.

"There are two existing laws, both with conflicting authority," Lt. Gen. Steven Blum said.

One law requires the Pentagon to get a governor's permission before making significant changes in the composition or location of Guard units in his or her state. The other law, creating the BRAC process, makes no mention of the governor's authority and specifically overrides other laws that restrict what the national leadership can do with military facilities.

"When you have two laws in conflict, the courts have to decide what has priority," Blum told a breakfast session with defense reporters.

A number of governors, including Illinois Gov. Rod Blagojevich, have threatened to sue the Pentagon over plans to move or eliminate Air National Guard units in their states. Blagojevich is protesting the Air Force's decision to move the 183rd Fighter Wing's F-16s from Abraham Lincoln Capital Airport in Springfield to Indiana.

Blagojevich sent new letters to Defense Secretary Donald Rumsfeld and Anthony Principi, chairman of the independent BRAC commission, on Monday telling them he does not give his permission to move the 183rd's aircraft. "The Department of Defense did not coordinate this recommendation with either my office or the Illinois adjutant general," the governor's letter said. "This lack of consultation compromises the integrity of the process used to develop the BRAC recommendations and disregards my role as commander in chief of the Illinois National Guard."

Blagojevich added that under the law, "my consent is necessary for the actions contemplated by Secretary of Defense Rumsfeld with regard to the 183rd Fighter Wing."

Principi has asked U.S. Attorney General Alberto Gonzales for a formal legal opinion on the two conflicting laws. That opinion is expected soon.

Blum agreed with the complaints by the association of states adjutants general - the top Guard officer in each state - that the Air Force did not confer with the state officials before making its BRAC decisions.

"I was not involved, nor were the adjutants general, involved in the BRAC decisions" affecting the Air Guard, he said.

Blum said he did not know why the Air Force did that, adding that the protest from the adjutants general "was a predictable event."

The BRAC commission plans two days of hearings next week in which it will address the issue of the Guard changes, among other issues, and may decide to add some facilities to the list of bases being considered for closure or adjustments.

Editorial Articles

Jones, Audrey, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Thursday, July 14, 2005 6:47 PM
To: Schaefer, James, CIV, WSO-BRAC; McCreary, Robert, CIV, WSO-BRAC; Jones, Audrey, CIV, WSO-BRAC
Cc: Battaglia, Charles, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC
Subject: No effort spared to complicate your life ...
Attachments: DBCRC OGC - ANG and Related Issues.pdf

Jim, Rob, Audrey -

This went out to the commissioners, team leads, select SASC staff, and CRS today. It has potential to be a public affairs issue. It is NOT for deliberate public release.

That said, Dan Else at CRS received a phone call from a reporter five minutes after I sent it to him asking for a copy. Jim Hanna received a copy back from another Senate staffer.

I suggest responding to any inquiries by stating "The July 14 legal memorandum speaks for itself. It is not a press release. The memorandum is a discussion of legal and policy issues related to certain recommendations. It is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission. It frames issues for discussion and provides input to the Department of Justice."

Don't even try to read the attachment on your BlackBerry. It's also on the S drive in the legal folder.

Jim, other topic. We now have DoD's response to the adds list but it is embargoed until later tomorrow so that the commissioners get a chance to read it.

V/R

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DBCRC OGC - ANG
and Related Is...

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to “distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station,” Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the “Air National Guard” or “Army National Guard,” these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes “any military installation at which at least 300 civilian personnel are authorized to be employed,”¹⁴ or realigns a military installation resulting in “a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed” at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to “close Niagara Falls Air Reserve Station” because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to “closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.” Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign and installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign and installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act “is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States.”²⁶ Under the Base Closure Act, “the term ‘military installation’ means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility.”²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, “the term ‘realignment’ 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.*”²⁸ A “realignment,” under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, “*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*” by closing “Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH,” distributing “the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft).” Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to “distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station,” Maine. Under the recommendation, “no Air Force aircraft remain at Niagara.” The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing’s KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing’s fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to “close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard).” In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission “realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing’s F-16s (15 aircraft) retire. The wing’s expeditionary combat support elements remain in place.” As justification, the Air Force indicates “the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*.”³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, “each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard.”³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, “may designate the units of the National Guard ... to be maintained in each State and Territory” in order “to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.”³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (“The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.”) (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded.”⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an “organization of the National Guard whose members have received compensation from the United States as members of the National Guard,” the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission’s recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that “in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.”⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard “retire its eight KC-135E aircraft.” As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the “natural law of war.” See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC §104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DJC 14 Jul 05*
Approved: David Hague, General Counsel

DH 14 Jul 05

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).



**DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600**



June 24, 2005

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

Dear Chairman Principi:

The Department of Defense is pleased to respond to Commission inquiries concerning the 2005 Base Realignment and Closure (BRAC) recommendations. The Deputy General Counsel of the Commission, Mr. Dan Cowhig, by e-mail dated June 10, 2005, requested detailed legal analyses regarding the authority of the Department of Defense to make and implement certain recommendations affecting the Air National Guard. Mr. Cowhig also requested a description of any consultation or coordination that may have occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units. Information regarding Air Force consultation with Governors and Adjutants General is being provided under separate cover; you may expect to receive that information in the next few days.

The remaining four questions requested a series of legal opinions addressing the Department's authority to make and implement the recommendations forwarded to the Commission concerning Air National Guard units and equipment. We recently received word from the Department of Justice that on May 23, 2005, you requested similar legal advice from the Attorney General. In keeping with its common practice, the Office of Legal Counsel (OLC) has asked us to provide our views concerning these issues, and we will do so soon. As a consequence, we believe it would be premature and inappropriate for the Department to provide its views on these issues to the Commission in advance of OLC's opinion for the Commission.

I certify that the information contained herein is accurate and complete to the best of my knowledge and belief. If you have any questions concerning this response, please feel free to contact me at 703-693-4842 or nicole.bayert@osd.pentagon.mil.

Nicole D. Bayert
Associate General Counsel
Environment & Installations



ENCLOSURE 1

Cowhig, Dan, CIV, WSO-BRAC

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 9:06 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Flood, Glenn, CIV, OASD-PA; Hoggard, Jack, CTR, WSO-OSD_DST JCSG
Subject: OSD BRAC Clearing House Tasker C0285 ANG realignments in conflict with USC law

Attachments: BRAC Subpoena.pdf

Attached is the updated response to your inquiry, OSD Clearinghouse Tasker C0285 (PDF file is provided).



BRAC
jbpoena.pdf (136 KI)

OSD BRAC Clearinghouse

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 17, 2005 10:57 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: RE: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Clearinghouse -

Thank you. The memorandum indicates that a further response is pending. Please keep the tasker open until the answer is complete.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 17, 2005 10:18 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: FW: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Attached is the response to your inquiry, OSD Clearinghouse Tasker # C0285.
(PDF file is provided.)

OSD BRAC Clearinghouse

Subject: RE: OSD BRAC Clearing House Tasker #0285 ANG realignments in conflict with USC law

Attached is the answer to subject tasker. << File: BI-0056,CT0285, Dan Cowhig, 16 Jun 05.pdf >>

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC

Sent: Friday, June 10, 2005 5:09 PM

To: RSS dd - WSO BRAC Clearinghouse

Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL

Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard. Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or would not violate existing law.

The Governors and Adjutants General of various states have indicated that in their view the Department of Defense did not adequately consult or coordinate with the Governors and Adjutants General regarding the impact of the proposed realignments of Air National Guard units recommended by the Department of Defense on their homeland security missions. Please describe in detail the consultation or coordination that occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to retire certain numbers of specified aircraft fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to retire aircraft is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

Thank you.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer

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**DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600**



July 5, 2005

Mr. Dan Cowhig
Deputy General Counsel
Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600
Arlington, Virginia 22202-3920

Dear Mr. Cowhig:

This letter responds to your e-mail to the BRAC Clearinghouse, dated June 24, 2005. You asked for the legal advice the Department of Defense received regarding the authority of the Department to make and implement certain recommendations affecting the Air National Guard. You also requested copies of any pertinent documents.

Those involved in developing BRAC recommendations for the Secretary's consideration were advised by counsel regarding the authority of the Department of Defense to make and implement certain recommendations affecting the Air National Guard. The substance of this advice is protected from disclosure by the attorney-client privilege.

If you have any questions concerning this response, please contact Mrs. Nicole D. Bayert, Associate General Counsel for Environment & Installations, at 703-693-4842 or nicole.bayert@osd.pentagon.mil.

Sincerely,

Frank R. Jimenez
Acting Deputy General Counsel
(Legal Counsel)



ENCLOSURE 2

Cowhig, Dan, CIV, WSO-BRAC

From: RSS dd - WSO BRAC Clearinghouse
Sent: Tuesday, July 05, 2005 12:29 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Subject: FW: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Attachments: Response to Commission request for legal advice on guard signed.pdf

Attached is the response to your query OSD BRAC Clearinghouse # 0418, in PDF format.

OSD BRAC Clearinghouse

-----Original Message-----

From: Rice, Ginger, Mrs, OSD-ATL
Sent: Tuesday, July 05, 2005 12:16 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Yellin, Alex, CTR, OSD-ATL; Casey, James, CTR, OSD-ATL; Alford, Ralph, CTR, OSD-ATL; Meyer, Robert, CTR, OSD-ATL; Buzzell, Brian, CTR, OSD-ATL; Harvey, Marian, CTR, OSD-ATL
Subject: FW: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Attached is the response to Clearinghouse tasker 418 or 419 - please process appropriately.

Ginger B Rice
OSD BRAC Office
(703) 690-6101

-----Original Message-----

From: Bayert, Nicole, Ms, DoD OGC
Sent: Tuesday, July 05, 2005 11:54 AM
To: Rice, Ginger, Mrs, OSD-ATL
Cc: Potochney, Peter, Mr, OSD-ATL; Yellin, Alex, CTR, OSD-ATL
Subject: Response to Clearinghouse Tasker 418 or 419 - question from Dan Cowhig via June 24 email

Please ensure attached gets to clearinghouse for appropriate action - including provision to Congress w/in 48 hours. Thanks.

Nicole D. Bayert
Department of Defense
Associate General Counsel
(Environment & Installations)
703-693-4842; fax 693-4507

CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.

Cowhig, Dan, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Tuesday, July 05, 2005 11:05 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Hague, David, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: RE: OSD BRAC Clearinghouse Tasker #0418 - BRAC Commission RFI

Clearinghouse -

Request update on status of RFI. No response to date.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 5:11 PM
To: Alford, Ralph, CTR, OSD-ATL; Yellin, Alex, CTR, OSD-ATL; Buzzell, Brian, CTR, OSD-ATL; Casey, James, CTR, OSD-ATL; Meyer, Robert, CTR, OSD-ATL
Cc: Cowhig, Dan, CIV, WSO-BRAC
Subject: OSD BRAC Clearinghouse Tasker #0418 - BRAC Commission RFI

Please provide a response to the inquiry below and return to OSD BRAC Clearinghouse NLT noon on Wednesday 29 June 2005, with the designated signature authority, in PDF format.

Thank you for your cooperation and timeliness in this matter.

OSD BRAC Clearinghouse

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 24, 2005 4:47 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Hague, David, CIV, WSO-BRAC; Sillin, Nathaniel, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

What legal advice did the Department of Defense receive on the questions given below during the formulation of the base closure and realignment recommendations? Please provide copies of any pertinent documents.

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard.

Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or would not violate existing law.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to retire certain numbers of specified aircraft fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to retire aircraft is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

If they exist, legal opinions on these matters fall within the ambit of "all information used by the Secretary to prepare the recommendations."

Please expedite your response to this request.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 24, 2005 9:06 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Flood, Glenn, CIV, OASD-PA; Hoggard, Jack, CTR, WSO-OSD_DST JCSG
Subject: OSD BRAC Clearing House Tasker C0285 ANG realignments in conflict with USC law

Attached is the updated response to your inquiry, OSD Clearinghouse Tasker C0285 (PDF file is provided).

<< File: BRAC Subpoena.pdf >>

OSD BRAC Clearinghouse

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 17, 2005 10:57 AM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: RE: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Clearinghouse -

Thank you. The memorandum indicates that a further response is pending. Please keep the tasker open until the answer is complete.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil
www.brac.gov

From: RSS dd - WSO BRAC Clearinghouse
Sent: Friday, June 17, 2005 10:18 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: FW: OSD BRAC Clearing House Tasker #C0285 ANG realignments in conflict with USC law

Attached is the response to your inquiry, OSD Clearinghouse Tasker # C0285.
(PDF file is provided.)

OSD BRAC Clearinghouse

Subject: RE: OSD BRAC Clearing House Tasker #0285 ANG realignments in conflict with USC law

Attached is the answer to subject tasker. << File: BI-0056,CT0285, Dan Cowhig, 16 Jun 05.pdf >>

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Friday, June 10, 2005 5:09 PM
To: RSS dd - WSO BRAC Clearinghouse
Cc: Sillin, Nathaniel, CIV, WSO-BRAC; Hague, David, CIV, WSO-BRAC; Meyer, Robert, CTR, OSD-ATL
Subject: BRAC Commission RFI

Clearinghouse -

Please respond to the following:

The Governors and Adjutants General of various states have indicated they believe some or all of the realignments of Air National Guard units recommended by the Department of Defense violate 10 USC 18238 and 32 USC 104, as well as the authority of the various states to raise, maintain and command their respective militias under the state and Federal statutory law and constitutions. Please provide a detailed analysis of application of these statutes to the proposed realignment actions involving the Air National Guard. Please include an analysis of the underlying issues of the division of powers between the state and Federal governments. The analysis should specifically address whether and why the proposed realignments would or

would not violate existing law.

The Governors and Adjutants General of various states have indicated that in their view the Department of Defense did not adequately consult or coordinate with the Governors and Adjutants General regarding the impact of the proposed realignments of Air National Guard units recommended by the Department of Defense on their homeland security missions. Please describe in detail the consultation or coordination that occurred between the Department of Defense and the Governors and Adjutants General regarding the proposed realignments of Air National Guard units.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to relocate specified aircraft from one state's Air National Guard to the Air National Guard of another state fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to relocate aircraft from one state's Air National Guard to the Air National Guard of another state is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe the Department of Defense recommendations to retire certain numbers of specified aircraft fall outside the scope of authority established by the Defense Base Closure and Realignment Act of 1990, as amended. Please provide a detailed analysis of whether and why a recommendation to retire aircraft is or is not consistent with the purpose and authority of the Defense Base Closure and Realignment Act of 1990, as amended.

The Governors and Adjutants General of various states have indicated they believe some of the realignments of Air National Guard units recommended by the Department of Defense may violate the Constitutional separation of powers between the executive and legislative branches of the Federal Government. Some of the aircraft the Department of Defense has recommended for removal from specific states were purchased by Congress for the express purpose of equipping those states' militias. The Governors and Adjutants General of various states have suggested that removal of those aircraft from the designated state's militia and the transfer of the aircraft to another state's militia at the direction of the Department of Defense would employ the President's power as Commander-in-Chief to contravene Congress' exercise of its power to authorize, equip and fund that designated state's militia. Please provide a detailed analysis of that position as it applies to the proposed realignment actions involving the Air National Guard.

Thank you.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil <<mailto:dan.cowhig@wso.whs.mil>>
www.brac.gov

16 June 2005

Inquiry Response

Re: BI-0068

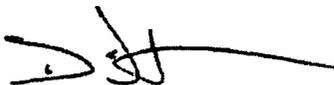
Requester: OSD Clearinghouse

Question: Identify whether or not the respective Governor consents to each proposed realignment or closure impacting an Air Guard installation.

Answer: The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states. There are no letters from any Governor, addressed to the Air Force, withholding consent to realignment or closure of Air National Guard installations in their respective states. However, there is one letter, (attached) from Pennsylvania Governor Rendell to Secretary Rumsfeld, non-consenting to the Navy closure impacting the 111th Fighter Wing, Pennsylvania Air National Guard (ANG), at Naval Air Station Joint Reserve Base (NAS JRB) Willow Grove.

I certify that the information contained herein is accurate and complete to the best of my knowledge and belief. If you have any questions, feel free to contact me.

Approved



DAVID L. JOHANSEN, Lt Col, USAF
Chief, Base Realignment and Closure Division



Willow Grove -
Rendell ltr.pdf...

ENCLOSURE 3



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

THE GOVERNOR

May 26, 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

The Department of Defense recommendations for the 2005 Base Realignment and Closure (BRAC) process included a recommendation to deactivate the 111th Fighter Wing, Pennsylvania Air National Guard, Willow Grove Air Reserve Station.

I am writing to advise you officially that, as Governor of the Commonwealth of Pennsylvania, I do not consent to the deactivation, relocation, or withdrawal of the 111th Fighter Wing.

The recommended deactivation of the 111th Fighter Wing has not been coordinated with me, my Adjutant General, or members of her staff. No one in authority in the Pennsylvania Air National Guard was consulted or even briefed about this recommended action before it was announced publicly.

The recommended deactivation of the 111th Fighter Wing appears to be the result of a seriously flawed process that has completely overlooked the important role of the states with regard to their Air National Guard units.

Sincerely,

A handwritten signature in black ink that reads "Edward G. Rendell".

Edward G. Rendell
Governor

Cc: The Honorable Anthony J. Principi
The Honorable Arlen Specter
The Honorable Rick Santorum
The Honorable Allyson Schwartz
The Honorable Michael Fitzpatrick

30 June 2005

Inquiry Response

Re: BI-0099 - ANG aircraft acquired through congressional add

Requester: BRAC Commission

Question:

Request the following information with respect to Air National Guard aircraft that were purchased over the past 20 years with congressional add money. Specifically, we need the type aircraft, tail number, location, date received by gaining unit, source of funding (FY, appropriation, etc). Please forward this information NLT than 31 Jun 05 as it supports a commission event.

Answer:

The requested information is provided in the attachment (4 pages). This information was provided by the National Guard Bureau.

Approved



DAVID L. JOHANSEN, Lt Col, USAF
Chief, Base Realignment and Closure Division

ENCLOSURE 4

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
F-16 Blk 52	189 FW, McEntire ANGB, SC	1995	92003902	16
		1995	92003903	
		1995	92003905	
		1995	92003909	
		1995	92003911	
		1995	92003914	
		1995	92003916	
		1995	92003917	
		1995	92003922	
		1995	93000531	
		1995	93000533	
		1995	93000535	
		1995	93000537	
		1995	93000539	
		1995	93000543	
		1995	93000549	
C-17A: 8 aircraft,	172 AW, Jackson, MS	18-Dec-03	2001112	8
		12-Jan-04	3003113	
		30-Jan-04	3003114	
		17-Feb-04	3003115	
		9-Mar-04	3003116	
		31-Mar-04	3003117	
		18-Apr-04	3003118	
		12-May-04	3003119	
C-21A <i>note: Historian shows 4 acquired, however only 2 currently in inventory</i>	200 ALF SQ, Peterson , CO	Dec 86 to Aug 87	86000374	2
			86000377	

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-130H <i>note: Historian shows 14 to Nashville, but programatically can only account for 12</i>	118 TAW, Nashville, TN	FY90	89001051	12
			89001052	
			89001053	
			89001054	
			89001181	
			89001182	
			89001183	
			89001184	
			89001185	
			89001186	
			89001187	
			89001188	
			123 AW, Louisville, KY	
91001232				
91001233				
91001234				
91001235				
91001236				
91001237				
91001238				
91001239				
91001651				
91001652				
145 AW, Charlotte NC		FY94-95	91001653	12
			92001451	
			92001452	
			92001453	
			92001454	
			93001455	
			93001456	
			93001457	
			93001458	
			93001459	
			93001561	
93001562				
93001563				

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-130H	153 AW, Cheyenne, WY	FY94-95	92001531	8
			92001532	
			92001533	
			92001534	
			92001535	
			92001536	
			92001537	
			92001538	
C-130H	167 AW, EWVRA Shepherd, WV	FY94-95	94006701	12
			94006702	
			94006703	
			94006704	
			94006705	
			94006706	
			94006707	
			94006708	
			95006709	
			95006710	
			95006711	
			95006712	
C-26A	124WG, Boise ID	FY90		11
	147FW Ellington AFB TX	FY90		
	144FW, Fresno CA	FY90		
	186ARW, Meridian MS (KEY FIELD)	FY90		
	182AW, Peoria, IL	FY90		
	111FW, Willow Grove NAS PA	FY90		
	122FW, Ft Wayne, IN	FY90		
	192FW, Richmond VA (BYRD FLD)	FY90		
	131FW, St Louis, MO (LAMBERT)	FY90		
	142FW, Portland OR	FY90		
	121ARW, Rickenbacker OH	FY90		
HH-60G	176ARW, Kulis ANGB, AK	FY90	92026466	6
			92026467	
			92026469	
			92026470	
			92026471	
			92026472	
HH-60G	106 RSQ WG, Suffolk, NY	FY90	88026108	6
			88026111	
			88026112	
			88026113	
			88026114	
			92026468	
HH-60G	129 RSQ WG, Moffett Fld, CA	FY90	88026106	6
			88026107	
			88026115	
			88026118	
			88026119	
			88026120	

note: C-26As are no longer
in the ANG inventory

note: Historian shows 4:
programmatically shows 6

**ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005**

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-26B <i>note: Historian shows 14, programmatically shows 11</i>	187 FW, Dannelly Fld, AL	FY92	91000504	
			94000265	
	147FW, Ellington, TX		94000260	
	141 ARW, Fairchild, WA		94000262	
	144 FW, Fresno, CA		90000529	
	125 FW, Jacksonville, FL		92000369	
	186 ARW, Meridian, MS		92000373	
	150 FW, Kirtland, NM		92000372	
	109 ALF WG, Schenectady, NY		94000261	
	115 FW, Truax, WI		94000264	
	162 FW, Tucson, AZ		94000263	11
C-38A	201 ALF SQ, Andrews AFB, MD		94001569	
			94001570	2
C-130J <i>note: Historian shows 8, programmatically shows 9</i>	175 WGH WG, Baltimore, MD		97001351	
			97001352	
			97001353	
			97001354	
			98001355	
			98001356	
			98001357	
			98001358	
			98001932	9
			146 ALF WG, Channel Islands, CA	
			1001462	
			2001483	
			2001484	4
	143 ALF WG, Quonset State, RI		2001434	
			99001431	
			99001432	
			99001433	4
EC-130J	193 SOP WG, Harrisburg, PA		1934	
			96008154	
			97001931	
			98001932	
			99001933	4
TOTAL AIRCRAFT:				145

*Note: C-12F - acquired 6
from 87 to 88, (no longer in
inventory)*



State of Illinois

NEWS

ROD R. BLAGOJEVICH – GOVERNOR
LISA MADIGAN – ATTORNEY GENERAL

FOR IMMEDIATE RELEASE:

July 21, 2005

CONTACTS:

Cheryle Jackson	312/814.3158 (office)
Abby Ottenhoff	312/814.3158 (office)
Andrew Ross	312/814.8193 (DCEO)
Melissa Merz	312/814.3188 (AG)

Gov. Blagojevich, Attorney General Madigan file lawsuit against U.S. Secretary of Defense Rumsfeld and BRAC Commission to stop the Pentagon from moving F-16s from Springfield's 183rd Fighter Wing

*The Governor takes case to court because any realignment
without his consent violates federal law*

SPRINGFIELD – Gov. Rod R. Blagojevich and Illinois Attorney General Lisa Madigan filed a lawsuit today in federal court to stop U.S. Secretary of Defense Donald Rumsfeld and the Defense Base Closure and Realignment Commission (BRAC) from moving F-16 aircraft from the 183rd Fighter Wing in Springfield. Gov. Blagojevich said that the Pentagon's May 13th recommendation to move the F-16 aircraft violated federal law, which dictates that he must give his consent for this type of realignment. Attorney General Madigan filed the lawsuit on behalf of the Governor in United States District Court for the Central Division of Illinois, Springfield Division.

"I have said from the moment the Pentagon released these recommendations that I would do everything humanly possible to keep the F-16 aircraft here in Illinois. We are taking our case to federal court because the Department of Defense did not coordinate this recommendation with either my office or the Illinois Adjutant General. The law leaves no question about how the process should work – Defense Secretary Rumsfeld must have my consent to move the 183rd Fighter Wing. I will not give my consent," Gov. Blagojevich said.

"I have made clear that I will take legal action on behalf of the Governor should it become necessary to prevent the realignment of the 183rd Fighter Wing in Springfield," Attorney General Madigan said. "Today, as Illinois' chief legal officer, I am taking that action to ensure the Secretary of Defense and BRAC Commissioners adhere to the law. Federal law could not be more clear: no National Guard base closures without the consent of the Governor. Governor Blagojevich certainly has not given his consent and, along with myself, the congressional delegation and the mayor, has fought this realignment. We now will continue this fight in court."

(more)

Gov. Blagojevich sent letters last week to both Defense Secretary Rumsfeld and Defense Base Closure and Realignment Commission (BRAC) Chairman Anthony Principi saying that he will not consent to the Department of Defense's recommendation to move F-16 aircraft from Springfield.

"We live in very uncertain times, and any BRAC actions that would threaten our homeland security would be a grave mistake. The Springfield Air National Guard Base is a unique facility whose missions cannot be duplicated, it has tremendous military value and plays critical roles in ensuring the safety and security of our state and our country. Illinois is home to 11 nuclear power plants that provide 50 percent of our power generation. We have 28 locks and dams on the Illinois, Mississippi and Ohio rivers. These vital assets and many others will be at greater risk without the F-16s in Springfield. In addition, this move will also cost the taxpayers \$10 million. These are the wrong recommendations, at the wrong time and for the wrong reasons and, on top of all that, they are illegal," Gov. Blagojevich said.

Just last week, legal counsel for the BRAC Commission issued a memo in which he fully agreed with the legal arguments that Gov. Blagojevich has been making all along. BRAC Deputy General Counsel Dan Cowhig wrote that no change in the organizational structure of an Air National Guard Unit may take place without the consent of that state's governor.

The Governor has been leading a coordinated effort for more than two years with the Illinois Congressional Delegation, other elected officials and local leaders to prevent Illinois' military bases from ending up on the BRAC list that will be announced in September. He consistently has stressed that these actions are a threat to our national and homeland security and are not cost effective.

"I fully support the action taken by Governor Blagojevich and Attorney General Madigan," said U.S. Senator Dick Durbin (D-IL). "The Defense Department's attempt to realign our state's Air National Guard base is not supported by the Pentagon's own standards of military value, does not have the consent of our Governor and compromises national security. The Constitution explicitly grants the states authority over the militia – and today that means the National Guard. I am confident that the courts will find in our favor and allow the F-16s to remain with the 183rd Fighter Wing in Springfield."

"I support all efforts to keep the 183rd Air National Guard in Springfield. The men and women of the 183rd served Illinois and the entire nation bravely in Iraq, and I believe they should be allowed to continue their service in Illinois. I will continue to work with the delegation here in Washington to protect the 183rd, and I am hopeful that together we will be successful in this effort," added U.S. Senator Barack Obama (D-IL).

"I want to applaud Gov. Blagojevich, and everyone else who have been working so hard in this effort, for taking this appropriate legal action to keep the 183rd Fighter Wing where it belongs. The Department of Defense violated federal law by making this recommendation, and it must be reversed. This is a critical issue of homeland security for our city, our state and our country," Springfield Mayor Timothy Davlin said.

Gov. Blagojevich presented Illinois' detailed and comprehensive analysis refuting the U.S. Department of Defense's recommendations that would take almost 1,900 jobs from the Rock Island

(more)

Arsenal, strip the 183rd Fighter Wing in Springfield of its F-16 aircraft and more than 600 jobs and eliminate more than 2,000 jobs from the Great Lakes Naval Training Center at a BRAC Regional Hearing last month in St. Louis.

The Commission will publicly release its BRAC report by September 8th and will send it to President Bush. The President has until September 23rd to approve or disapprove the list. The BRAC list must then be sent to Congress by November 7th, who must also approve or disapprove the list.