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 Cowhig[1]
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,

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 (AFR[6]) 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 (ANG[7]) 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

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).

- 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[9] 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.

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.

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.

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.

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.

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

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 mix[29] 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.

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 172d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN[31] 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

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).

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 chapter[38] 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.

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).

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.

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).

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.

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).

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.

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 DC 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).

DCN: 12570

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

DCN: 12570

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
ıbpoena.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

DCN: 12570

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

DCN: 12570

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

DCN: 12570

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.

DCN: 12570

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.

DCN: 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

DCN: 12570

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

DCN: 12570

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,

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

DCN: 12570

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	169 FW, McEntire ANGB, SC	1995	92003902	
		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	16
C-17A: 8 aircraft,	172 AW, Jackson, MS	18-Dec-03	2001112	
		12-Jan-04	3003113	
		30-Jan-04	3003114	
		17-Feb-04	3003115	
		9-Mar-04	3003116	
		31-Mar-04	3003117	
		16-Apr-04	3003118	
		12-May-04	3003119	8
C-21A *note: Historian shows 4 acquired, however only 2 currently in inventory*	200 ALF SQ, Peterson , CO	Dec 86 to Aug 87	86000374	
			86000377	2

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-130H	118 TAW, Nashville, TN	FY90	89001051	
note: Historian shows 14 to Nashville, but programatically can only account for 12				
			89001052	
			89001053	
			89001054	
			89001181	
			89001182	
			89001183	
			89001184	
			89001185	
			89001186	
			89001187	
			89001188	12
	123 AW, Louisville, KY	FY92	91001231	
			91001232	
			91001233	
			91001234	
			91001235	
			91001236	
			91001237	
			91001238	
			91001239	
			91001651	
			91001652	
			91001653	12
	145 AW, Charclette NC	FY94-95	92001451	
			92001452	
			92001453	
			92001454	
			93001455	
			93001456	
			93001457	
			93001458	
			93001459	
			93001561	
			93001562	
			93001563	12

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	
			92001532	
			92001533	
			92001534	
			92001535	
			92001536	
			92001537	
			92001538	8
	167 AW, EWVRA Shepherd, WV	FY94-95	94006701	
			94006702	
			94006703	
			94006704	
			94006705	
			94006706	
			94006707	
			94006708	
			95006709	
			95006710	
			95006711	
			95006712	12
C-26A	124WG, Boise ID	FY90		
note: C-26As are no longer in the ANG inventory	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		11
HH-60G	176ARW, Kulis ANGB, AK	FY90	92026466	
note: Historian shows 4; programmatically shows 6			92026467	
			92026469	
			92026470	
			92026471	
			92026472	6
	106 RSQ WG, Suffolk, NY	FY90	88026108	
			88026111	
			88026112	
			88026113	
			88026114	
			92026468	6
	129 RSQ WG, Moffett Fld, CA	FY90	88026106	
			88026107	
			88026115	
			88026118	
			88026119	
			88026120	6

ANG New Aircraft
Aquisitions Through Congressional Adds 1985-2005

Type Aircraft	Unit Received	Date Received	Tail #	Total
C-26B	187 FW, Dannelly Fld, AL	FY92	91000504	
note: Historian shows 14, programmatically shows 11			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	175 WGH WG, Baltimore, MD		97001351	
note: Historian shows 8, programmatically shows 9			97001352	
			97001353	
			97001354	
			98001355	
			98001356	
			98001357	
			98001358	
			98001932	9
	146 ALF WG, Channel Islands, CA		1001461	
			1001462	
			2001463	
			2001464	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:				45

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