

Executive Correspondence
DCN 4669

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BRAC Commission

JUL 14 2005

Received



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PAGES: 28

MESSAGE: URGENT

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MAJORITY DEPUTY WHIP

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July 13, 2005

The Honorable Anthony J. Principi
 Chairman
 Defense Base Closure and Alignment Commission
 2521 South Clark Street
 Arlington, Virginia 22202

Dear Mr. Principi:

As the 2005 BRAC round proceeds, I am increasingly concerned about the effect that recusals by several members of the Defense Base Realignment and Closure (BRAC) Commission will have upon the Commission's ability to fulfill the important public trust responsibilities expected of them under applicable laws and regulations. By way of example, I understand that one Commissioner may have to abstain from most of the votes but his failure to fully participate will not affect the requirement that a majority of the seated Commissioners must affirmatively vote to take a base off of the BRAC list. Other Commissioners have expressed their intention to abstain from specific votes. It is in the public's interest that every Commissioner participates in the deliberations of the BRAC Commission as fully as the law allows. Ideally, no BRAC Commissioner should be forced to recuse him or herself from participating in any issue before the Commission.

At the Commission's public meeting on May 19, 2005, Commissioners Bilbray, Coyle, Gehman and Hansen announced that they would recuse themselves from certain decisions of the BRAC Commission. It is my understanding that Commissioners Coyle and Gehman engaged in certain activities related to the 2005 BRAC round prior to their appointment to the BRAC Commission that required each to recuse himself under an Ethics Agreement that all of the Commissioners signed as a condition of appointment. There seems to be little controversy over their decisions given the circumstances.

Commissioners Bilbray and Hansen, on the other hand, appear to have recused themselves from decisions involving their home states solely because they formerly served in elective office from those states.¹ I am particularly concerned about the voluntariness of Commissioner Bilbray's decision.

¹ Letter from Anthony J. Principi, Chairman, BRAC Commission to the Honorable Ted Stevens, United States Senate, June 17, 2005 and enclosed Extract of Transcript of the May 19, 2005 Public Meeting of the BRAC Commission, March 8, 2005. Commissioner Hansen indicated that he would recuse himself from

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Media accounts indicate that Commissioner Bilbray made this decision after consultation with the BRAC Commission's counsel.² However, one article suggests that Commissioner Bilbray was given little choice in the matter. This article quotes Commissioner Bilbray as stating, "I was kind of shocked when our counsel advised me to recuse." Commissioner Bilbray spoke to the reporter who wrote this story immediately after the May 19th Commission meeting at which he announced his recusal.³

Questions about the voluntariness of Commissioner Bilbray's recusal arose once again at the BRAC Commission's Alaska Regional Hearing on June 15, 2005. An article that appeared the day prior to the hearing cast doubt on whether the Commissioner's recusal applied to the proposed removal of fighter aircraft from Eielson AFB to Nellis AFB. In that article, Bilbray was quoted as follows:

I'm going to do what's right for the country...I think the people in Alaska will find that I'll be very fair in this matter. And if I don't think those planes should go to Nellis, I'll be one of the first to say that.

The article goes on to quote Commissioner Bilbray as follows, "I think Nellis needs more planes like a hole in the head; they've got so many there already."⁴

The following day, Commissioner Bilbray said he would recuse himself from BRAC Commission votes related to the proposed transfer of F-16 aircraft to Nellis AFB, again on the advice of the Commission's counsel. However, he continued to insist that he had no intention of favoring his home state in his work on the BRAC Commission. Quite the contrary, Commissioner Bilbray suggested that he was favorably disposed to keeping the F-16 aircraft at Eielson AFB.

I've been leaning against the recommendation to realign Eielson...I could very well have been a 'no vote' that they cancelled out.

I feel bad for the people of Alaska...I've been very sympathetic to those bases.⁵

substantial participation in any portion of the BRAC Commission that would affect any installation in the State of Utah on the grounds that he has held public office in Utah for forty-two years, 22 of which as a member of Congress. Commissioner Bilbray indicated that he was recusing himself from any work "in regard to the State of Nevada in these particular deliberations," "in advice of the Ethics Council (sic) to our Commission."

² Sam Bishop, Bilbray Mulls Recusal for Eielson Votes, Fairbanks Daily News-Miner, June 14, 2005.

³ Samantha Young, Ex-Congressman Quits Work Involving State Military Sites, Las Vegas Review-Journal, May 20, 2005.

⁴ See, note 2.

⁵ R.A. Dillon, BRAC Commission to Take Second Look at Recusals, Fairbanks Daily News-Miner, June 16, 2005. (Emphasis added)

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These news media accounts also suggest that the BRAC Commission staff was confused about the applicable ethics rules. On June 14, Commission spokesman Jim Schaefer was quoted as saying that he didn't believe Commissioner Bilbray needed to recuse himself on the Eielson issue. Schaefer said, "From what I've heard he's not planning to."⁶

On June 15th, Schaefer is quoted as saying that "Commission bylaws mandate that commissioners abstain from voting on issues that directly affect their home states." Bilbray, on the other hand, contended that the recusal decision followed questions from the media about his impartiality.⁷

You were quoted in the June 15 story as indicating that "the Commission would meet with its legal counsel [the following week] to review the recusal process." That article also quotes you as saying that "If we keep recusing people every time there's a potential minor conflict we're going to run into trouble."⁸ I fully expected that this meeting would include all of the Commissioners. I was disappointed to learn that you were the only Commissioner present.⁹

On June 21, 2005, following the meeting with counsel, you wrote Senators Stevens and Warner that the previously announced recusals would remain in effect.¹⁰ My counsel, who was briefed on the outcome of the meeting by the BRAC Commission's General Counsel, informs me that the recusals by Commissioners Bilbray and Hanson were not withdrawn in deference to a precedent established by former Senator Dixon from Illinois who served on a prior BRAC Commission that has since sunsetted.

However worthy the precedent, and that in itself is debatable, it is not the law. I am informed that BRAC Commission is a chartered federal advisory committee, subject to the Federal Advisory Committee Act. The Commission's charter specifies that the Commissioners are "Special Government Employees" (SGEs). Contrary to the statements of the Commission's spokesperson, neither the Commission's charter, the procedural rules it has adopted, nor the Commission's principal governing legislation, the Defense Base Closure and Realignment Act of 1990, specify the conflict of interest or impartiality rules governing members of the BRAC Commission.

BRAC Commissioners, as SGEs, are subject to the mandates of federal ethics laws and the US Office of Government Ethics (OGE) government-wide ethics regulations. The OGE government-wide ethics regulations require that SGEs abstain from voting on matters before federal advisory committees on which they cannot cast an

⁶ See, note 2.

⁷ See, note 5.

⁸ Id. (Emphasis added)

⁹ See, note 1.

¹⁰ Letter from Anthony J. Principi to the Honorable John W. Warner, United States Senate, June 21, 2005.

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impartial vote.¹¹ However, these regulations define partiality in terms that would not require Commissioner Bilbray to abstain from any decision solely because his home state might win or lose in the vote.

The regulations require that an SGE abstain from participating in "particular matters" in which the SGE, a member of his or her household, or a person with which he or she has a "covered relationship" has a "direct and predictable financial interest." These matters must involve "specific parties"¹² Moreover, the SGE must only abstain if "a reasonable person with knowledge of the relevant facts would question his impartiality." These regulations do not require that an individual disqualify himself simply because a member of the press or the public might subjectively believe he is partial.¹³

Recognizing that it is impossible to predict all conceivable fact situations in regulations, the OIG encourages SGEs who are concerned that other circumstances would raise a question of impartiality to consult an Ethics Counselor.¹⁴ The regulations enumerate a series of factors to be considered by the Ethics Counsel in determining whether an individual's participation in a government decision "outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations."¹⁵ These Ethics Counselor is expected to weigh the appearance that the government employee's decisions will be driven by his or her financial interest (or the financial interests of a related party) against the need for the employee to participate in the decision.¹⁶

The government-wide ethics regulations provide a roadmap for evaluating questions of impartiality, real or perceived. These regulations do not require a person to abstain from the performance of his or her official duties absent a showing that the individual, a family member or a close associate will benefit financially from the government employee's decisions. To the best of my knowledge, nobody has suggested that Commissioner Bilbray, his family members, or those associated with him, have any financial stake in the outcome of the BRAC Commission's deliberations.

Commissioner Bilbray's protestations in the media do not inspire confidence that he was offered the choice of following the government-wide ethics regulations or electing

¹¹ 5 C.F.R. 2635.501 - 502 (2005).

¹² See, 5 C.F.R. 2637.102(a) (7) (2005) for definitions of "specific matters" and "specific parties". DoD guidance, note 13, observes that "DoD advisory committees usually focus on policy-level issues and do not consider particular matters involving specific parties."

¹³ See, Standards of Conduct Office, DoD General Counsel, Keeping Committees Clear of Ethical Problems: An Ethics Guide for Designated Federal Officials of DoD Advisory Committees (February 10, 2004)(discussion of conflicts of interest), An Advisory Guide for Consultants and Advisory Committee Members at the Department of Defense (February 10, 2004) (discussion of impartiality), Employees' Guide to the Standards of Conduct (October 2002) at 8.

¹⁴ 5 C.F.R. 2637.501(a) (2005)

¹⁵ 5 C.F.R. 2635.502(d). (2005)

¹⁶ 5 C.F.R. 2635.502(d) (1)-(5).

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a more restrictive position as a matter of conscience. Weeks after reading Commissioner Bilbray's comments in the newspaper, I am still troubled by the Commissioner's protest that his possible vote against the realignment of Eielson AFB - a vote against the interests that supposedly disqualified him - would be "cancelled out," presumably by the Commission's attorneys.¹⁷ I am left with the impression that the Commission's attorneys characterized the decision made by Senator Dixon some years back as the applicable law and "advised" Commissioner Bilbray to follow it.

Section 5(b) (3) of the Federal Advisory Committee Act sets forth Congress' expectation that the advice and recommendations of the advisory committee "will not be inappropriately influenced by the appointing authority...but will instead be the result of the advisory committee's independent judgment."¹⁸ The arbitrary exclusion of committee members from participation in Commission decisions by staff members who are employed by the supporting agency necessarily raises an inference of interference.

The General Services Administration's Federal Advisory Committee Act regulations, at the suggestion of OGE,¹⁹ enumerate the specific responsibilities of an agency that supports an advisory committee to assure that the committee functions in an ethical fashion. These responsibilities include, "assur[ing] that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes, regulations issued by the...OGE, including any supplemental agency requirements, and other Federal ethics rules."²⁰

While advisory committees are also subject to other applicable laws, regulations and agency policies,²¹ my staff has not identified any authority to support the proposition that a BRAC Commissioner who once served, but no longer serves in elective office, must abstain from decisions that possibly could benefit or burden his home state.

Following the Commission's return from Fairbanks, my counsel suggested to the BRAC Commission's General Counsel that it might be helpful to seek a written "second opinion" on this critically important issue from the OGE or the Office of Legal Counsel of the United States Department of Justice. I think this is a fine suggestion and hope that you are taking advantage of the opportunity to have a fresh pair of eyes evaluate whether the advice given to Commissioner Bilbray, and perhaps to other Commissioners, was

¹⁷ See, note 5.

¹⁸ 5 U.S.C. Appendix. Although the language of Section 5(b)(3) establishes standards for legislation to create new advisory committees, the General Services Administration (which promulgates government-wide standards for the operation of federal advisory committees under authority granted in Section 7(c)) has interpreted it as a congressional mandate that advisory committees function independently of their appointing authorities. See, Final Rule, Federal Advisory Committee Management, 66 Fed. Reg. 37731 (July 19, 2001).

¹⁹ Id.

²⁰ 41 C.F.R. 102-3.105(h) and Appendix A to Subpart C (Point IV).

²¹ 41 C.F.R. 102-3.125(c) and Appendix A to Subpart C (Point VI)

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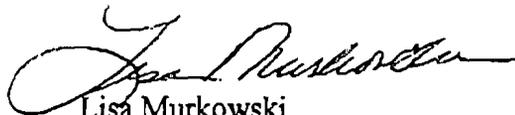
unjustifiably restrictive. This written opinion needs to be completed before the Commissioners begin reviewing the staff recommendations.

Please understand that I share the Commission's desire to operate above reproach and free from any real or perceived bias. However, I would respectfully submit that it is just as egregious to arbitrarily exclude an unbiased Commissioner from full participation as it is to permit a Commissioner with a direct and substantial financial interest in the outcome of a decision to fully participate.

In formulating this letter I found the observations of Jack Maskell, a Legislative Attorney for the Congressional Research Service, in a report entitled, "Entering the Executive Branch of Government: Potential Conflicts of Interest With Previous Employments and Affiliations" (March 23, 2003), quite illuminating, and I have enclosed a copy of the report for your review. I would specifically direct your attention to the "Note on General 'Impartiality,' Alleged 'Bias,' and Past Affiliations or Activities" which begins on page CRS-17 and concludes on page CRS-19. Mr. Maskell's analysis, which defines impartiality as the absence of a financial conflict of interest, suggests that the Commission's attorneys got this decision wrong in a very big way.

I appreciate your thoughtful consideration of this views expressed in this letter and look forward to your reply.

Sincerely,



Lisa Murkowski
United States Senator

Enclosure

cc: BRAC Commission Members