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MEMORANDUM

TO: ADC BOARD OF DIRECTORS
TIM FORD
TODD HERBERGHS
RANDY FORD
DAN COHEN

FROM: MR. SCHLOSSBERG
MR. PERSKY, LEGISLATIVE PROGRAM MANAGER

DATE: MAY 23, 2012

RE: FY13 APPROPRIATIONS AND DEFENSE AUTHORIZATION UPDATE

Introduction

This memorandum compiles relevant funding levels, report language, and provisions related to the Fiscal Year 2013 (FY13) appropriations and authorization processes.

Refer to the table of contents on page four for a list of bill text and report language.

Authorization Status

The House passed its version¹ (H.R. 4310) of the FY13 National Defense Authorization Act (NDAA) on May 18. The bill contains provisions that would restrict the Secretary's realignment and closure authorities, restrict the Secretary's authority to relocate units and military personnel, and would limit the Secretary's ability to retire weapons systems.

¹ House Committee Report 112-479: <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt479/pdf/CRPT-112hrpt479.pdf>;
House Committee Report 112-485 (amendments): <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt485/pdf/CRPT-112hrpt485.pdf>

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The White House released a Statement of Administration Policy² regarding the House's bill on May 15, expressing disagreement with "many provisions in this bill that impede the ability of the Secretary of Defense to carry out the 2012 defense strategic guidance."

The Senate Armed Services Committee began to mark up its version of the bill on May 22 and is expected to pass the measure to the full Senate by the end of this week.

The Senate Armed Forces Readiness Subcommittee, which has jurisdiction over military construction, installations, family housing issues, and the BRAC process, reported its mark to the full Senate Armed Services Committee on May 22. Bill details are expected to be released May 23–24.

Appropriations Status

Military Construction

The House Appropriations Committee passed its version³ of the FY13 Military Construction Appropriations Bill on May 16, referring it to the full House.

The Senate Appropriations Committee passed its version⁴ of the spending bill on May 22, referring it to the full Senate.

It is unknown when the full chambers will take up their respective measures.

Defense

The House Appropriations Committee passed its version⁵ of the FY13 Defense Appropriations Bill on May 17, referring it to the full House. It is unknown when the House will take up the measure.

The Senate Appropriations Committee is still conducting informational hearings regarding its version of the spending bill, and has not yet moved on to the markup phase.

² http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr4310r_20120515.pdf

³ Draft Bill: <http://appropriations.house.gov/UploadedFiles/BILLS-112HR-SC-AP-FY13-MilConVA.pdf>;

Draft Report: <http://appropriations.house.gov/UploadedFiles/MILCON-FY13-FULLCOMMITTEEREPORT.pdf>

⁴ Summary: <http://www.appropriations.senate.gov/news.cfm?method=news.view&id=bce38ab6-f30e-4ac0-99a7-c8281bd606ae>

⁵ Draft Bill: <http://appropriations.house.gov/UploadedFiles/BILLS-112HR-FC-AP-FY13-Defense.pdf>;

Draft Report: <http://appropriations.house.gov/UploadedFiles/DEFENSE-FY13-FULLCOMMITTEEREPORT.pdf>

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If you have any questions concerning this information, please call George Schlossberg directly at (202) 828-2418 or email him at george.schlossberg@kutakrock.com, or call Eli Persky directly at (202) 828-2465 or e-mail him at eli.persky@kutakrock.com.

A handwritten signature in black ink that reads "Eli Persky". The signature is written in a cursive style, with the first name "Eli" and the last name "Persky" clearly legible. A long, sweeping horizontal line extends from the end of the signature across the page.

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NDAA—House

Prohibition on Conducting Additional Base Realignment and Closure (BRAC) Round (Section 2713)

This section would prohibit funds authorized to be appropriated by this Act from being used to propose, plan for, or execute an additional BRAC round.

Intergovernmental Support Agreements with State and Local Governments (Section 331)

This section would authorize the Secretary concerned to enter into intergovernmental support agreements with State or local governments for the procurement of installation support services. Procurement of police and fire protection services are specifically exempt from this authority.

Bill Text

(A) serves the best interests of the military department by enhancing mission effectiveness or creating efficiencies or economies of scale, including by reducing costs;

(B) serves the best interest of State or local government party to the agreement, as determined by the community's particular circumstances; and

(C) otherwise provides a mutual benefit to the military department and the State or local government.

Funds available to the Secretary of the military department concerned for installation support may be used to reimburse a State or local government for providing installation-support services pursuant to an agreement under this subsection. Funds received by the Secretary as reimbursement for providing installation-support services pursuant to the agreement shall be credited to the appropriation or account charged with providing installation support.

Local Communities' Capacity to Support Military Installation Change (Item of Special Interest)

The committee is concerned about the impact of Base Closure and Realignment (BRAC), overseas rebasing, and force structure changes on local communities surrounding installations affected by these initiatives. The committee is concerned that some communities affected by significant installation growth were not as well prepared as others to ensure that adequate transportation infrastructure, schools, utilities services, and housing were available when needed to support installation growth. The committee notes that some communities that coped relatively well with the growth may have implemented strategies that, if adopted, might benefit other communities experiencing similar installation growth in the future. The committee also notes

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that many communities have been affected by the closure of about 100 major installations through 5 BRAC rounds authorized and carried out between 1988 and 2011. The committee is aware that the Government Accountability Office has issued a series of reports since 2004 on such issues as to how communities fared after the first four BRAC rounds, how effectively the Army communicated growth plans at its installations with local communities, the main challenges in coping with local installation growth, and the Department of Defense's Defense Access Roads program. Coping with growth is particularly important because the ability of the installation to meet mission requirements can be affected by overburdened transportation and utilities networks.

Now that the Department of Defense has completed its fifth BRAC round and the potential exists for future infrastructure, force structure, and installation mission changes, local communities may once again have to manage potentially significant installation change. Communities that encounter such changes in the future could benefit from lessons learned from those communities that coped relatively well with such change. Therefore, the committee directs the Comptroller General of the United States to study the practices and strategies that local communities and States used to cope with such changes, and to prepare and submit a report to the congressional defense committees by March 1, 2013. At a minimum, the Comptroller General's report should address the following:

- (1) The best practices that communities or states relied on to cope with installation growth, installation closure, or mission changes and how could those practices be replicated by similarly situated communities in the future;
- (2) Opportunities that exist to share best practices to cope with installation change that were successfully implemented by communities or States;
- (3) The extent to which local communities' or states' economies recover from the closure of a major military installation in any of the five BRAC rounds conducted through 2011; and
- (4) Any such additional questions that the Comptroller General deems relevant to this study.

Indemnification of Transferees of Property at Any Closed Military Installation (Section 2813)

This section would provide an indemnification for properties transferred at all closed military installations after October 24, 1988. This section would unify the protections previously provided to properties closed pursuant to a base closure process with those properties that were closed pursuant to section 2687 of title 10, United States Code.

Modification of Notice Requirements in Advance of Permanent Reduction of Sizable Numbers of Members of the Armed Forces at Military Installations (Amendment 136—Adopted)

At the end of title XXVIII, add the following new section:

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SEC. 9___. MODIFICATION OF NOTICE REQUIREMENTS IN ADVANCE
OF PERMANENT REDUCTION OF SIZABLE NUMBERS OF
MEMBERS OF THE ARMED FORCES AT MILITARY INSTALLATIONS.

(a) CALCULATION OF NUMBER OF AFFECTED MEMBERS.—Subsection (a) of section 993 of title 10, United States Code, is amended by adding at the end the following new sentence: “In calculating the number of members to be reduced, the Secretary shall take into consideration both direct reductions and indirect reductions.”.

(b) NOTICE REQUIREMENTS.—Subsection (b) of such section is amended by striking paragraphs (1) and (2) and inserting the following new paragraphs:

“(1) the Secretary of Defense or the Secretary of the military department concerned—

“(A) submits to Congress a notice of the proposed reduction and the number of military and civilian personnel assignments affected, including reductions in base operations support services and personnel to occur because of the proposed reduction; and

“(B) includes in the notice a justification for the reduction and an evaluation of the costs and benefits of the reduction and of the local economic, environmental, strategic, and operational consequences of the reduction; and

“(2) a period of 90 days expires following the day on which the notice is submitted to Congress.”.

(c) TIME AND FORM OF SUBMISSION OF NOTICE.—Such section is further amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by inserting after subsection (b) the following new subsection:

“(c) TIME AND FORM OF SUBMISSION OF NOTICE.—The notice required by subsections (a) and (b) may be submitted to Congress only as part of the budget justification materials submitted by the Secretary of Defense to Congress in support of the budget for a fiscal year submitted under section 1105 of title 31.”.

(d) DEFINITIONS.—Such section is further amended by adding at the end the following new subsection:

“(e) DEFINITIONS.—In this section:

“(1) The term ‘direct reduction’ means a reduction involving one or more members of a unit.

“(2) The term ‘indirect reduction’ means subsequent planned reductions or relocations in base operations support services and personnel able to occur due to the direct reductions.

“(3) 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, which is located within any of the

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several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or Guam. Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

“(4) The term ‘unit’ means a unit of the armed forces at the battalion, squadron, or an equivalent level (or a higher level).”.

Consideration of United States Military Bases Located Overseas in Criteria Used to Consider and Recommend Military Installations for Closure or Realignment (Amendment 134—Adopted)

At the end of title XXVII, add the following new section:

SEC. 27____. CONSIDERATION OF UNITED STATES MILITARY BASES LOCATED OVERSEAS IN CRITERIA USED TO CONSIDER AND RECOMMEND MILITARY INSTALLATIONS FOR CLOSURE OR REALIGNMENT.

Section 2687(b)(1)(B) of title 10, United States Code, is amended—

(1) by striking “and” at the end of clause (i); and

(2) by adding at the end the following new clause:

“(iii) the anticipated continuing need for and availability of military bases outside the United States, taking into account current restrictions on the use of military bases outside the United States and the potential for future prohibitions or restrictions on the use of such bases; and”.

Alternative Financing Instruments (Item of Special Interest)

The committee is concerned that the process to determine costs and savings from future basing decisions may overlook costs that should be taken into consideration. Specifically, the Department of Defense has effectively leveraged private capital to improve military family housing through the Military Housing Privatization Initiative; promote renewable energy use on installations through Energy Savings Performance Contracts, Utility Energy Service Contracts, guaranteed loans from the Department of Energy, and other alternative financing vehicles; developed unused installation property for consideration from private developers through the Enhanced Use Leasing Program; and improved Army lodging through the Privatization of Army Lodging program. At the same time, a future basing decision could lead to a closure of an installation before the associated ground leases or other contractual arrangements between the government and the developer have been satisfied. Thus, the long-term contractual obligations may affect future basing decisions.

Therefore, the committee directs the Comptroller General of the United States to determine the impact of base closures on alternatively financed projects and to provide a report

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of the findings to the congressional defense committees by March 1, 2013. At a minimum, the Comptroller General's study should assess the following:

(1) What alternatively financed projects exist on military installations in the United States and what contractual obligations related to contract or ground lease termination or loan guarantees exist in these contracts, leases, or loans;

(2) How the Department of Defense ensures that the U.S. Government's interests are protected in addressing contract or ground lease termination, or loan guarantees;

(3) To what extent the Department of Defense's process for estimating costs and savings from candidate basing modifications capture any termination liability that the U.S. Government could incur from these contractual obligations; and

(4) The Comptroller General should add such additional questions as deemed relevant to complete this study.

Congressional Notification for Contracts for the Provision and Operation of Energy Production Facilities Authorized To Be Located on Real Property Under the Jurisdiction of a Military Department (Section 2821)

This section would require the Department of Defense to notify Congress when entering into contracts for the provision and operation of energy production facilities on real property owned by the United States if the contract is longer than 20 years.

Review of Air National Guard Component Numbered Air Force Augmentation Force (Amendment 105—Adopted)

At the end of subtitle G of title X, add the following new section:

SEC. 1078. REVIEW OF AIR NATIONAL GUARD COMPONENT NUMBERED AIR FORCE AUGMENTATION FORCE.

(a) REVIEW.—

(1) IN GENERAL.—The Secretary of the Air Force shall conduct a review of the decision of the Secretary to cancel or consolidate the Air National Guard Component Numbered Air Force Augmentation Force.

(2) MATTERS INCLUDED.—The review under paragraph (1) shall include the following:

(A) An explanation of how the Secretary determined which Air National Guard Augmentation Units would be retired or relocated during fiscal year 2013.

(B) A description of the methodologies underlying such determinations, including the factors and assumptions that shaped the specific determinations.

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(C) The rationale for selecting Augmentation Units to be retired or relocated with respect to such Units of the Air National Guard.

(D) An explanation of how such consolidation or relocation affects national security.

(E) Details of the costs incurred, avoided, or saved with respect to consolidation or relocation of Augmentation Units.

(b) REPORT.—Not later than 90 days after the date of the enactment of this Act, the Secretary shall submit to the congressional defense committees a report on the review conducted under subsection (a)(1).

(c) COMPTROLLER GENERAL REVIEW.—Not later than 60 days after the date on which the report is submitted under subsection (b), the Comptroller General of the United States shall submit to the congressional defense committees a review of such report.

Sense of Congress on the Essential Service Provided by Fighter Wings Performing Aerospace Control Alert Missions (Amendment 69—Adopted)

At the end of section 352 (page 119, after line 9), add the following new subsection:

(e) SENSE OF CONGRESS ON THE ESSENTIAL SERVICE PROVIDED BY FIGHTER WINGS PERFORMING AEROSPACE CONTROL ALERT MISSIONS.— It is the sense of Congress that fighter wings performing the 24-hour Aerospace Control Alert missions provide an essential service in defending the sovereign airspace of the United States in the aftermath of the terrorist attacks upon the United States on September 11, 2001.

Removal of Brigade Combat Teams from Europe (Amendment 48—Adopted)

At the end of title XII, add the following new section:

SEC. 12 ____. REMOVAL OF BRIGADE COMBAT TEAMS FROM EUROPE.

(a) FINDING.—Congress finds that, because defense spending among European NATO countries fell 12% since 2008, from \$314 billion to \$275 billion, so that currently only 4 out of the 28 NATO allies of the United States are spending the widely agreed-to standard of 2% of their GDP on defense, the United States must look to more wisely allocate scarce resources to provide for the national defense.

(b) REMOVAL AUTHORIZED.—The President is authorized and requested to end the permanent basing of units of the United States Armed Forces in European member nations of the North Atlantic Treaty Organization and return the four Brigade Combat Teams currently stationed in Europe to the United States.

(c) USE OF ROTATIONAL FORCES TO SATISFY SECURITY NEEDS.— It is the policy of the United States that the deployment of units of the United States Armed Forces on a

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rotational basis at military installations in European member nations of the North Atlantic Treaty Organization pursuant to the Army Force Generation (ARFORGEN) process is a force-structure arrangement sufficient to permit the United States—

(1) to satisfy the commitments undertaken by United States pursuant to Article 5 of the North Atlantic Treaty, signed at Washington, District of Columbia, on April 4, 1949, and entered into force on August 24, 1949 (63 Stat. 2241; TIAS 1964);

(2) to address the current security environment in Europe; and

(3) to contribute to peace and stability in Europe.

Leasing Real Property (Item of Special Interest)

The committee is concerned that by using real property leases as allowed under section 2667 of title 10, United States Code, for the purchase of services being performed on non-excess Department of Defense land, the Department and the military departments are bypassing the small-business considerations provided for under the Federal Acquisition Regulation (FAR). For example, the Department of the Navy has sought to lease to public or private entities a portion of the former Ship Repair Facility on non-excess real property at the U.S. Naval Base Guam under the authority of section 2667. In addition, the Navy's request for proposal states that it was issued to "competitively select a private sector ship repair facility operator . . . The successful offeror should be capable of operating as, or partnering with, a fully qualified ship repair and overhaul enterprise." The committee urges the Department and the military services to use appropriate statutory and regulatory authorities when leasing real property and to pursue contracted services through the FAR, and not via leasing arrangements, so that proper consideration is given to small business interests.

MilCon Approps—House

Limitation on Realignment and Closure (Section 126)

SEC. 126. (a) Except as provided in subsection (b), none of the funds made available in this Act may be used by the Secretary of the Army to relocate a unit in the Army that—

(1) performs a testing mission or function that is not performed by any other unit in the Army and is specifically stipulated in title 10, United States Code; and

(2) is located at a military installation at which the total number of civilian employees of the Department of the Army and Army contractor personnel employed exceeds 10 percent of the total number of members of the regular and reserve components of the Army assigned to the installation.

(b) EXCEPTION.—Subsection (a) shall not apply if the Secretary of the Army certifies to the congressional defense committees that in proposing the relocation of the unit of the Army, the Secretary complied with Army Regulation 5–10 relating to the policy, procedures, and responsibilities for Army stationing actions.

Mark Center Parking Limitation (Section 124)

SEC. 124. None of the funds made available by this Act may be used by the Secretary of Defense to take beneficial occupancy of more than 2,000 parking spaces (other than handicap-reserved spaces) to be provided by the BRAC 133 project: Provided, That this limitation may be waived in part if: (1) the Secretary of Defense certifies to Congress that levels of service at existing intersections in the vicinity of the project have not experienced failing levels of service as defined by the Transportation Research Board Highway Capacity Manual over a consecutive 90-day period; (2) the Department of Defense and the Virginia Department of Transportation agree on the number of additional parking spaces that may be made available to employees of the facility subject to continued 90-day traffic monitoring; and (3) the Secretary of Defense notifies the congressional defense committees in writing at least 14 days prior to exercising this waiver of the number of additional parking spaces to be made available.

Base Realignment and Closure 2005 (Mark Center Report Language)

The committee recommendation continues to carry a parking limitation for Base Closure and Realignment (BRAC) recommendation #133 (Mark Center). The Committee believes that carrying this provision will continue to mitigate traffic congestion surrounding the Mark Center site. Specifically, the Committee recommendation includes a limitation on the number of parking spaces the Department may utilize at the Mark Center to no more than 2,000, with the exception of disabled parking spaces. The limitation may be waived in part, but not in whole, if the Secretary of Defense certifies that none of the intersections surrounding the Mark Center reach failing levels of service “e” or “f,” as defined by the Transportation Research Board Highway

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Capacity Manual, during a consecutive 90-day period or the Department of Defense and the Virginia Department of Transportation agree on the number of additional parking spaces that may be made available to employees of the facility subject to continued 90-day traffic monitoring. The Committee continues to strongly encourage the Department of Defense to examine mandatory commuting alternatives such as telework, flexible work schedules, satellite parking facilities with dedicated shuttle service to the Mark Center, parking capacity at the Pentagon, additional ridesharing and public transit incentives and all other means to ensure that Mark Center employees can commute to and from work without undue burden.

Base Realignment and Closure 2005 Remediation Agreements (Report Language)

The Committee commends the Deputy Under Secretary of Defense for Installations and Environment and the Department of the Army for their willingness to work with other governmental agencies to facilitate private sector growth and government efficiency. The Committee understands from reports by the Department of the Army that additional requirements are being imposed on some of the cleanup efforts in States. The Department of the Army has indicated that additional requirements in the remediation of land in closures threaten to delay land transfer and therefore increase expenses beyond the original project scope.

Therefore, the Committee believes the Deputy Under Secretary of Defense for Installations and Environment and the Environmental Protection Agency should continue to work to reach remediation agreements with standards allowed under current BRAC law. The Committee directs the Department of Defense's Inspector General to review BRAC 2005 closures and report to the congressional defense committees on additional issues that delayed land transfer and increased costs to the Department of Defense 180 days after enactment of this Act.

Defense Approps—House

Limitation on Realignment and Closure (Section 8018)

SEC. 8018. No more than \$500,000 of the funds appropriated or made available in this Act shall be used during a single fiscal year for any single relocation of an organization, unit, activity or function of the Department of Defense into or within the National Capital Region: Provided, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing to the congressional defense committees that such a relocation is required in the best interest of the Government.

Mark Center Parking Restriction (Section 8103)

SEC. 8103. None of the funds made available by this Act may be used by the Secretary of Defense to take beneficial occupancy of more than 2,000 parking spaces (other than handicap-reserved spaces) to be provided by the BRAC 133 project: Provided, That this limitation may be waived in part if: (1) the Secretary of Defense certifies to Congress that levels of service at existing intersections in the vicinity of the project have not experienced failing levels of service as defined by the Transportation Research Board Highway Capacity Manual over a consecutive 90-day period; (2) the Department of Defense and the Virginia Department of Transportation agree on the number of additional parking spaces that may be made available to employees of the facility subject to continued 90-day traffic monitoring; and (3) the Secretary of Defense notifies the congressional defense committees in writing at least 14 days prior to exercising this waiver of the number of additional parking spaces to be made available: Provided further, That the Secretary of Defense shall implement the Department of Defense Inspector General recommendations outlined in report number DODIG–2012–024, and certify to Congress not later than 180 days after enactment of this Act that the recommendations have been implemented.