



# Office of Command Counsel Newsletter

April 2002, Volume 02-02

## CLE 2002 Electives and Plenary Session Announced

The AMC Continuing Legal Education Program is taking shape as the Planning Committee has identified elective and plenary sessions. The 15 electives are:

1. 4th Amendment Searches—What is private and what is not?
2. Recent Supreme Court Environmental Cases (commerce and takings clauses involved)
3. Foreign Military Sales 101
4. Ethics Update
5. Homeland Security
6. Evolution of Technical Data Rights
7. A-76—The Future
8. Threats of Workplace Violence
9. Partnering for Success: The revised Guide and innovative Partnering Initiatives
10. Mediation: Designing your solution(s) for your problem(s)
11. Cybercrimes

12. Depots and Arsenal Legal Issues
13. Understanding Negotiated Settlement Agreements
14. Environmental initiatives
15. Fiscal Law Developments

We are pleased that **General Kern** will address us and participate in the AMC Attorney Awards Program. **BG David Carey**, Assistant Judge Advocate General for Civil Law and Litigation will speak to us as well .

**Plenary sessions** include Ethics and the Media; Military Commissions; Defining the Objective Force; Ethics Millionaire; and, the Future Combat System.

We feel confident that the design of the program covers many of the significant issues that we face as an Army and at AMC.

We'll see you in May.

## Commander's Conference Briefing Papers

See what the Command Counsel provided to your Commanders

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# Office of Command Counsel: Index of Briefing Papers for AMC Commander's Conference

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- \*2. Allegations of Misconduct or Impropriety
- \*3. ADR Update:
  - a. Partnering
  - b. REDS
- \*4. Jones/Hill Joint Venture GAO Decision
- \*5. Solicitation Based on Urgency
- \*6. Emergency Acquisition Handbook
- 7. DOD Intellectual Property Guide
- 8. Disciplinary Actions - USPS vs Gregory
- 9. Disabilities Actions - Williams vs Toyota
- 10. Privacy Act Actions - Cummings vs U.S. Navy

The items with asterisks were briefed by HQ AMC Command Counsel **Ed Korte** to the Commanders.

## **Newsletter Details**

### **Staff**

*Command Counsel*  
Edward J. Korte

### *Editor*

Stephen A. Klatsky

### *Layout & Design*

Holly Saunders

### *Webmaster*

Joshua Kranzberg

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Check out the Newsletter on the Web at [http://www.amc.army.mil/amc/command\\_counsel/](http://www.amc.army.mil/amc/command_counsel/)

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

# Acquisition Law Focus

## DOD Appropriations Act for FY 2002

The HQ AMC Office of the Command Counsel has prepared a Synopsis of the most important provisions of the National Defense Appropriations Act for Fiscal Year 2002, P.L. 107-117.

These synopsised provisions are considered to be the most significant and of the greatest interest to our clients.

The synopsis for each legislative provision highlights the provision, and, where appropriate, any related other statutory and/or regulatory references that are affected by this provision.

The synopsis is not intended to be a detailed analysis of the subject since to do so would create a voluminous product.

HQAMC personnel may contact the subject matter expert noted at the end of each section of the synopsis for additional advice and assistance, while other personnel should contact their supporting legal office.

The major areas covered include:

1. Lobbying and Propaganda
2. Competitive Sourcing
3. Depots, Arsenals and Ammunition Plants
4. Environmental/Real Estate Issues
5. Emergency Preparedness
6. Foreign Military Sales
7. Military Pay & Benefits
8. Financial Management Information Technology System
9. Projects Honoring Victims of Terrorist Attacks

## List of Enclosures

1. DOD Appropriations Act
2. FMS Proceeds--Can you buy more than quantity sold?
3. CECOM's Emergency Acquisition Handbook
4. Partnering Devel'ments
5. Urgency Solicitations
6. DOD IP Guide-- Navigating Commercial Waters
7. Supreme Court Narrows Disability Law
8. REDS Program Review
9. Supreme Court on Use of Prior Discipline
10. Ethics Advisory: Conflict of Interest Prosecutions
11. Frequent Flyer Changes
12. What gets GOs and SES People in Trouble?
13. Preventing Financial and Legal Problems
14. Privacy Act and Feres

# Acquisition Law Focus

## Issue: Can FMS Sale Proceeds Be Used to Buy More Than the Quantity Sold?

Recently, questions have arisen at AMCOM regarding the use of the proceeds of sales from stock to FMS customers to acquire more than the quantity originally sold to the FMS customer.

After a review of the applicable statutes and regulations, it appears that acquiring more than the replacement quantity from the proceeds of an FMS sale from stock would be improper.

Several statutes are addressed, including 10 USC 114 (c)(2) and 22 USC 2761(a)(1) as well as the DOD Financial Management Regulations, DOD 7000.14R.

POC is **Tony Vollers**, DSN 897-1288 (Encl 2).

## CECOM Designs & Publishes Emergency Acquisition Handbook

CECOM has developed a handbook to assist the attorneys in its Business Law Division with providing legal support and guidance for emergency acquisitions in support of Operation Noble Eagle.

The handbook provides easy access to information on a variety of different approaches for handling emergency acquisitions.

The handbook includes:

1. A Legal Office checklist for emergency acquisitions
2. Information about different existing contract vehicles that could be used to rapidly put certain types of equipment and services on contract
3. FAR and DFARS Part 12 on the Acquisition of Commercial Items

4. A copy of the Draft Commercial Item Handbook
5. FAR, DFARS and AFARS provisions on Undefined Contractual Actions
6. FAR 6.302 and corresponding DFARS and AFARS provisions on circumstances where other than full and open competition is permitted
7. A sample Urgency J&A
8. FAR, DFARS and AFARS Part 13 on Simplified Acquisition Procedures
9. Information concerning the use of contractors on the battlefield

The handbook provides a quick and convenient way for agency attorneys to quickly access information about legal issues that may arise in connection with emergency acquisitions.

A Point Paper on this Handbook is at Enclosure 3

## Partnering Developments Briefed to Commanders

## Urgency Solicitations: What do you have to show?

At the AMC Commander's Conference attendees were briefed on three areas of the AMC Partnering Program: the revised AMC Partnering for Success Guide; AMC Partnering Awards Program; Identification of "Top" Contracts for Partnering.

POC is **Steve Klatsky** DSN 767-2304.

The AMC Partnering for Success Guide was revised to include a major new section on Lessons Learned from the AMC Partnering experience.

The Guide contains new appendices such as article on Corporate Partnering Agreements, as well as updated examples of many Partnering tools: Charters, Mission Statement, Rocks-in-the-Road Action Plans and issue escalation clauses.

The AMC Partnering Awards Program is in its second year. The intent is to recognize significant Partnering achievements during the past year.

MSCs have provided nominations in three categories: Program Award, Individual-Government and Individual-Contractor Award. These will be presented by the CG at Atlanta XVIII on April 23.

### Partnering and Top Contracts

During the CG weekly meetings with senior staff a chart is presented identifying major contract programs—exceeding \$ 10,000,000. A notation is made as to whether Partnering is anticipated.

A point paper on this subject is at Enclosure 4.

AMCCC counsel **Josh Kranzberg** DSN 767-8808 prepared an information paper for the Commander's Conference on this important area.

The Competition in Contracting Act of 1984 (CICA) requires "full and open competition" in government procurements except where otherwise specifically allowed by the statute.

One exception to this competition requirement is where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals (Encl 5).

## GAO Sustains A-76 Protest based on Conflict of Interest Concerns

On 5 Dec 01, the GAO sustained the Jones/Hill Joint Venture protests which challenged the Navy's determination pursuant to OMB Circ. A-76 that it would be more economical to perform base operations and support services in-house at the Naval Air Station, Lemoore, CA.

### GAO sustained the protests on many issues:

1. A Conflict of Interest existed because a Navy employee and a consultant wrote and edited the performance work statement (PWS) and then prepared the most efficient organization (MEO).

2. The Navy Independent Review Official's Certification that the government could perform was not supported by either contemporaneous documentation or hearing testimony.

3. The MEO was based on using personnel not included in the MEO.

4. The Navy's determination that the MEO and the Jones/Hill proposal were comparable was unreasonable because several strengths identified in the Jones/Hill proposal were not accounted for in the MEO.

The decision announces new law with regard to conflicts of interest, and directly impacts the majority of ongoing A-76 studies within the Army.

On Decemehr 17, the Navy requested that GAO reconsider its conflict of interest part of the decision.

A decision is expected shortly.

A-76 studies must still be completed within the 24-month (single function activity)/48-month (multi-function activity) statutory time limit. 107 PL 117, Title VIII, Sec. 8024.

HQ, AMC requires that the AMC staff be briefed six months before the statutory time limit on reasons for the delays and the actions being taken to complete the study before the time limit expires.

## DOD IP Guide: Navigating Through Commercial Waters

Industry representatives have reported to Headquarters DoD their perception that they are unnecessarily required to give up intellectual property (IP) rights to the Government when performing research and development for the Government.

A memo to Service Acquisition Executives directed reform to include development of a Guide, leading to a draft in April 2001.

A revised version incorporating mostly non-substantive changes was issued as on 15 October 2001 and is available on the OUSD(AT&L) web site: <http://www.acq.osd.mil/ar/doc/intelprop.pdf>.

A link to the site is on the AMCCC IP page [http://www.amc.army.mil/amc/command\\_counsel/ip/ip.html](http://www.amc.army.mil/amc/command_counsel/ip/ip.html)

An Information Paper is at Enclosure 6.

POC is **Bill Adams** 767-2301

## Supreme Court Narrows Disability Law

### Payment for Professional Licensing

The Defense Appropriation act adds a new Section 5758 to Title 5, U.S.C. which permits agencies to pay for credentials, professional licensing and professional examinations.

We are awaiting DoD implementing guidance. Once received, we'll pass it along.

The language in the Act is as follows:

Sec. 1112. PAYMENT OF EXPENSES TO OBTAIN PROFESSIONAL CREDENTIALS

(a) IN GENERAL. - Chapter 57 of title 5, United States Code, is amended by adding at the end the following new section:

5757. Payment of expenses to obtain professional credentials.

(a) An agency may use appropriated funds or funds otherwise available to the agency to pay for —

(1) expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and

(2) examinations to obtain such credentials.

(b) The authority under subsection (a) may not be exercised on behalf of any employee occupying or seeking to qualify for appointment to any position that is **excepted from the competitive service** because of the confidential, policy-determining, policy-making, or policy-advocating character of the position.

This may mean attorneys are excluded.

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A unanimous Supreme Court narrowed the definition of disability when it found that a worker with carpal tunnel syndrome was not “disabled” under the Americans with Disabilities Act. *Williams v. Toyota Motor Manufacturing*, No. 00-1089 (U.S. Jan. 8, 2002).

The Court stated that in order to demonstrate that the individual is substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's lives. The impairment's impact must also be permanent or long-term.

The law does not protect a person whose carpal tunnel syndrome limits only the person's ability to perform certain work-related manual tasks. The tasks must be the kind of tasks that are of central importance to most people's daily lives.

POC is **Mike Lassman**, DSN 767-8040.

### REDS Review Coming to Your House

Resolving Employment Disputes Swiftly (REDS) is the AMC model Alternative Dispute Resolution Program for workplace disputes.

The AMC REDS Program has been in place for over two years. Some 25 REDS Teams were trained to implement the program. A representative of EEO chairs each AMC REDS Team with membership from the legal and civilian personnel community.

General Kern asked Ed Korte to lead a REDS Program Review with AMCEE and AMCPE representation.

A memorandum was sent to each AMC EEO Office on 1 March announcing the intent to conduct a program review.

An included Survey asks several questions with respect to implementation and evaluation of REDS.

REDS offers a menu of ADR methods—primarily Mediation and Peer Review Panels.

REDS can be used for any workplace issue: EEO, discipline, grievances, labor-management issues.

REDS is included in the

Office of Personnel Management compendium of federal agency ADR programs. HQ DA has determined that REDS meets the Equal Employment Opportunity Commission rule requiring agencies to “establish or make available” ADR programs for pre-complaint EEO matters.

### Memo from General Kern

A Memorandum will be sent to the MSC Commanders announcing the REDS Program Review around 1 April. Installations can volunteer to host an on site review. Other installations will be chosen at random.

MSC Commanders will be asked to forward the CG’s Memo to subordinate commanders within their MSC. The REDS Review Team will also visit selected non-MSC installations.

POC is **Steve Klatsky**, DSN 767-2304.

An Information Paper is at Enclosure 8.

When an agency’s disciplinary action is challenged before the MSPB, the agency bears the burden of proving its charge by a preponderance of the evidence, and that the penalty is reasonable. *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 333-334 (1981)

The U.S. Circuit Court of Appeals for the Federal Circuit ruled that prior disciplinary actions that are subject to current challenge many not be used to support the reasonableness of a penalty.

Government agencies including the Department of Army disagreed with this ruling as challenges to disciplinary actions via grievances or appeals can take a long period of time.

The Supreme Court reversed, holding that the MSPB may review independently prior disciplinary actions pending in grievance proceedings when reviewing adverse actions. *USPS v. Gregory*, No. 00-758 (U.S. Nov 13, 2001).

This means that deciding officials reviewing disciplinary actions can review prior disciplinary actions even if the disciplinary actions have not been fully adjudicated.

POC is **Mike Lassman**, DSN 767-8040 (Enclosure 9).

## Ethics Focus

# Garfield issues First Ethics Advisory--Conflict of Interest Prosecution Survey

The topic for this Advisory is "2000 Conflict of Interest Prosecution Survey." Annually, the Office of Government Ethics (OGE) publishes its annual survey of prosecutions involving the conflict of interest statutes. It has just completed its survey for calendar year 2000.

These cases present valuable lessons to Government employees. They present real life situations where employees had to confront ethics issues, and to the employees' misfortunes they made the wrong choice.

Hopefully, learning about their experiences will help us make the right choice.

These cases are all a matter of public record.

One final comment before I go into the case summaries: several of the employees were high ranking officials. Employees sometimes develop the notion that the high ranking officials always seem to walk away and employees lower down in the organization get hammered. As you can see, that is not always the case.

These cases fall into the following three areas: conflicts of interest under 18 USC 208, post-employment conflicts of interest at 18 USC 207, and 18 USC 203.

POC is **Bob Garfield**, DSN 767-8003.

Enclosure 10.

## Frequent Flyer Benefits Not Taxable

The Internal Revenue Service (IRS) recently announced that promotional benefits received from official travel, such as frequent flyer miles, that are used for personal purposes are not subject to taxation.

It had been IRS practice in the past not to assert tax liability on taxpayers who used these benefits but with the recent change for Federal employees, a definitive position was sought from the IRS.

## Frequent Flyer Rules Change Dramatically

The Defense Authorization Act for Fiscal Year 2002 contains a provision that permits Federal civilian and military employees to accept promotional items such as frequent flyer miles earned when traveling in an official capacity.

(1) DOD travel regulations applicable to military and civilian personnel and the DOD Joint Ethics Regulation (JER) have been amended to reflect the change in the law.

(2) Law is retroactive. It applies to frequent flyer miles earned on, before, or after the effective date of the Act.

(3) When a non-Federal entity pays for the travel, e.g., under authority of 31 USC 1353 or 5 USC 4111, Federal military and civilian personnel may retain frequent flyer miles that are derived from such travel provided the entity paying for the travel does not object.

Of course, certain rules still apply--so we invite you to read and distribute the enclosed Information Paper by **Bob Garfield**,

Enclosure 11.

# OGE Publishes Several Changes to Form 450

1. OGE will ask OMB for a **3-year extension** of OMB's approval of the OGE Form 450.

2. The new 450 will be **"slightly revised."** Part V of the form is where one reports gifts and travel reimbursements.

There will be an increase in the threshold for reporting gifts and travel reimbursements (currently \$260). There will also be an increase in the "don't count amount" (currently \$104), i.e., if an item has a value of \$104 or less, you don't count it when determining if the total value of all the gifts and travel reimbursements received from one source exceeds \$260.

3. The \$260 threshold for reporting gifts and travel reimbursements will increase with the **definition of "minimal value" for purposes of gifts from foreign governments.** Gifts from a foreign government that are under the "minimal value" may be retained. Those over the "minimal value" belong to the government. GSA should announce sometime this year

the definition of "minimal value" that will apply during calendar years 2002 through 2004. Every 3 years GSA revises upward the definition of "minimal value" for purposes of gifts to foreign governments. When GSA announces the new definition of "minimal value," the definition will be retroactive to January 1, 2002.

4. While **OGE sees no legal bar to electronic filing** and electronic signatures for the OGE Form 450, agencies must meet the requirements of the Government Paperwork Elimination Act (GPEA) and other applicable laws and issues such as security, verification, non-repudiation, etc.

Those agencies seeking to develop or utilize an electronic version of the OGE Form 450, and who have not so informed OGE, are asked to advise OGE's Deputy Director for Administration and Information Management of their intentions to do so and to provide assurance of their adherence to the previously mentioned requirements.

# What Gets General Officers and Senior Executives in Trouble?

**Bob Garfield** provided the Commanders at the recent Commander's Conference an outstanding paper on the above-captioned issue. The statistics for FY 01:

- 1) 888 (517 GO) allegations received in FY 01.
- (2) Approximately 35% are anonymous.
- (3) 21 % go to formal investigation.
- (4) 7% of the allegations are substantiated.
- (5) 30% of substantiated allegations began anonymously.

The paper includes sections on the issues that most give SES and GO personnel the most difficulty.

For GO's: number 1 is abuse of authority or position.

For SES: travel and TDY issues.

Enclosure 12

# LEGAL ASSISTANCE

## Preventing Financial and Legal Problems

Being on the move all the time makes it difficult for military families to keep their personal affairs in order. These precautions can help you prevent many legal and financial problems:

1. Organize your personal papers. Have one place, such as a filing cabinet or fire-proof strong box, where you keep all your personal papers. Each time you get a new document, such as an LES, file it right away so it will not be lost. Important receipts should also be retained. You should keep all tax records, cancelled checks and/or bank statements for a minimum of three years. That way, if a problem arises, you will have the records needed to sort it out. For example, if there is ever any question about the amount of family support payments you made or the amount you paid for an item damaged during a household goods shipment, you will have the proof to back up what you say.

2. Keep a written summary of important business conversations. Many important financial and legal matters are handled over the phone or face-to-face. You should write down the full name of the person to whom you are speaking, the date and time of the conversation and a brief summary of it. You will not be able to prove the contents of the conversation by doing this, but it will add to your credibility if you need to refer to the conversation in the future.

3. Keep copies of business letters. Letters you write to solve your financial and legal problems are far more valuable if you keep copies of them. You will be able to refer to these letters in the future and can use them to prove that you have been trying to solve the problem.

4. Send letters certified, return receipt requested, so that you will be able to prove that they were received. You

should save your return receipt (green card) with the copy of the letter that you sent.

5. Take care of problems as they arise. Financial and legal difficulties only get worse if you ignore them. If you receive court documents and don't know what to do with them, you should consult a legal assistance or other attorney immediately. Instead of letting unpaid bills pile up, see ACS for budget or debt counseling.

This summary gives you general information only. It is not intended to be a substitute for talking with a lawyer. You may consult a legal assistance attorney by appointment at the Legal Services Branch.

Thanks to CECOM's **Pamela McArthur**, DSN 992-4760 for her continued contributions to the Newsletter. (Enclosure 13)

## Chemical Agents and Munitions--SBCCOM Summary Report

SBCCOM commissioned Argonne National Laboratory (ANL) to prepare a technical memorandum detailing federal and state environmental regulations applicable to the management of chemical weapons or chemical warfare agents.

Focus of this review is on the application of the Resource Conservation and Recovery Act (RCRA), from a solid and hazardous waste management perspective, and the Clean Water Act (CWA), the Clean Air Act (CAA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) for regulation of chemical weapons or chemi-

cal warfare agents as hazardous substances, hazardous pollutants or hazardous materials.

This technical memorandum is a comprehensive listing of the many statutes and regulations currently applicable to the management of chemical weapons or chemical warfare agent, intended to benefit the installations and Army agencies involved in the area. A

Copies of this report, available either electronically or in printed form, may be obtained by calling the SBCCOM Environmental Office at 410.436.2167 or DSN 584.2167.

## Environmental Protection and Enhancement--New Pamphlet Issued

The final PAM that implements Army Regulation 200-1, Environmental Protection and Enhancement, was published with an effective date of 17 January 2002.

This PAM explains how the Army will execute the "U.S. Army Environmental Strategy into the 21<sup>st</sup> Century" and describes in detail Army procedures for preserving, protecting, and restoring environmental quality.

A copy of the new DA PAM 200-1 is available at <http://www.usapa.army.mil/pdffiles/p200-1.pdf>

## The FAR & the Environment

The Army Environmental Center--Southern Regional Office recently published useful information regarding new FAR provisions regarding energy-efficiency products and

a proposed FAR rule regarding hazardous material safety data.

For further information contact **Laura Smith** at (202) 208-7279

# District Court Finds the Navy Guilty of Violating the Migratory Bird Treaty Act

The U.S. District Court for the District of Columbia recently ruled that the Navy's training activities on the island of Farallon de Medinilla (FDM), an island in the western Pacific, are killing migratory birds and therefore violating the Migratory Bird Treaty Act (MBTA) and the Administrative Procedures Act.

After hearing oral arguments March 13, the court ruled on the issue of liability in the case Center for Biological Diversity v. Robert B. Pirie, Jr., Acting Secretary of the Navy; Donald H. Rumsfeld, Secretary of Defense (Civil Action No. 00-3044).

The military has conducted training exercises on FDM, a small uninhabited island that is part of the Commonwealth of Northern Mariana Islands (CNMI), since 1971.

The MBTA is a 1918 law

that prohibits any killing of designated migratory birds.

The "taking" of migratory birds, such as wounding or killing them, is allowed under permits issued by the Fish & Wildlife Service (FWS), but the FWS had earlier denied the Navy request for a permit.

The denial was based on the fact that the law lacked any provisions allowing the FWS "to issue permits authorizing unintended conduct on the part of a permittee," the court said quoting from a FWS letter. Also, the FWS couldn't possibly ensure compliance, given the fact that the conduct was unintended.

Despite this denial, the services continued to kill birds without a permit, therefore violating the MBTA, said the court. The court further stated that, "[E]ven if this Court accepts defendants' argument that these killings are

'unintentional,' the MBTA prohibits both intentional and unintentional killing."

The court also agreed with the plaintiff that the military has violated the APA, which prohibits unlawful agency action.

While the MBTA contains no private cause of action allowing citizens to enforce actions against the U.S. government, the plaintiff argued that since the government's activities violated that law, they should be found liable for violating the APA's bar on agency actions that are otherwise not in accordance with law.

Given a fairly recent decision by the D.C. Circuit Court that military facilities are subject to the MBTA (see, Humane Society v. Glickman, 217 F.3d 882 (D.C. Cir. 2000)), ELSs should be alert to military activities that could jeopardize migratory birds covered by the MBTA.

# Privacy Act Decision and the Feres Doctrine

## Spazzarini Retires as AMCOM Chief Counsel

The doctrine first enunciated in Feres v. United States, 340 U.S. 135 (1950), provides that the U.S. Government shall not be held liable under the Federal Tort Claims Act for injuries to service members that arose out of or were incurred in the course of activity incident to service.

The Feres doctrine has subsequently been extended to bar lawsuits for deprivation of civil rights under 42 U.S.C. section 1985 (3), as well as to common-law and constitutional tort matters.

In a 2-1 decision, the U.S. Court of Appeals for the District of Columbia Circuit recently held that the Feres doctrine does not bar a lawsuit for damages under the Privacy Act filed by a member of the Armed Forces, reversing the district court's dismissal of the cause of action and remanding the case to the

district court for further proceedings addressing the service member's specific Privacy Act allegations.

The district court had held that the Feres doctrine barred the lawsuit because the injury occurred in the course of activity incident to military service.

The U.S. Court of Appeals for the D.C. Circuit was unwilling to extend the reach of the Feres doctrine any further because the Privacy Act does not implicate any of the rationales presented for extending the reach of the Feres doctrine to the Privacy Act.

An enclosed Information Paper elucidates the particular fact situations faced by the court.

Since this was a split decision appeal to the Supreme Court may be considered.

POC is **MAJ Al Glamba**, DSN 767-8081.

Enclosure 14

**Bob Spazzarini** announced a May 2002 retirement after 38 years of exceptional government service. NEWSFLASH--Bob has agreed to stay on for a few more months.

A native of Connecticut Bob served in several increasingly complex procurement law assignments prior to ascending to the Senior Executive Service and Chief Counsel position.

You can not replace someone with the wide-range of experiences Bob brings.

Additionally, his calm demeanor in the face of legal challenges and the merger of the AMC St. Louis to Huntsville, created an atmosphere that led to harmonious working and personnel relationships in one of the largest legal offices in AMC and the Army.

Further, despite many years in the South Bob was able to retain his allegiance to the New York Yankees--an extraordinary feat.

# Faces In The Firm

## Arrivals

### ARL

Effective 24 February 2002, **Sam W. Shelton III**, returned to work at the ARL Administrative Law/ Litigation Branch, once again. Sam apparently got "home sick" or commuter sick.

### HQ AMC

**Amy Armstrong** has joined the General Law Division as part of the Employment Law Team, transferring from the OSC.

**Tiffany Cox** has assumed the Secretary position in the Protest Litigation Branch. She comes to us from the RM directorate.

### TACOM-ARDEC

**Cindy Bedell** recently joined the Legal Office as Secretary, arriving from the Close Combat Armaments Center where she worked for 21 years.

**Mark S. Walsh** joined the Business Law Section on December 10, 2001. Mark graduated from Seton Hall University School of Law and joins TACOM-ARDEC from private practice. During law school Mark interned at the US Environmental Protection Agency in New York and Philadelphia.

## Promotions

### TACOM-RI

**Carrie Schaffner** was promoted to GS-14. She serves as general law attorney and labor counselor for TACOM-RI.

### AMCOM

**Walter (Tony) Baker**, who has been promoted to GS-14 in the General Law Division.

**Will Rathburn**, who has been promoted to Division Chief of the Acquisition Law Division Branch D.

This is the position that was formerly held by **LTC Andy Hughes**, who is station now in Bosnia.

## Birth

### RRAD

**CPT Mark Hannig** is proud to announce the birth of Daughter Jennifer Ellen

## Deaths

### ARL

In February 2002, Mrs. **Monika Roberts**, mother of **Tina D. Shaner**, Legal Assistant, Army Research Laboratory (ARL), Office of Chief Counsel, passed away unexpectedly from a massive heart attack.

### AMCOM

We regret to inform the AMC Legal Community that **Bruce Jones** wife Joan Jones passed away 2 March 2002.

**Hal C. Dilworth's** father Conn Dilworth passed away 17 March 2002.

**Carl Ray Stephens** mother Mrs. Beatrice Stephens passed away.

The former head of Intellectual Property **John Garvin's** daughter also passed 10 March 2002.

The entire AMC Legal Community sends its sympathy to those who have lost loved ones.

**NATIONAL DEFENSE  
APPROPRIATIONS ACT  
FOR FISCAL YEAR 2002**



**Prepared by**

**Business Operations Law Division  
Office of the Command Counsel  
HQ, U.S. Army Materiel Command**

## **Introduction**

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## Introduction

The HQ AMC Office of the Command Counsel has prepared a Synopsis of the most important provisions of the National Defense Appropriations Act for Fiscal Year 2002, P.L. 107-117. These synopsised provisions are considered to be the most significant and of the greatest interest to our clients. The synopsis for each legislative provision highlights the provision, and, where appropriate, any related other statutory and/or regulatory references that are affected by this provision. The synopsis is not intended to be a detailed analysis of the subject since to do so would create a voluminous product. The subject matter expert noted at the end of the synopsis can be contacted for additional advice and assistance by HQAMC personnel while other personnel should contact their supporting legal office.

## Executive Summary

### 1. **Lobbying and Propaganda.**

- a. **Restrictions Publicity and Propaganda (Sec 8001).** Reenacts this recurring provision, which prohibits the use of any appropriation for publicity or propaganda purposes not authorized by Congress. (Diane Travers, 617-7571).
- b. **Restrictions on Lobbying (Sec. 8012).** This recurring annual provision prohibits the use of appropriations to influence congressional action on any legislation or appropriation. (Diane Travers, 617-7571).

### 2 **Competitive Sourcing.**

- a. **Requirement to Conduct Most Efficient Organization Analysis (Sec. 8014).** Reenacts annual provision requiring certification to Congress of a most efficient and cost effective organization analysis prior to converting a function being performed by more than 10 DOD civilians to contractor performance, with limited exception. These exceptions include: (1) contracts for functions included on the procurement list established pursuant to the Javits-Wagner-O'Day Act; (2) functions planned to be converted to performance by a qualified non-profit agency for the blind or severely handicapped in accordance with the Javits-Wagner-O'Day Act; or (3) functions planned to be converted to performance by a qualified firm under 51 percent ownership by an Indian Tribe or Native Hawaiian organization. (Diane Travers, 617-7571).

b. **Time Limits on A-76 Studies (Sec. 8024)**. Reenacts annual provision that prohibits the use of appropriated funds to perform any OMB Circular A-76 cost study exceeding a period of 24 months for a single function study or 48 months for a multifunction study. (Diane Travers, 617-7571).

c. **Public-Private Depot Maintenance Competitions (Sec. 8035)**. Permits DOD to acquire depot level maintenance or repair of aircraft, vehicles, and vessels, as well as the production of components and other Defense-related articles, through non-A-76 public-private competitions. The Senior Acquisition Executive or designee must certify that successful public and private bids contain comparable estimates of direct and indirect costs. (Diane Travers, 617-7571).

### 3. **Depots, Arsenals & Ammunition Plants**

a. **Operations and Maintenance, Army (Title II)**. \$22,335,074,000 appropriated, of which up to \$10,794,000 can be used for emergencies or extraordinary expenses, and not less than \$355,000,000 is available only for conventional ammunition care and maintenance. (Dave Harrington, 617-7570).

b. **Research, Development, Test and Evaluation, Army (Title IV)**. \$7,106,074,000 available until 30 September 2003. (Dave Harrington, 617-7570).

c. **Defense Working Capital Funds (Title V)**. Appropriates \$1,312,986,000. (Dave Harrington, 617-7570).

d. **Chemical Agents and Munitions Destruction (Title VI)**. Appropriates \$1,105,557,000 for stockpile and non-stockpile chemical material destruction, consisting of \$739,020,000 for OMA, \$164,158,000 for Procurement and \$202,379,000 for RDT&E. (Dave Harrington, 617-7570).

e. **Prohibition of Small Arms Demilitarization (Sec. 8020)**. No funds available to DoD may be used to demil or dispose of M-1, M-14, .22 caliber, .30 caliber rifles, or M-1911 .45 pistols. (Dave Harrington, 617-7570)

f. **Credit on Small Business Subcontracting Plans for purchases from Qualified Non-Profit Agency for the Blind or Severely Handicapped (Sec.8028)**. For negotiated and sealed bid purchases over \$500,000, contractors must have a subcontracting plan for use of firms controlled by veterans, disabled veterans, women, socially and economically disadvantaged persons and qualified non-profit agencies for the blind or severely handicapped to be counted toward fulfilling plan goals. (Dave

Harrington, 617-7570.

g. **Use of Funds for Drug Interdiction and Counter-Drug Activities Performed by National Guard (Sec. 8057).** Allows use of funds appropriated by the Act for compensation of NG members who perform duties pursuant to a state plan for drug interdiction and counter-drug activities approved by the Secretary of Defense. (Dave Harrington, 617-7570).

h. **Purchase of Ultralight Camouflage Net Systems (Sec. 8148).** Authorizes use of OMA funds to purchase ultralight camouflage net systems as unit spares in order to modernize the current inventory, provided the Secretary of the Army first certifies to Defense Committees that the UCNS is technically superior, less costly and provides improved force protection compared to the current system. (Dave Harrington, 617-7570).

i. **Army Acquisition Management (Sec. 8149).** Reduces Army OMA Account by \$5,000,000 to reflect efficiencies in acquisition management and requires a report to Defense Committees by 15 April 2002 on final plans for realigning requirements generations, acquisition, resource management and departmental headquarters function and systems. Independent analysis of CAN report and budget and personnel savings by function for FYs through 08 are also required (DaveHarrington,617-7570).

j. **Non-Profit Army Venture Capital Corporation (Sec. 8150).** Makes available \$25,000,000 of Army RDTE funds, derived from pro rata reduction from research projects other than Congressional Special Interest and Future Combat System, to be available for funding the venture capital investment corporation established pursuant to 10 U.S.C. §2371. The idea of corporation is to take an ownership stake in companies with promising military technologies. Although the fund is supposed to eventually become self-sustaining, it is initially funded by this “tax” on the RDTE appropriation.  
(Dave Harrington, 617-7570)

#### 4. **Environmental/Real Estate Issues**

a. **Environmental Restoration, Army T(Title V).** Appropriates \$389,800,000 that may be transferred to other appropriates and merged into them when required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings or other purposes, and if the funds are determined unnecessary, they may be transferred back to the original appropriation. (Dave Harrington, 617-7570)

b. **Relocations within the National Capital Region Authorization Act (Sec. 8021).** This provision states that no more than \$500,000 of the FY 02 funds shall be

used during a single fiscal year for “any single relocation of an organization, activity or function of the DoD into or within the National Capital Region. However, the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing that such a relocation is required in the best interest of the Government. (Stan Citron, 617-8043)

c. **Prohibition Against Transportation of Chemical Munitions/Agent to Johnston Atoll Authorization Act (Sec. 8075).** This provision states that no FY 02 funds may be used to transport chemical munitions or agents to Johnston Atoll for storage or demilitarization. The provision has an exception for “World War II chemical munitions or agent of the U.S. found in the “World War II Pacific Theater of Operations”. (Stan Citron, 617-8043)

d. **Iowa Army Ammunitions Plant (Iowa AAP) Worker Health Study Authorization Act (Sec. 8172).** The Secretary of Defense is required to take appropriate action to determine the nature and extent of exposure of current and former employees, including contractor and subcontractor employees, to radioactive or other hazardous substances at Iowa AAP. The provision also requires notifying employees of known or possible exposure to radioactive or other hazardous substances at Iowa AAP. The provision also requires notifying employees of known or possible exposure to radioactive or other hazardous substances at Iowa AAP and, if necessary, providing appropriate guidance on contracting health care providers. The deadline for completing these actions is 90 days after enactment of the Act. (Stan Citron, 617-8043)

## 5. **Emergency Preparedness**

a. **Defense Emergency Relief Funds (DERF) (Sec. 301).** DERF funds are available for the purposes set forth in the 2001 Emergency Supplemental Appropriation Act (PL 107-38) provided the funds are used to reimburse other appropriations or funds of the DoD for costs incurred for such purposes on or after 9/11; Provided further that the Sec.Def. may transfer to the fund amounts from any current appropriation made available in defense appropriation acts only for the purpose of adjusting and liquidating obligations properly chargeable to the fund if the SecDef determines amounts in the fund are insufficient to liquidate obligations made using appropriations in the fund. All DERF funds transferred shall be merged with and shall be available for the same purposes and for the same time period as the appropriation to which transferred. (Nick Brognano, 617-8050)

b. **Defense Emergency Relief Funds (DERF) for Military Construction.** Authorizes the Secretary of Defense to use funds from the DERF to carry out military construction projects in response to or protection from acts or threatened acts of

terrorism (requires congressional notification). (Nick Brognano, 617, 8050).

c. **Investment Item Limitation. (Sec. 8043)** The \$100,000 limitation of OMA funds for an Investment Item does not apply to amounts appropriated in this Act under the heading “operation and maintenance, Defense-Wide” for expenses related to certain classified activities. (Nick Brognano, 617-8050)

d. **DOD Working Capital Funds. (Sec. 8044)**. No funds can be used to buy an investment item for the purpose of acquiring a new inventory item for sale or anticipated sale with certain exceptions. (Nick Brognano, 617-8050)

e. **Unsolicited Proposals Sec. 8051**. Before any funds can be appropriated for sole source studies, analysis or consulting services, the HCA must determine that: (1) a supporting technical evaluation has been done, (2) the unsolicited proposal offers significant technical promise, is of original thinking and was submitted in confidence, (3) it takes advantage of a unique and significant industrial accomplishment. This provision does not apply to contracts less than \$25,000 or relates to improvements of equipment in production or development. (Nick Brognano, 617-8050)

f. **Other Agency Support (Sec. 8105)**. No DOD funds shall be used to provide support to another department or agency if that department or agency is more than 90 days in arrears to DOD for goods and services previously rendered to it by DoD on a reimbursable basis. (Nick Brognano, 617-8050)

6. **Foreign Military Sales.**

a. **NATO Account, (Sec. 8019)**. The Secretary of Defense may negotiate with a foreign country to establish a separate account into which residual value amounts regarding the return of US military installations may be deposited in local currency. Those credits may be used for construction of facilities (as approved by Congress) to support US forces in the foreign country or for certain real estate maintenance or operating costs. (Craig Hodge, 617-8940)

b. **Violation of Trade Agreements, (Sec. 8036)**. For countries that violate trade agreements, the Secretary of Defense shall rescind any blanket waiver of the Buy American Act. (Craig Hodge, 617-8940)

c. **Transfer of Defense Articles Limited, 8072**. No funds may be spent transferring supplies or services (except intelligence services) to foreign countries or international organizations involved in international peacekeeping, peace-enforcement, or humanitarian assistance, without 15-day notice to Congress. (Craig Hodge, 617-8940)

d. **Waiver of Procurement Limitations (Sec. 8089)**. The Secretary of Defense may waive certain legal limitations of procurement from foreign sources, if the application of the limitation would invalidate DOD/foreign country cooperative programs, or invalidate reciprocal trade agreements under 10 USC 2531. This assumes the country does not discriminate against the same items produced in the US. (Craig Hodge, 617-8940)

7. **Military Pay & Benefits**

a. **Military Housing Maintenance and Repair Limitations (Sec. 8099)**. Prohibits using any funds other than those specifically appropriated for family housing accounts for repairs or maintenance to military family housing units – even where the units are used to conduct DOD business (i.e., for Flag and General Officer quarters). Additionally requires the DODIG to report on compliance with the funding rules for maintenance and repairs of Flag and General Officer quarters. (MAJ Beauchamp, 617-9022).

b. **Limitations on Support for Non-appropriated Fund Activities that Procure Alcohol for Resale with Non-appropriated Funds (Sec. 8108)**. In order to be eligible for support, the NAF Activity must procure beer and wine in the State or States where the installation is located. Except in non-contiguous States (Alaska and Hawaii), hard liquor need not be procured in state, but must be procured from the most competitive source, price and other factors considered. (Dave Harrington, 617-7570).

8. **Financial Management Information Technology System (Sec. 8104)** Prohibits appropriated funds from being used for a mission critical or mission essential Financial Management Information Technology System that is not registered with the DoD Chief Information Officer. Prohibits such a system from receiving a milestone I, II, or III approved until the Under Secretary of Defense (Comptroller) certifies that the system is being developed in accordance with DoD's Financial Management Modernization Plan. (Nick Brognano, 617-8050).

9. **Project Honoring Victims of Terrorist Attacks**. Unity in the Spirit of America Act (USA Act) – Directs the Points of Light Foundation (funded under this act) to establish the number of victims killed as a result of the terrorist attacks of 11 September 2001; and complete a list that specifies the names of each victim and their state of residence. Authorizes the foundation to identify community based national based national and service projects and to name such projects in honor of such victims. Requires the foundation to establish and maintain websites and databases describing and recognizing such projects. (Nick Brognano, 617-8050)

## **CAN FMS SALE PROCEEDS BE USED TO BUY MORE THAN THE QUANTITY SOLD?**

Recently, questions have arisen at this command regarding use of the proceeds of sales from stock to FMS customers to acquire more than the quantity originally sold to the FMS customer. After a review of the applicable statutes and regulations, it appears that acquiring more than the replacement quantity from the proceeds of an FMS sale from stock would be improper.

22 USC 2761(a)(1) authorizes the executive branch to sell defense articles out of stock to FMS customers. It doesn't address the disposition of the proceeds of these sales. However, it does provide that (a) if the article is not to be replaced, the amount to be paid by the FMS customer shall be not less than the actual value of the article, and (b) if the article is intended to be replaced at the time of sale agreement, the amount charged shall be "the estimated cost of replacement including the cost or production costs less any depreciation in the value of such article". Clearly, intentionally charging an FMS customer more than the "estimated cost of replacement . . ." violates this statutory requirement.

10 USC 114 (c)(2) provides that amounts received under 22 USC 2761(a)(1) shall either be deposited in the Special Defense Acquisition Fund, subject to its statutory limit, or as miscellaneous receipts in the US Treasury. It does not explicitly address using any of these amounts for replacement of the articles sold to the FMS customer. Also, it negates certain language in 22 USC 2777(a) that provided for return of such sale proceeds to the military departments. 10 USC 114(c)(2) was added as part of the 1990 DoD Authorization Act.

Paragraph 070302 (C) of Chapter 7, volume 15 of the DoD Financial Management Regulations, DoD 7000.14-R, provides that when an item is sold from the stocks of the department and that item is not intended to be replaced, the proceeds of the sale will be disposed in accordance with 10 USC 114(c)(2). This regulation is an apparent interpretation of the inter-relationship of the 22 USC 2761(a)(1) and 10 USC 114(c)(2) since it allows use of the sales proceeds to replace the article sold, a provision implicit in 22 USC 2761(a)(1) but not addressed in 10 USC 114(c)(2). This regulation does not explicitly address the situation where the proceeds of the sale are more than sufficient to replace the articles sold.

Based on the foregoing authorities, it seems certain that the proceeds of an FMS sale from stock can be used only to replace the quantity originally sold and that any excess must be deposited in accordance with 10 USC 114(c)(2).

TONY K. VOLLERS  
Attorney Adviser  
256-313-1288

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INFORMATION PAPER

27 February 2002

SUBJECT: Emergency Acquisitions

PURPOSE: To provide information about CECOM's new handbook on emergency acquisitions

FACTS:

- CECOM has developed a handbook to assist the attorneys in its Business Law Division with providing legal support and guidance for emergency acquisitions in support of Operation Noble Eagle.
- The handbook provides easy access to information on a variety of different approaches for handling emergency acquisitions.
- The handbook includes:
  - ❖ A Legal Office checklist for emergency acquisitions
  - ❖ Information about different existing contract vehicles that could be used to rapidly put certain types of equipment and services on contract
  - ❖ FAR and DFARS Part 12 on the Acquisition of Commercial Items
  - ❖ A copy of the Draft Commercial Item Handbook
  - ❖ FAR, DFARS and AFARS provisions on Undefined Contractual Actions
  - ❖ FAR 6.302 and corresponding DFARS and AFARS provisions on circumstances where other than full and open competition is permitted
  - ❖ A sample Urgency J&A
  - ❖ FAR, DFARS and AFARS Part 13 on Simplified Acquisition Procedures
  - ❖ Information concerning the use of contractors on the battlefield
- The handbook provides a quick and convenient way for agency attorneys to quickly access information about legal issues that may arise in connection with emergency acquisitions.

RELEASED BY: EDWARD J. KORTE  
COMMAND COUNSEL  
AMCCC  
DSN: 767-8032

ACTION OFFICER: JOSHUA KRANZBERG  
ASSOCIATE COUNSEL  
AMCCC-B-PL  
DSN: 767-8808

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INFORMATION PAPER

13 February 2002

SUBJECT: AMC Partnering for Success Program Developments

PURPOSE: To brief the Commander's Conference on three areas of the AMC Partnering Program: the revised AMC Partnering for Success Guide; AMC Partnering Awards Program; Identification of "Top" Contracts for Partnering

FACTS:

- Over 16,000 original edition AMC Partnering for Success Guides were distributed throughout AMC, the contractor community and other Federal agencies.
- The AMC Partnering for Success Guide was revised to include a major new section on Lessons Learned from the AMC Partnering experience.
- The Guide contains new appendices such as article on Corporate Partnering Agreements, as well as updated examples of many Partnering tools: Charters, Mission Statement, Rocks-in-the Road Action Plans and issue escalation clauses
- Each AMC MSC Lead Partnering Champion was provided an initial allocation of Partnering Guides for distribution and use. Additionally, each MSC Chief Counsel was provided copies in their capacity of MSC Senior Advisor's for Alternative Dispute Resolution.
- The AMC Partnering Awards Program is in its second year. The intent is to recognize significant Partnering achievements during the past year. MSCs have provided nominations in three categories: Program Award, Individual-Government and Individual-Contractor Award. The 2002 AMC Partnering Awards will be presented by the CG at Atlanta XVIII on April 23.
- During the CG weekly meetings with senior staff a chart is presented identifying major contract programs--exceeding \$ 10,000,000. A notation is made as to whether Partnering is anticipated. MSC Lead Partnering Champions also use this information to seek out opportunities to expand the AMC Partnering Program.
- The Partnering goal: to institutionalize Partnering as an AMC business practice.

RELEASED BY: EDWARD J. KORTE  
COMMAND COUNSEL  
AMCCC  
DSN 767-8031

ACTION OFFICER: STEPHEN A. KLATSKY  
ASST. CMD COUNSEL  
AMCCC  
DSN 767-2304

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INFORMATION PAPER

26 February 2002

SUBJECT: Urgency Solicitations

PURPOSE: To provide information regarding the need to fully articulate rationale supporting solicitations based on urgency:

FACTS:

- The Competition in Contracting Act of 1984 (CICA) requires “full and open competition” in government procurements except where otherwise specifically allowed by the statute.
- One exception to this competition requirement is where the agency’s needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals.
- If noncompetitive procurement procedures are used, the agency is required to execute a written J&A with sufficient facts and rationale to support the use of the urgency exception. To qualify, the requirement must truly be an urgent one, the urgency must not have been created by the agency due to a lack of advanced planning, and the quantity being acquired must only be the minimum amount necessary to satisfy the immediate urgent requirement.
- The GAO will normally give great deference to a military agency’s reasonable determination that a particular requirement is “urgent,” i.e., that the requirement impacts mission readiness and/or safety of personnel.
- The GAO has been less deferential in protests questioning the agency’s minimum quantity necessary to satisfy the urgent requirement. In a decision issued on September 21, 2001, the GAO sustained a protest against an urgent Army procurement holding that while the Army had established that the requirement was in fact urgent, it had failed to justify why the particular quantity being procured was the minimum necessary to meet the urgent requirement. The GAO also found that the Army failed to engage in reasonable advanced procurement planning, where despite having been aware of safety problems with the current system it took the Army two years to draft performance specifications for a competitive procurement of a new system. Signals & Systems, Inc., B-288107, September 21, 2001.

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- The lesson of this recent GAO decision is that even after September 11, procurement officials should be careful to use the unusual and compelling urgency exception to full and open competition only where there is a legitimate urgent requirement, the quantity being procured is the minimum necessary to meet that requirement, and the urgency is not due to the lack of advanced procurement planning.

RELEASED BY: EDWARD J. KORTE  
COMMAND COUNSEL  
AMCCC  
DSN: 767-8032

ACTION OFFICER: JOSHUA KRANZBERG  
ASSOCIATE COUNSEL  
AMCCC-B-PL  
DSN: 767-8808

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INFORMATION PAPER

25 February 2002

SUBJECT: DoD Intellectual Property Guide, "Navigating Through Commercial Waters," Version 1.1, 15 October 2001

PURPOSE: To provide information concerning an acquisition initiative from the Office of Acquisition Initiatives within the Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) (OUSD(AT&L)).

FACTS:

- Industry representatives have reported to Headquarters DoD their perception that they are unnecessarily required to give up intellectual property (IP) rights to the Government when performing research and development for the Government.
- AMC heard similar comments at the Atlanta Executive Seminars XXVII in April 2001, and LTG Beauchamp charged AMCCC with monitoring or initiating necessary action to address industry concern and report out at Atlanta XXVIII.
- AMCCC discovered that OUSD(AT&L) was already moving to address this concern.
- Intellectual property rights in defense contracts are based largely on statutes; however, USD(AT&L), Pete Aldridge, says, "I think we can ... relax some of the rules." In fact, his predecessor Dr. J.S. Gansler had already begun an initiative to do so with a 5 September 2000 memo to the Service Secretaries directing IP training.
- A second memo to Service Acquisition Executives dated 5 January 2001 directed reform concerning acquisition of IP rights from contractors and the development of "a layman's guide on the treatment of IP for training purposes throughout the DoD."
- A final coordinating draft of such a DoD IP Guide, "Navigating Through Commercial Waters," was issued 30 April 2001.
- The Office of Acquisition Initiatives) (formerly the Office of Acquisition Reform) within the OUSD(AT&L) immediately began collecting comments to revise and update the IP Guide.
- A revised version incorporating mostly non-substantive changes was issued as Version 1.1 on 15 October 2001 and is available on the OUSD (AT&L) web site: <<http://www.acq.osd.mil/ar/doc/intelprop.pdf>> and links to the site are on both the

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SUBJECT: DoD Intellectual Property Guide, Navigating Through Commercial Waters,"  
Version 1.1, 15 October 2001

AMCRDA <<http://www.amc.army.mil/amc/rda/rda-ap/aqnguidance.html#intelprop>>  
and AMCCC IP page <[http://www.amc.army.mil/amc/command\\_counsel/ip/ip.html](http://www.amc.army.mil/amc/command_counsel/ip/ip.html)>

- OUSD(AT&L) issued a memo, 21 Dec 2002, subject: Intellectual Property, to the Service Secretaries encouraging them to widely distribute the IP Guide
- AMCCC and AMCRDA conducted a VTC on 29 January 2002 to a target audience of AMC's MSC's PARCs, Chief Counsel, IP Counsel and Acquisition Law Counsel and had Air Force Lt. Col. Greg Redick, the OUSD(AT&L) Action Officer for the IP Guide, go over the Guide with particular emphasis on Chapter 4 "Issues and Solutions." Lt. Col. Redick also explained what IP Guide Training Modules will look like after funding is received and a contract for their preparation can be executed.
- At Lt. Col. Redick's request AMCCC collected comments concerning the Guide from VTC attendees and submitted them directly to OUSD(AT&L) on 22 February 2002.
- OUSD(AT&L) plans to release subsequent numbered Versions of the IP guide containing substantive changes as Version 2.0 and higher.
- AMCCC received confirmation that training concerning IP is a hot topic when the General counsel of the Army, the Honorable Steven J. Morello requested that he be briefed by AMCCC on the differences between the Federal Acquisition Regulation Technical Data clauses as they existed prior to 1995 and the current Technical Data rules.
- Mr. Edward L. Stolarun, a Patent Attorney in AMCCC will accompany Mr. Korte to Mr. Morello's Office on 28 February 2002 and deliver the requested briefing.
- We anticipate greater emphasis on this topic as Training Modules funded by OUSD(AT&L) become available over the next several months.

RELEASED BY:  
Edward J. Korte  
617-8031  
7E06

ACTION OFFICER:  
William V. (Bill) Adams  
617-2301  
7S58

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INFORMATION PAPER

25 February 2002

SUBJECT: Disability Action - Supreme Court Decision in Williams vs Toyota

PURPOSE: To provide recent information on Reasonable Accommodation

BACKGROUND:

- Reasonable accommodation requires an agency to accommodate the known physical or mental limitations of an applicant, or employee, who is a qualified individual with a disability, unless the agency can demonstrate the accommodation would impose an undue hardship on the operation of its program. 29 C.F.R. 1614.203(c)(1).
- An individual with a disability is one who: (1) has a physical or mental impairment, which **substantially limits one or more of the person's major life activities**; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. 1614.203(a)(1).
- **Substantially limits** is defined as the inability to perform a major life activity, or significant restriction as to condition, manner or duration with which a person performs a major life activity compared to the average person. 42 USC 12102, 29 C.F.R. 1630.2j.

NEW RULING OF LAW:

- A unanimous Supreme Court narrowed the definition of disability when it found that a worker with carpal tunnel syndrome was not "disabled" under the Americans with Disabilities Act. Williams v. Toyota Motor Manufacturing, No. 00-1089 (U.S. Jan. 8, 2002).
- The Court stated that in order to demonstrate that the individual is substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's lives. The impairment's impact must also be permanent or long-term.
- The law does not protect a person whose carpal tunnel syndrome limits only the person's ability to perform certain work-related manual tasks. The tasks must be the kind of tasks that are of central importance to most people's daily lives.
- Household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's lives and, should be part of the assessment of whether an individual is limited in performing manual tasks.

AMCCC

SUBJECT: Meetings Attended by Support Contractors' Employees

- The Supreme Court remanded the case to the U.S. Circuit Court of Appeals for the Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee) and said that the Court must examine evidence regarding tasks that are central to most people's lives. Thus, the Sixth Circuit erred when it looked at a class of manual tasks associated with some assembly line jobs.

RELEASED BY:  
Edward J. Korte  
617-8031  
7E06

ACTION OFFICER:  
Michael L. Lassman  
617-8040  
7E18

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AMCCC

INFORMATION PAPER

13 February 2002

SUBJECT: Resolving Employment Disputes Swiftly (REDS) Program Review

PURPOSE: To inform the Commander's Conference that the CG has asked for a review of the implementation of REDS--the AMC model alternative dispute resolution (ADR) program for workplace issues.

FACTS:

- The AMC REDS Program has been in place for over two years. Some 25 REDS Teams were trained to implement the program. A representative of EEO chairs each AMC REDS Team with membership from the legal and civilian personnel community.
- REDS offers a menu of ADR methods--primarily Mediation and Peer Review Panels.
- REDS can be used for any workplace issue: EEO, discipline, grievances, labor-management issues.
- REDS is included in the Office of Personnel Management compendium of federal agency ADR programs. HQ DA has determined that REDS meets the Equal Employment Opportunity Commission rule requiring agencies to "establish or make available" ADR programs for pre-complaint EEO matters.
- A REDS Survey was sent to each AMC EEO Office on 1 March announcing the intent to conduct a program review. The Survey asks several questions with respect to implementation and evaluation of REDS.
- A Memorandum will be sent to the MSC Commanders announcing the REDS Program Review. Installations can volunteer to host an on site review. Other installations will be chosen at random.
- MSC Commanders will be asked to forward the CG's Memo to subordinate commanders within their MSC. The REDS Review Team will also visit selected non-MSC installations.

RELEASED BY: EDWARD J. KORTE  
COMMAND COUNSEL  
AMCCC  
DSN 767-8031

ACTION OFFICER: STEPHEN A. KLATSKY  
ASST. CMD COUNSEL  
AMCCC  
DSN 767-2304

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INFORMATION PAPER

25 February 2002

SUBJECT: Disciplinary Actions - USPS vs Gregory

PURPOSE: To provide recent information on the reasonableness of a penalty based on prior disciplinary actions.

BACKGROUND:

- When an employing agency's disciplinary action is challenged before the Board, the agency bears the burden of proving its charge by a preponderance of the evidence. This requires proving not only that the misconduct actually occurred, but also that the penalty assessed was **reasonable** in relation to it. Douglas v. Veterans Admin., 5 M.S.P.B. 313, 333-334 (1981)
- The U.S. Circuit Court of Appeals for the Federal Circuit previously ruled that prior disciplinary actions that are subject to current challenge many not be used to support the **reasonableness** of a penalty. Gregory v. USPS, No. 00-3123 (Fed. Cir. May 15, 2000)
- Government agencies including the Department of Army disagreed with this ruling as challenges to disciplinary actions via grievances or appeals can take a long period of time.

NEW RULING OF LAW:

- The U.S. Supreme Court reversed the Federal Circuit and held that the MSPB may review independently prior disciplinary actions pending in grievance proceedings when reviewing termination and other serious disciplinary actions. USPS v. Gregory, No. 00-758 (U.S. Nov 13, 2001).
- This means that deciding officials reviewing disciplinary actions can review prior disciplinary actions even if the disciplinary actions have not been fully adjudicated.

RELEASED BY:  
Edward J. Korte  
617-8031  
7E06

ACTION OFFICER:  
Michael L. Lassman  
617-8040  
7E18

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This is my first Ethics Advisory since I succeeded Mike Wentink on his retirement in September 2001. For those of you who attended our Annual Ethics Training Program last fall, "Do You Wanna Be an Ethics Millionaire?," you were introduced to me at that time. For those of you who do not know me, let this Ethics Advisory be my introduction to you. I want to know what you think about the Ethics Advisories. I welcome your questions about the topics or any other ethics topic. I also welcome your suggestions for future topics. You can reach me by e-mail--I am on the Global Address list--or you can call me at 703-617-8003.

The topic for this Advisory is "2000 Conflict of Interest Prosecution Survey." Annually, the Office of Government Ethics (OGE) publishes its annual survey of prosecutions involving the conflict of interest statutes. It has just completed its survey for calendar year 2000. I believe these cases present valuable lessons to Government employees. They present real life situations where employees had to confront ethics issues, and to the employees' misfortunes they made the wrong choice. Hopefully, learning about their experiences will help us make the right choice. These cases are all a matter of public record, and in this Advisory I am paraphrasing information from public records. For this reason the employees' names and their official positions are real. One final comment before I go into the case summaries: several of the employees were high ranking officials. Employees sometimes develop the notion that the high ranking officials always seem to walk away and employees lower down in the organization get hammered. As you can see, that is not always the case.

### **Conflicts of Interest--18 USC 208**

United States v. Douglas J. Blake--Mr. Blake was an Air Force employee who had business relationships with Champion Construction Company. They shared profits as business partners in a series of ongoing business ventures. At times, Mr. Blake used his Government office equipment and resources to advance some of their joint business interests.

Mr. Blake informed officials at Champion that his agency was planning to solicit bids to renovate office space where he worked and recommended to them that Champion bid on the project. Champion officials asked Mr. Blake whether there was any problem with Champion bidding on the project because of his relationship with Champion. Blake assured them there would no conflict because he would not participate in the bidding process or the selection of the contractor.

Mr. Blake, however, did participate in the contract process. He first recommended to the contracting agency that Champion should be given the opportunity to bid on the contract. He later provided advice to the Contracting Officer's Technical Representative that Champion should be selected to do the work. He then personally selected Champion for the award after being

delegated the responsibility to make the decision without ever disclosing to anyone at his agency that he knew he should not participate because of his relationship with Champion. After the contract was awarded he continued to participate personally and substantially in change orders and overseeing Champion's work on the contract.

Outcome: Guilty plea to one felony count. Mr. Blake was sentenced to one-year probation and a \$2000 fine. He resigned from his Government position during the investigation.

United States v. Francis DeGeorge--Mr. DeGeorge was Inspector General of the United States Department of Commerce. Litton/PRC was a company conducting business with Department of Commerce and one of its subagencies, the National Weather Service. It had a contract with the National Weather Service to update its automated system.

As Inspector General of the Department of Commerce, Mr. DeGeorge was responsible for oversight of Litton/PRC's contract and he participated personally and substantially in that contract by making recommendations and rendering advice. While still employed at Department of Commerce and participating personally and substantially on the Litton/PRC contract, Mr. DeGeorge negotiated with the company for prospective employment.

Outcome: Guilty plea to a misdemeanor count of violating the conflict of interest statute for participating personally and substantially as a Government employee in a particular matter in which an organization with whom he was negotiating for prospective employment had a financial interest. Mr. DeGeorge was sentenced to one-year probation.

United States v. Michael P. Filchock--Mr. Filchock was employed as a loan officer by the Export-Import Bank of the United States (Ex-Im Bank), a wholly owned government corporation and independent agency of the United States. He was responsible for reviewing loan applications and presenting his financial analysis to his superiors. Based on his recommendations and analysis, Ex-Im Bank would decide whether to make a loan.

First National Bank of New England (First National Bank) often requested the services of the Ex-Im Bank. Mr. Filchock had frequent, almost daily, contact with First National Bank regarding various loan guarantees sought by the bank. While employed at the Ex-Im Bank, Mr. Filchock sent his resume to First National Bank. He received an offer of employment, which he eventually declined. While negotiating for employment with First National Bank. Mr. Filchock wrote two memoranda recommending approval of guarantees requested by First National Bank.

Outcome: Mr. Filchok was prosecuted for participating personally and substantially as a Government employee in a particular matter in which an organization with whom he was negotiating for employment had a financial interest. He entered into a civil settlement agreement under which he paid the Government \$5000 and the Government released him from its claims.

United States v. Jean Kennedy Smith--Ms. Smith was the United States Ambassador to Ireland. While serving as Ambassador, she sent a letter to the Prime Minister of Ireland on State Department letterhead requesting a \$1,000,000 donation to help underwrite the costs of the Irish Festival to be sponsored and held at the Kennedy Center. At that time, Ms. Smith was also serving on the Board of Trustees of the Kennedy Center, a not-for-profit cultural and charitable organization. Ms. Smith was aware of the prohibitions against fundraising. During her Senate confirmation hearings she wrote a letter to Department of State legal and ethics officials that she would not personally and substantially participate in any solicitation of funds involving the Kennedy Center. She asserted she had approval to send the letter in question. There was no allegation that she gained personally in the matter. She was prosecuted for participating personally and substantially in a matter as a Government employee in a particular matter in which she was serving as an officer, director, or trustee of an organization that had a financial interest in the matter.

Outcome: Ms. Smith entered into a civil settlement agreement. She paid the Government \$5000 and the Government released her from its claims.

United States v. Donald Rappaport--Mr. Rappaport served as Chief Financial Officer and Chief Information Officer of the Department of Education. His wife owned 600 shares of Compaq stock that she inherited from her mother. During this period, Mr. Rappaport was involved in issues concerning Compaq computers. He was prosecuted from participating personally and substantially in a particular matter in which he or his spouse had a financial interest.

Outcome: Mr. Rappaport entered into a civil settlement agreement. He paid the Government \$20,000 and the Government released him from its claims.

United States v. Glenn R. Hodges--Dr. Hodges was Chief of Staff at the VA Medical Center in Kansas City, Missouri. During the same time he was employed as a physician by the University of Kansas Medical Center in Kansas City, Kansas. In his official capacity he approved a contract for cardiopath services to the VA Medical Center by the University of Kansas Medical Center.

Outcome: Dr. Hodges pled guilty to a misdemeanor count of taking official action in a matter affecting his personal financial interest. He was sentenced to a fine of \$250 and a special assessment of \$25.

United States v. Gilford Moss--Mr. Moss was an IRS Revenue/Settlement Officer. He was assigned to a collection matter which gave him access to inside information concerning a proposed stock exchange. After his role in the case was substantially complete, he purchased approximately \$2000 in the stock subject to the proposed exchange based in part on the information he learned during the course of his duties as revenue officer. After he purchased the stock, on several occasions, he had minor contact on the case with the parties before the IRS. He eventually went to his supervisor and disclosed his interest in the stock and was removed from further participation in the case. Mr. Moss also lost money on the stock transaction.

Outcome: Mr. Moss was prosecuted for participating personally and substantially as a Government employee in a particular matter in which he had a financial interest. He was placed on a pre-trial diversion for six months on the condition that he resign from the IRS and perform 120 hours of community service.

### **Post Employment Conflicts of Interest--18 USC 207**

United States v. Mark A. Boster--Mr. Boster served as the Deputy Assistant Attorney General of the Information Resources Management Office of the Department of Justice. This is an Executive Service position. His job involved managing computer systems, and his office was responsible for maintaining, assessing, designing, and procuring computer and telecommunications systems. Mr. Boster left Government service and went to work for SAIC. About three months after he left Government service he telephoned the Government official acting in his former position and told that official he knew the agency was considering not using SAIC on a new contract. Mr. Boster stated that such action might require a payment to SAIC, which could, in turn, trigger the Anti-Deficiency Act because budgeted funds would have been exceeded.

Outcome: The Government alleged Mr. Boster's conduct violated the one-year restriction prohibiting "senior employees" from communicating with their former agency on behalf of another person or entity with the intent to influence an agency action--the one-year "cooling off" period. Mr. Boster entered into a civil settlement in which he paid the Government \$30,000 and the Government released Boster from its claims.

United States v. Timothy A. Anderson--Mr. Anderson was employed as a chemist by the Food and Drug Administration in the Office of Generic Drugs

(OGD). He performed reviews of Abbreviated New Drug Applications (ANDAs) submitted by pharmaceutical companies seeking to gain approval to manufacture and market generic versions of innovator drugs. Shortly before leaving Government employment he completed the first level chemistry review of Taro Pharmaceuticals, Inc. ANDA #74-444, an alleged generic equivalent of Monistat-7. Upon leaving Government service he went to work for Taro. On numerous occasions he contacted OGD officials in an effort to obtain approval of Taro's ANDA #74-444, which was still pending before OGD. He inquired about the status of the application and aggressively sought to speed up the approval process. He used his acquaintance with supervisory-level OGD officials in an attempt to obtain special treatment for Taro's product, which ultimately was approved.

Outcome: Mr. Anderson was charged with violating the lifetime prohibition against communicating or appearing before the Government on behalf of another in connection with any matter in which the individual participated personally and substantially as a Government employee. Mr. Anderson entered into a civil settlement under which he paid the Government \$15,000 and the Government released him from its claims.

### **Government Employee Representation--18 USC 203**

United States v. Annette Johnson--Ms. Johnson was a clerical employee for the Immigration and Naturalization Service (INS) who took money in exchange for assisting in processing INS naturalization documents.

Outcome: Ms. Johnson pled guilty to a misdemeanor charge for receiving compensation for representational services rendered in a particular matter before an agency of the Government. She was sentenced to two-years probation and a \$1000 fine.

Robert H. Garfield  
Associate Counsel for Ethics

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INFORMATION PAPER

21 February 2002

SUBJECT: Changes in Rules Governing Frequent Flyer Miles and Promotional Items

PURPOSE: To provide information on changes in the rules governing ownership of frequent flyer miles and other promotional items received as a result of official travel.

FACTS:

a. What is Changed? National Defense Authorization Act for Fiscal Year 2002 provision permits Federal civilian and military employees to accept promotional items such as frequent flyer miles earned when traveling in an official capacity.

(1) DOD travel regulations applicable to military and civilian personnel and the DOD Joint Ethics Regulation (JER) have been amended to reflect the change in the law.

(2) Law is retroactive. It applies to frequent flyer miles earned on, before, or after the effective date of the Act.

(3) When a non-Federal entity pays for the travel, e.g., under authority of 31 USC 1353 or 5 USC 4111, Federal military and civilian personnel may retain frequent flyer miles that are derived from such travel provided the entity paying for the travel does not object.

b. What is Not Changed?

(1) The rules on voluntary and involuntary "bumps" remain the same. A traveler voluntarily vacating a seat may keep payments from the carrier; however, no additional expenses, e.g., per diem, may be paid as a result of the traveler's delay. A traveler involuntarily denied a seat enters an "Awaiting Transportation" status for per diem and miscellaneous expense reimbursement. Any monetary compensation (including meal and lodging vouchers) for denied seating belongs to the Government.

(2) Military and civilian personnel may use their frequent flyer miles to upgrade from coach class to any higher class when on official travel, but military may not fly first class in uniform.

c. Supervisory Challenges--What to Look Out For!

(1) Unnecessary travel, scheduling meetings at more distant locations, and scheduling travel with multiple legs.

(2) Avoiding the contract (city-pairs) carrier when the traveler does not have a frequent flyer account with that carrier.

(3) Scheduling travel to increase an individual's frequent flyer account that results in additional costs to the Government violates the JER, and in some cases, criminal conflict of interest statutes.

d. Taxability of the Benefit. The IRS announced on 20 February 2002 that frequent flyer miles earned from business travel will not be taxed as income. The only exception is a frequent flyer program that allows award miles to be converted to cash. The IRS considers that money taxable income that must be reported by the taxpayer.

APPROVED BY: EDWARD J. KORTE  
Command Counsel  
617-8031  
Rm. 7E06

ACTION OFFICER: ROBERT H. GARFIELD  
Associate Counsel  
AMCCC-G  
Rm. 8E18 617-8003

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INFORMATION PAPER

21 February 2002

SUBJECT: Allegations of Senior Official Misconduct or Impropriety

PURPOSE: To provide information on the DAIGs FY 01 summary of allegations of misconduct or impropriety made against Army General Officers and Senior Executive Service Members

FACTS:

a. The Statistics.

- (1) 888 (517 GO) allegations received in FY 01.
- (2) Approximately 35% are anonymous.
- (3) 21 % go to formal investigation.
- (4) 7% of the allegations are substantiated
- (5) 30% of substantiated allegations began anonymously.

b. What Gets General Officers in Trouble.

- (1) Abuse of Authority or Position--failure to investigate, failure to take corrective actions, unlawful command influence, preferential treatment, improper support to private organizations.
- (2) Fraud, waste, and abuse--unnecessary or excessive travel, questionable conferences, gold-plated renovations, improper use of resources, double payments, cellular telephones.
- (3) Improper personnel actions--unequal treatment, pre-selection, failure to provide due process, reprisal, attempting to influence selection boards.
- (4) Personal misconduct--APFT, sexual misconduct, abusive profane language, sexual harassment, fraternization, awards, gifts and perks.

c. What Gets Senior Executives in Trouble.

- (1) Improper travel/TDY--arranging TDY for personal business or visits to friends and relatives, filing false or inaccurate TDY vouchers.
- (2) Improper hiring practices--pre-selection.
- (3) Fraudulent claims--fraudulently obtaining pay, false statements, reporting incorrect educational level.
- (4) Favoritism--authorizing unnecessary training, promotion or transfer, preferential treatment.

d. Root Causes.

- (1) Improper acts by overzealous assistants, Chiefs of Staff, or other staff members.
- (2) Unfamiliarity with Standards of Ethical Conduct.
- (3) Ignoring advice of Ethics and Legal Counsel and Inspector General.
- (4) Creating a climate that impedes two-way communication.

APPROVED BY: EDWARD J. KORTE  
Command Counsel  
617-8031  
Rm. 7E06

ACTION OFFICER: ROBERT H. GARFIELD  
Associate Counsel  
AMCCC-G  
Rm. 8E18 617-8003

COORDINATION: Considered

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## PREVENTING FINANCIAL AND LEGAL PROBLEMS

Being on the move all the time makes it difficult for military families to keep their personal affairs in order. These precautions can help you prevent many legal and financial problems:

1. Organize your personal papers. Have one place, such as a filing cabinet or fire-proof strong box, where you keep all your personal papers. Each time you get a new document, such as an LES, file it right away so it will not be lost. Important receipts should also be retained. You should keep all tax records, cancelled checks and/or bank statements for a minimum of three years. That way, if a problem arises, you will have the records needed to sort it out. For example, if there is ever any question about the amount of family support payments you made or the amount you paid for an item damaged during a household goods shipment, you will have the proof to back up what you say.
2. Keep a written summary of important business conversations. Many important financial and legal matters are handled over the phone or face-to-face. You should write down the full name of the person to whom you are speaking, the date and time of the conversation and a brief summary of it. You will not be able to prove the contents of the conversation by doing this, but it will add to your credibility if you need to refer to the conversation in the future.
3. Keep copies of business letters. Letters you write to solve your financial and legal problems are far more valuable if you keep copies of them. You will be able to refer to these letters in the future and can use them to prove that you have been trying to solve the problem.
4. Send letters certified, return receipt requested, so that you will be able to prove that they were received. You should save your return receipt (green card) with the copy of the letter that you sent.
5. Take care of problems as they arise. Financial and legal difficulties only get worse if you ignore them. If you receive court documents and don't know what to do with them, you should consult a legal assistance or other attorney immediately. Instead of letting unpaid bills pile up, see ACS for budget or debt counseling.

This summary gives you general information only. It is not intended to be a substitute for talking with a lawyer. You may consult a legal assistance attorney by appointment at the Legal Services Branch. Call 532-4371 for an appointment, or check our web site at <http://legal-assistance.monmouth.army.mil>.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Pamela McArthur, (732) 532-4760; DSN 992-4760.

KATHRYN T. H. SZYMANSKI  
Chief Counsel

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AMCCC

INFORMATION PAPER

25 Feb 02

**SUBJECT:** Privacy Act - Court of Appeals (DC) Decision in Cummings v. Department of the Navy

**PURPOSE:** To provide information and a brief analysis of the above-cited case.

**FACTS:**

1. In a 2-1 decision, the U.S. Court of Appeals for the District of Columbia Circuit recently held that the Feres doctrine does not bar a lawsuit for damages under the Privacy Act filed by a member of the Armed Forces, reversing the district court's dismissal of the cause of action and remanding the case to the district court for further proceedings addressing the service member's specific Privacy Act allegations. The district court had held that the Feres doctrine barred the lawsuit because the injury occurred in the course of activity incident to military service.

2. Mary Louise Cummings, a naval aviator, was assigned to a flight squadron in November 1994 at the Naval Air Station, Cecil Field, in Jacksonville, FL, to train on F-18 Hornet aircraft. Six months into her training period, the U.S. Navy convened a Field Naval Aviator Evaluation Board (the Board) to assess her flying skills and to evaluate her potential. The Board recommended terminating her flying status. The Commander of the Navy's Atlantic Fleet, however, disagreed with the Board's recommendation and directed that Cummings retain her flight status and continue training on F-18 Hornet aircraft.

3. During this time, the U.S. Navy permitted Robert Gandt, the future author of the book, Bogeys and Bandits: Making of a Fighter Pilot, to observe naval aviators training on Hornet aircraft, without their knowledge, when researching material for the upcoming book. The book was based upon his observations of the Hornet training program and other information supplied by the U.S. Navy. Cummings alleges that the other information included the unauthorized release of her training record to Gandt. Cummings also alleges that a character in Gandt's book, named "Sally Hopkins," portrays her in his book and that Gandt's book includes details from her training record and direct quotations from her negative evaluation report by the Board. As a result, her military and civilian prospects were severely damaged, and she suffered severe mental distress, embarrassment, and personal and professional humiliation.

**DISCUSSION:**

1. The Privacy Act of 1974, 5 U.S.C. section 552a, as amended, prohibits a federal agency from disclosing any record contained within a system of records, except by the written request of or with the prior written consent of the individual to whom the record pertains, unless certain

exceptions apply. The Privacy Act provides for both criminal penalties against the individual and civil remedies against the agency for violations of its provisions.

2. The doctrine first enunciated in Feres v. United States, 340 U.S. 135 (1950), provides that the U.S. Government shall not be held liable under the Federal Tort Claims Act for injuries to service members that arose out of or were incurred in the course of activity incident to service. The Feres doctrine has subsequently been extended to bar lawsuits for deprivation of civil rights under 42 U.S. C. section 1985 (3), as well as to common-law and constitutional tort actions.

3. The U.S. Court of Appeals for the D.C. Circuit was unwilling to extend the reach of the Feres doctrine any further because the Privacy Act does not implicate any of the rationales presented for extending the reach of the Feres doctrine to the Privacy Act.

a. Nowhere does the Privacy Act establish a parallel private (civil) liability against individuals as it does against the United States in the same manner and to the same extent under like circumstances.

b. Unlike the need to resort to local tort law under the Federal Tort Claims Act, the distinctly federal relationship between the United States and its military forces, covered by the Privacy Act, is governed by Federal law.

c. Unlike veterans' benefits for injured service members, Congress has provided no other compensation or benefit system for those injured by violations of the Privacy Act.

d. The peculiar and special relationship between the service member and his commanders would not be disrupted and military discipline would not be undermined if lawsuits were allowed to proceed forward for violations of the Privacy Act incurred during the course of military service.

## **CONCLUSION:**

Since this was a split decision, the U.S. Navy may request reconsideration of the decision en banc, which if granted, could lead to a different result. If not granted, however, then the U.S. Navy will have to decide whether to file for certiorari to the U.S. Supreme Court, which could ultimately lead to the loss of the entire Feres doctrine, even within the context of the Federal Tort Claims Act from which it first arose. In the meantime, we in the Federal Government must be extra vigilant in guarding against the unauthorized disclosure of agency records protected by the Privacy Act.

RELEASED BY:  
Edward J. Korte  
617-8031  
7E06

ACTION OFFICER:  
MAJ Algis P. Glamba  
617-8081