

A CALL TO ARMS: “TAKING” THE VOLUNTEER OUT OF THE ALL VOLUNTEER FORCE

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I. INTRODUCTION

On September 11, 2001, the United States of America was awakened to international terrorism by the attacks on the World Trade Center and the Pentagon. The attacks changed the lives of many Americans, particularly, National Guard and Reserve members have experienced the most dramatic change. The 9/11 attacks led to the largest call up of Guardsmen and Reservist since World War II. On September 14, 2001, President George W. Bush, under the authority of 10 U.S.C. § 12302, declared a national emergency due to the terrorist attacks.¹ The Department of Defense (DoD) called up approximately 300,000 of the 1.2 million National Guard and Reserve members for periods of one to two years of active duty military service.²

Since September 2001, Guardsmen and Reservist have fought on the front lines and in combat support positions in Iraq and Afghanistan; tracked terrorists throughout the Middle East, Asia and Africa; served as peacekeepers in Afghanistan, the Balkans, and Iraq; and participated in a number of domestic missions including maintaining a visible presence at U.S. civilian airports and flying combat air patrols (CAP) over major cities in the United States.³ However, the military lacked vital information to fully use members of the Ready Reserve⁴ because it did not have valid contact information for at least 40,000 of its 300,000 members.⁵ This resulted in an inefficient application of national resources and a realization that some scarce occupational skills necessary for the US military mission were not found in the US military but were available in the Reserve Forces. To solve this problem the DoD instituted a policy of mandatory disclosure of occupational information by its Reserve Component members.⁶

An Air National Guard personnel specialist, who happens to be an air traffic controller in his civilian life, may now find him or herself in a precarious position. He or she may be called to active duty solely for the purpose of using his/her civilian job skills which the military neither provided nor enhanced. Likewise, the Army Reserve Captain, an infantry company commander,

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¹ 10 U.S.C. § 12302 (2003).

² United States General Accounting Office, Report to the Subcommittee on Personnel, Committee on Armed Services, August 2003, p. 3.

³ James R. Bancroft, *Military Personnel DOD Actions Needed to Improve the Efficiency of Mobilizations for Reserve Forces*, GAO Report to the Subcomm. on Personnel, Comm. on Armed Servs., U.S. Senate, GAO-03-921 8,9 (Aug. 2003) at 3.

⁴ Within the Ready Reserve there are three subcategories of personnel:

1. Selected Reserve, with 882,142 members in 2002, are active members of the National Guard or Reserve units participating in regularly scheduled training for pay;
2. Individual Ready Reserve, with 314,087 members in 2002, includes members that have not reached the end of their minimum service obligations, and are transferred into the Individual Ready Reserve (IRR). They do not participate in regularly scheduled training and are not paid for their membership in the IRR;
3. Inactive National Guard with 3,142 members in 2002; its members were not part of the mobilization because they did not participate in regular training, but remain attached to their National Guard units.

⁵ Bancroft at 6.

⁶ Colonel Gary L. Crone, Off. of the Asst. Sec. of Def. for Reserve Affairs, *DOD Actions Needed to Better Manage Reserve Component Civilian Occupation Info.*, Reserve Component Civilian Occupation Info. Final Report 8 (Dec. 2002).

who has built a civilian career as a corporate information technology specialist may also find the future more challenging than expected. As a result of the new Civilian Employment Information (CEI) program, the US military now has information about his/her occupation. The DoD plans to use the information to identify those Reserve Component personnel with “hard to grow” civilian skills and to support the Employer Support of Guard and Reserve (ESGR) program.

Presently the DoD requires all Reserve Component⁷ personnel to supply their respective branches of service with pertinent information concerning their civilian employment and occupation. The government’s possible use of that data beyond the purpose of the legislation is the focus of this article. Particularly, DoD’s use of that data to activate Guardsmen and Reservist based solely on their civilian occupational skill rather than their military specialty.⁸

Part I of this article will probe the issue of whether the activation of a Guardsman or Reservist solely for the use of his/her civilian occupation skills constitutes the taking of private property by the government for public use. Part II of the article will then discuss the purpose and the proposed application of the DoD Civilian Employment Information Reporting Act. Part III will provide a brief discussion of the Takings Clause and its effect on the condemnation of private property for public use. Parts IV through VI address occupational skills as property, the adverse use of the Civilian Employment Information gathered by the DoD, and relevant compensation models for Reserve Component members activated to duty for their non-military occupation skills. The article will conclude with suggested remedies for plaintiffs.

II. CIVILIAN EMPLOYMENT INFORMATION

In 2002, the United States Department of Defense issued the Reserve Component Civilian Occupation Information Report requiring National Guardsmen and Reservist to provide pertinent information about their civilian employment. On March 31, 2004, the Department of Defense announced that the Civilian Employment Information (CEI) Program had become a mandatory requirement for all Reserve Component members.⁹ The CEI Program requires all National Guard and Reserve members to enter the following information into the Defense Manpower Data Center electronic database: their employment status, their employers' names, their employers' complete mailing address, their civilian job title, and their total number of years in their current civilian occupation.¹⁰ The objectives of the program are to:

1. Give consideration to civilian workers — including emergency responders such as police officers, firefighters and medical personnel—needed to maintain the national health, safety and interest when deciding which Guard and Reserve members should be called to active duty;
2. Ensure more members with critical civilian jobs and skills are not retained in the reserve components than necessary to respond to emergencies; and

⁷ The reserve component, as defined in 10 U.S.C. §10101, is comprised of the Army National Guard, the Air National Guard, the Army Reserve, the Air Force Reserve, the Naval Reserve, the Marine Corp. Reserve and the Coast Guard Reserve.

⁸ The Air Force uses the Air Force Specialty Code (AFSC) to denominate its duties, the Army and the Marines use the Military Occupational Specialty (MOS), the Navy uses the Naval rating to denominate its occupational codes.

⁹ Master Sgt. Bob Haskell, *Reserve Component Civilian Employment Information Program Begins*, http://www.dod.gov/news/Mar2004/n03312004_200403311.html. (March 31, 2004).

¹⁰ *Reserve component civilian employment information program*, Army Reserve Magazine, Spring 2004, http://www.findarticles.com/p/articles/mi_m0KAB/is_1_50/ai_n6184111.

3. Inform the reservists' civilian employers of their rights and responsibilities under the 1994 Uniformed Services Employment and Reemployment Rights Act.”¹¹

To ensure the most complete information available, DoD mandates that Reserve Component personnel submit their civilian employment data with their branch of the service. Additionally, Reserve Component members are required to continually update any change in their civilian employment status.¹² The respective branches of service are now required to maintain the CEI data as an extension of the member's existing personnel data record and are authorized to do so under the previous Privacy Act system notices.¹³

a. Authority

The DoD cites 38 U.S.C. § 4333 which empowers the Secretary of Defense to take action as he deems appropriate in regard to the employment rights and benefits of Reserve Component personnel as the statutory authority to collect employer information from Guardsmen and Reservists.¹⁴ Additional statutory authority is gained from other sections of the U.S. Code and from an executive order.¹⁵ The DoD also relies on a General Accounting Office (GAO) report supporting the collection of information necessary to accomplish the purposes of the Employer Support of the Guard and Reserve (ESGR).¹⁶

b. Purpose

The DoD mandated National Guard and Reserve members to disclose pertinent information about their civilian employer and job skills, to aid the DoD in meeting the two essential requirements required by law. First, the DoD must continuously screen Reserve Component personnel for the purpose of ensuring mobilization requirements are met and ensure that appropriate consideration is given to current employment-related information when pre-mobilization planning is conducted. The DoD is required to screen members in search of those having critical civilian skills that must be maintained outside of DoD during war or national emergency.¹⁷ The screening process considers civilian employment necessary to maintain national health, safety and interest when considering members for recall.¹⁸ Particular attention is given to first responders such as policemen, firefighters and medical personnel who tend to be a critical resource to maintain the nation's health and safety.¹⁹ Additionally, the screening process is intended to minimize attrition within the National Guard and Reserve at the time mobilization occurs.²⁰ Second, the DoD must ensure that members with critical civilian skills are not retained in numbers beyond those needed satisfy the requirements. In other words, the military may not stockpile National Guardsmen and Reservist or retain them on active duty beyond the stated

¹¹ Haskell, supra n. 8.

¹² 10 U.S.C. §10205.

¹³ 10 U.S.C. §10204 (1994)(wherein the Secretary has a duty to maintain current personnel records of its reserve components and it is under the Secretary's jurisdiction to include each member's civilian occupational skills.); members having critical civilian skills that are necessary for their operations, and not beyond the need for those skills.)

¹⁴ RESERVE COMPONENT CIVILIAN OCCUPATION INFORMATION FINAL REPORT, p. 4, December 2002.

¹⁵ See 10 U.S.C. §§ 10149, 10204, 12302; EO 9397.

¹⁶ Id. GAO Report 02-608, dated June 2002, DOD Actions Needed to Better Manage Relations between Reservists and Their Employers.

¹⁷ Id. supra n.4 at 13.

¹⁸ Id. see 10 U.S.C. §12302.

¹⁹ See Mimi Hall, Police, fire departments see shortages across USA Fiscal woes biggest factor in substandard staffing, USA Today, November 29, 2004, at 1A.

²⁰ Id.

emergency. Finally, the DoD is required to use the assembled data to inform employers of Reserve Component personnel's rights and responsibilities and the employer's rights and responsibilities under the Uniformed Services Employment and Re-employment Rights Act (USERRA).²¹ To enforce this regulation the DoD informed the National Guardsmen and Reservists that those who knowingly fail or refuse to provide the required information or who knowingly provided false employment-related information may be subject to administrative action or punishment.²²

c. Proposed Application

The proposed use of the CEI data is to ensure that Reserve Component personnel with occupations as emergency response personnel and other critical skills used by the civilian sector during times of crisis are deployed in a manner that does not impair their local communities or the national defense. Immediately following the 9/11 attack, many small towns found themselves with little or no emergency response personnel because a large number of their first responders were members of the Reserve Component serving in similar military positions.²³ Access to information about Reserve Component personnel's civilian occupations allows the DoD to balance its requirements and avoid conflicts between the National Guardsmen and Reservists' civilian and military duties during wartime or national emergency.²⁴ Additionally, Reserve Component personnel serving in critical career fields such as healthcare, public safety and defense industrial support are to be given special consideration beyond the annual screening required in 10 U.S.C. §10149.²⁵

The mechanics of registering civilian employment information is accomplished through a DoD computer website. Reserve Component personnel gain access to the web portal by entering his/her social security number, last name, and birth date. Once on the site, the member identifies his/her place of employment, job title, and length of employment. The computerized cataloging of occupational skills makes it relatively easy for individuals with a particular skill to be identified. In a shrinking military it becomes important to find individuals with unique, hard to grow civilian skills²⁶ however, the problem of a taking of private property looms if those individuals are targeted for activation to military duty solely because of their civilian skills.

III. CONSTITUTION, TAKINGS CLAUSE

a. Origin

The Fifth Amendment of the US Constitution states that private property shall not be taken for public use without just compensation.²⁷ The Fifth Amendment grants the United States the power of eminent domain. Eminent domain has an ancient history which empowered the power of the sovereign to take property which the sovereign needs from any person subject to the dominium of the sovereign.²⁸ In the Old Testament of the Holy Bible, King David offered and

²¹ United States Department of Defense News Release, *Reserves Civilian Employment Information Program Announced*, No. 240-04, <http://www.defenselink.mil/releases/2004/nr20040331-1125.html>, (March 31, 2004).

²² Haskell, *supra* n. 5.

²³ Newspaper article on reserve forces affect on emergency services.

²⁴ See 10 U.S.C. §10149 which requires an annual screening of the Reserve Component member's employment.

²⁵ See 10 U.S.C. 12302(b)(3).

²⁶ The DoD has classified the following as critical civilian occupational skills: medical, languages, information technology and other technical skills.

²⁷ U.S. Const. amend. V, cl. 4.

²⁸ Sydney Z. Searles, *The Law Of Eminent Domain*, American Law Institute - American Bar Association Continuing Legal Education ALI-ABA Course of Study 1, 5 (1997).

paid Araunah compensation for his threshing place acquired to build an altar to the Lord in order to stop the epidemic.²⁹ In feudal England, all of the land belonged to the sovereign and was held by the lords under tenure; the sovereign would take as needed.

If the government through the DoD calls Reserve Component personnel to active duty solely to exploit non-military aided skills, has private property been taken for public use without just compensation? The Fifth Amendment does not define private property, public use or just compensation. To determine whether a thing or an asset constitutes private property one must ascertain what the federal standard is in a taking, keeping in mind that a compensable taking arises only if government action is authorized.³⁰ The concept of what constitutes private property has followed two separate paths. The first path suggests that is property a thing and the second path supports the concept that private property is a bundle of rights.

Property as a thing According to modern laymen, private property is often thought of as a physical thing that can be physically manipulated.³¹ Early legal thought also focused on private property as a thing. Blackstone memorialized that concept of property when he described it as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."³² Blackstone opined that property was best defined by the legal relationship between man and an object. The livery of seisin ceremony illustrates the concept of property as a thing.³³

Today, the predominant theory is that private property is a bundle of rights.³⁴ This bundle of rights includes the following attributes: the liberty to use, the right to exclude, the power to give, the power to bequeath, the immunity against expropriation, and the liability to execution.³⁵ The Hohfeldian theory of property has transformed property into an almost infinitely malleable concept of rights, privileges and powers which is amenable to being formed into to a variety of permutations.³⁶ Under this theory, it is argued that each separate strand within the bundle constitutes an individual property right unto itself. This theory can lead to an overbroad concept of private property in a condemnation case. Under the bundle of rights theory, an impairment of a single incident of property within the bundle of rights could constitute a taking.³⁷ For example, a restriction of prohibiting the construction of commercial structures would impair the owner's right to develop the property as he/she desired. In the employment arena any government action that would limit the employer's right to discharge an employee could also be considered a taking. Both of these scenarios could lead to the government compensating the owner for an impairment that may be less than a taking.

²⁹ Holy Bible, 2 Samuel 24: 20 – 24, Good News Study Bible.

³⁰ *Del-Rio Drilling Programs, Inc. v. United States*, 146 F3d 1358 (Fed Cir. 1998).

³¹ Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L. REV. 1163, 1170 (1999).

³² William Blackstone, *II Commentaries on the Laws of England*, Chap. 1, 3 (Wayne Morrison ed., 2001) (1765-1769).

³³ The medieval ceremony in which the buyer and seller of real property met on the parcel in question to transfer ownership by handing over a twig or a clod of dirt representing the land.

³⁴ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), in which the the Court states that its takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."

³⁵ Jeremy Waldron, *Supply Without Burthen Revisited*, 82 IOWA L. REV. 1467, 1482 (1997).

³⁶ Abraham Bell & Gideon Parchomovsky, *A Theory Of Property*, 90 CORNELL L. REV. 531 (2005).

³⁷ See *Andrus v. Allard*, 444 U.S. 51, 63 (1979), ("[T]he denial of one traditional property right does not always amount to a taking...the aggregate must be viewed in its entirety."), see also *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 510 (Cal. 1990).

Private Property Test

Professors David Dana and Thomas Merrill have attempted to provide a more refined federal definition of private property in a condemnation case constructed a three part test. The test is used to determine whether an asset qualifies as private property. The test questions:

1. Whether the item in question refers to some right or set of rights enjoyed with respect to some discrete asset;³⁸
2. Whether there is a right to exclude others from the discrete asset;³⁹ and
3. Whether the interest is one which is exchangeable on a stand-alone basis.⁴⁰

The first prong of the test limits private property to things which have a right or set of rights associated with it.⁴¹ The second prong further limits private property to those things which have the right to exclude others associated with it.⁴² The third prong of the Dana/Merrill definition goes beyond any definition articulated in federal case law by adding a factor limiting the broad effect of the first prong of the test.⁴³ Asking “whether a private party, with the same aims and strategy as the government . . . would have needed to purchase the property,” the Dana/Merrill definition of private property restricts the meaning of private property to those assets which more closely approximate those intended by the Fifth Amendment.⁴⁴ Furthermore this limitation allows for more accurately compensation of those assets taken, by correlating the definition of the property and the value to the market place.

Additionally, the American Law of Property (ALP) defines private property to be “an aggregate of legal relations which has economic or sale value if transfer be allowed.”⁴⁵ The ALP definition appears to agree with the Dana/Merrill test.

a. Real Property

Property consists not in the thing said to be owned, but in the right to dominion over it, control of its use and disposition.⁴⁶ Real property has long been contemplated as a subject of the Takings Clause. However, property interests are not created by the Constitution; rather they are created and their dimensions are defined by existing rules or understanding that stems from a source independent of the state.⁴⁷ The early eminent domain cases arose in the state courts, under state constitutional or statutory law.⁴⁸ The first application of federal eminent domain power was in 1875 regarding the taking of real property for use as a federal office complex in Cincinnati, Ohio.⁴⁹ Prior to *Kohl v. United States*, the federal government acquired real property from the states which condemned and conveyed the land.⁵⁰ In the 1900s the federal government expanded its activities resulting in a dramatic increase in the number of cases involving the condemnation of real property.

³⁸ DAVID A. DANA, THOMAS W. MERRILL, *TAKINGS*, p. 68, Foundation Press (2002).

³⁹ *TAKINGS*, p. 72.

⁴⁰ *Id.* at 77.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 79, quoting Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1340 (1991).

⁴⁵ 6 ALP, *supra* note 21, § 26.1 n.1.

⁴⁶ *Delaware, L. & W.R. Co. v. Town of Morristown*, 14 F.2d 257; *Eaton v. Boston, C. & M.R.R.*, 51 NH 504; *Chicago, B. & Q.R. Co. v. Public Utilities Commission*, 193 P.726 ().

⁴⁷ *Ruckelshaus v. Monsanto*, 467 U.S. 986, 104 S. Ct. 2862 (1986).

⁴⁸ Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 BOSTON COLLEGE L. REV. 283, 293 (1991).

⁴⁹ *Kohl v. United States*, 91 U.S. 367 (1875).

⁵⁰ *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, FN 3.

b. Trade Secrets

Another classification of private property that has been subject to condemnation is the trade secret. The trade secret, like other intangible property, has been subject to condemnation just like tangible property.⁵¹ Courts have protected the property interest in trade secrets which the original Restatement of Torts defines as “any formula, pattern, device or compilation of information which is used in one’s business, and gives one an opportunity to obtain an advantage over competitors who do not know or use it.”⁵² The Uniform Trade Secrets Act (USTA) defines a trade secret as “information, including a formula, pattern, compilation, program device, method, technique, or process that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”⁵³ Although the Restatement definition is more widely cited in case law, the USTA is now more widely accepted by the various states.⁵⁴

Occupational Skills As Property

a. Philosophies

The proposition that occupational skills are property can be found in the philosophy of early America. John Locke’s labor theory of property that suggests that people are entitled to hold, as property, whatever they produce by the labor of their body and work of their hands.⁵⁵ Locke’s theory is derived from the premise that one has a property right in his own person and in what one produces.⁵⁶ Accordingly, labor is the unquestioned property of the laborer, limited only to

⁵¹ Leon F. Mead, II, *Raiders: \$7.2 Million, City of Oakland: 0. . . Was that the Final Gun? A Story of Intrigue, Suspense and Questionable Reasoning*, 9 *Loyola Ent. L.J.* 401, 408 (1989).

⁵² Restatement of Torts § 757, cmt b (1939); see also Ira S. Matsil, *Government Seizures of Trade Secrets: What Protection Does the Takings Clause Provide?*, 48 *SMU L. Rev.* 687, 698 (1995).

⁵³ Unif. Trade Secrets Act § 1.01.

⁵⁴ 42 states and the District of Columbia have enacted statutes modeled on the USTA: Alaska, §45.50.910 et. seq.; Arizona, Ari. R.S. § 44-401 et. seq.; Arkansas, Ark. C.A. § 4-75-601 et. seq.; California, Cal. Civ. Code § 3426 et. seq.; Colorado, Colo. R.S. § 7-74-101 et. seq.; Connecticut, Conn. G.S. §35-50 et. seq.; Delaware, Del. C. § 2001 et. seq.; Florida, Fla. S. §688.001 et. seq.; Georgia, Ga. C.A. §10-1-760 et. seq.; Hawaii, Haw. R.S. § 482B-1 et. seq.; Idaho, 1981 Idaho C. § 48-801 et. seq.; Illinois, 765 ILCS § 1065/1 et. seq.; Indiana, Ind. C. § 24-2-3-1 et. seq.; Iowa, 90 Acts, ch 1201 § 550.1 et. seq.; Kansas, K.S.A. § 60-3320 et. seq.; Kentucky, Ky. R.S. § 365.880 et. seq.; Louisiana, La. R.S.A. § 51:1431 et. seq.; Maine, Me. R.S.A. § 1541 et. seq.; Maryland, Md. Comm.L. § 11-1201 et. seq.; Michigan, MCL 445.1901 et. seq. (MSA §19.901 et. seq.); Minnesota, M.S.A. § 325C.01 et. seq.; Missouri, Mo. Rev. Stat. Sec. 417.450 et. seq.; Mississippi, M.C.A. § 75-26-1 et. seq.; Montana, Mont. C.A. § 30-14-401 et. seq.; Nebraska, Neb. R.S. § 87-501 et. seq.; Nevada, Nev. R.S.A. § 600A.010 et. seq.; New Hampshire, N.H. R.S.A. § 350-B:1 et. seq.; New Mexico, N.M. S.A. § 57-3A-1 et. seq.; North Carolina, N.C. G.S. § 66-152 et. seq.; North Dakota, N.D. Cent. C. § 47-25.1-01 et. seq.; Ohio, R.C. § 1333.61 et. seq.; Oklahoma, Okl. S.A. tit. 78 § 85 et. seq.; Oregon, OR. R.S. § 646.461 et. seq.; Rhode Island, R.I. G.L.A. § 6-41-1 et. seq.; South Carolina, S.C. C.A. § 39-8-1 et. seq.; South Dakota, S.D. Comp. L.A. § 37-29-1 et. seq.; Tennessee, T.C.A. § 47-25-1701-1709; Utah, Utah C.A. § 13-24-1 et. seq.; Vermont, Ch. 143 Section 4601 et. seq.; Virginia, Va. C.A. § 59.1-336 et. seq.; Washington, Wash. R.C.A. § 19.108.010 et. seq.; West Virginia, W. Va. C.A. § 47-22-1 et. seq.; Wisconsin, Wis. S. § 134.90. Meanwhile 5 states use the common law to protect trade secrets: Alabama (Ala. Code § 8-27-1 et. seq.) and Massachusetts (Mass. G.L.A. ch. 93 § 42 et. seq.) use neither the common law nor the USTA as the basis of their state statute.

⁵⁵ JOHN LOCKE, *THE SECOND TREATISE OF GOVT., IN TWO TREATISES OF GOVT.* 5 §26(P. Laslett ed. 1967) (4th ed. 1713).

⁵⁶ *Id.*

protect the equally valid claims of another who has rights in the same.⁵⁷ Locke's theory helped to establish a culture of individual ownership of labor skills within the United States.

Likewise, Jeremy Bentham stated that "the idea of property consists in an established expectation."⁵⁸ The expectation of a property right in occupational skills is apparent in the United States by the number of listing with employment agencies and classified ads. The expectation of a private ownership in one's own occupational skills is manifested in the number of job posting websites such as Monster.com and other employment website used to allow job seekers an opportunity to sell their skills to willing employers.⁵⁹ Likewise, employers post listings of particular skill sets that correlate to each job they list on employment websites, classified ads, with headhunter organizations and employment agencies.

Case law also supports the premise that occupational skills constitute private property. In *Pittsburgh Cut Wire Co. v. Sufirin*, the Pennsylvania Supreme Court addressed the issue of an employee's use of his employment skills in the context of trade secrets.⁶⁰ Sufirin illustrates the practical use of Locke's theory of skills as property by stating: "A man's aptitude, his skill, his dexterity, his manual and mental ability, and such other subjective knowledge as he obtains while in the course of his employment, are not the property of his employer and the right to use and expand these powers remains his property unless curtailed through some restrictive covenant entered into with the employer."⁶¹ Sufirin's proposition that an employee's occupational skills are his property has been cited numerous by both state and federal courts.⁶² Therefore the Reserve Component personnel should be able to rely upon the same.

⁵⁷ Id. at 5 § 27.

⁵⁸ JEREMY BENTHAM, *PRINCIPLES OF THE CIVIL CODE, OBJECTS OF THE CIVIL LAW*, Ch 8.

⁵⁹ Monster.com is an internet employment hub on which subscribers to its service list their occupational skills and employers post jobs requiring specific skill sets and have access to the posted resumes of subscribers.

⁶⁰ *Pittsburgh Cut Wire Co. v. Sufirin*, 350 Pa. 31, 35 (1944), see also Williston on Contracts, § 1646, p. 4627.

⁶¹ *Sufirin*, 350 Pa. 31, 35 (1944).

⁶² [Official Aviation Guide Co. v. American Aviation Associates](#), 150 F.2d 173, C.A.7.Ill.,1945 (Knowledge confidentially gained in course of employment may be made subject of restrictive agreement, but employer cannot prevent employee from using his skill and intelligence acquired through experience received in course of the employment and employee may achieve superiority by every lawful means and, upon rightful termination of his contract, may use that superiority for benefit of rivals in business of his former employer); [Safeway Stores v. Wilcox](#), 220 F.2d 661, C.A.10.N.M.,1955 (An employee leaving employment ordinarily has right to engage in business for himself in competition with former employer, in absence of contrary agreement, and may use in such business skill acquired, knowledge obtained and all information received in former employment so long as he takes no property of employer, such as trade secrets); [Hahn & Clay v. A. O. Smith Corp.](#), 320 F.2d 166, C.A.5.Tex.,1963 (Legal protection afforded trade secrets does not preclude utilization of skills acquired, or proficiencies developed, while working for former employer); [Syntex Ophthalmics, Inc. v. Novicky](#), 745 F.2d 1423, C.A.Fed.,1984 (Employee can always take with him at the termination of his employment the general skills and knowledge acquired while working for an employer); [CVD, Inc. v. Raytheon Co.](#), 769 F.2d 842, C.A.1.Mass.,1985 (Employee upon terminating his employment may carry away and use general skill or knowledge acquired during course of employment, thus effectuating public interest in labor mobility, promoting employee's freedom to practice a profession, and promoting freedom of competition); [Abetter Trucking Co. v. Arizpe](#), 113 S.W.3d 503, Tex.App.Houston.1.Dist.,2003 (An employee may use his general knowledge, skill, and experience acquired in the former employment to compete); [Witty v. McNeal Agency, Inc.](#), 521 S.E.2d 619, Ga.App.,1999 (Upon terminating employment, an employee has the right to take with him all the knowledge he obtained so long as no property of the employer is taken); [Ram Products Co., Inc. v. Chauncey](#), 967 F.Supp. 1071, N.D.Ind.South.Bend.Div.,1997 (Under Michigan law, general knowledge, skill, or facility acquired through training or experience while working for employer appertain exclusively to employee, and that knowledge or skill can be utilized by employee after terminating employment); [National Risk Management, Inc. v. Bramwell](#), 819 F.Supp. 417, E.D.Pa.,1993 (Employee's aptitude, skill, dexterity, manual and mental ability, and such other subjective knowledge as he obtains in course of employment are not property of his employer, and right to use powers remains his property unless

A Reserve Component member called to active duty solely for the use of his/her civilian occupational skills has suffered the taking of private property for public use without just compensation. In using the Dana/Merrill definition of private property for a takings case, the member's occupational skills constitute private property. The member's occupational skill is a discrete asset in which the member enjoys the right to use, donate, sell, and exercise complete dominion over. The member also has the right and the ability to exclude all others from those skills. The member exercises that right in his/her choice of whether to use the skill or to withhold the right to use the skill thereby excluding the world from the benefits of that asset. Finally, the member's occupational skills are exchangeable on a stand-alone basis. The member exercises the right to exchange that skill in the market place by determining the circumstances whereby he/she will authorize access to those skills. In accordance with the Dana/Merrill definition, the reserve member's civilian occupational skill constitutes private property in a takings case. In addition to the Dana/Merrill definition, case law supports the conclusion that occupational skills are property.⁶³

Public Use

Since 1923, the Court has deferred to the legislative branch to define public use.⁶⁴ In 1954, the Supreme Court addressed the District of Columbia Redevelopment Act of 1945, enacted by Congress as the legislative body for the District of Columbia, to eliminate slums within the nation's capital.⁶⁵ The Act allowed the District of Columbia to condemn lands classified as slums, to lease or sell excess condemned lands not specifically required by the government's redevelopment structures. In *Berman v. Parker*, the Court stated that Congress' determination of public use would receive great deference as "well-nigh conclusive" of a public interest in condemnation.⁶⁶ While *Berman* dealt with the government's taking of private property some of which was later leased or sold to private actors for redevelopment,⁶⁷ Nearly all courts require that the taking entity provide some measure of public benefit in order to meet the public use requirement.⁶⁸

The Reserve Component Civilian Occupation Information Report requiring National Guardsmen and Reservist to provide pertinent information about their civilian employment was created by Congressional legislation for implementation in 2004.⁶⁹ Other Congressional legislation provides additional support for the maintenance of civilian skills information within a Guardsmen's personnel record.⁷⁰ Additionally, Congress has provided the military services with legislation that authorizes each service to call reserve component personnel to active duty in a

curtailed through some restrictive covenant entered into employer.); [Smith Oil Corp. v. Viking Chemical Co.](#), 468 N.E.2d 797, Ill.App.2.Dist.,1984 (As a general rule, right of individual to follow and pursue particular occupation for which he is best trained is a fundamental right and one who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience).

⁶³ Id.

⁶⁴ *Rindge v Los Angeles*, 262 U.S. 700, 709 (1923) [The Court rejected the use by the public test holding "It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use.].

⁶⁵ *Berman v Parker*, 348 U.S. 26 (1954).

⁶⁶ Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest Group Perspective, 3 TEX. REV. L. & POL. 49, 73 (1998), See *Berman* at 348 U.S. 26 (1954).

⁶⁷ *Berman* at 29-31.

⁶⁸ DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS, p. 196, Foundation Press (2002).

⁶⁹ See *supra* n. 8.

⁷⁰ See 10 U.S.C. §10204, 38 U.S.C. § 4333.

variety of capacities.⁷¹ Whether using the standard found in Berman which states that if Congress has acted in that arena then there is a public interest and or use. That is evident when Congressional legislation is used to call reserve component personnel to active duty for the use of their civilian occupational skills in defense of the United States. Furthermore, the current standard of public use requires only some public benefit be provided is met by service to the nation's defense. Therefore, when a Reserve Component member is called to active duty to utilize his/her civilian occupation skills not created or cultivated by the military there is a taking for public use.

Just Compensation

Federal case law, the Constitution and U.S. statutes require federal agencies to provide just compensation to owners of private property which has been condemned for public use. Just compensation was not always required by law in the United States.⁷² The purpose of this requirement is twofold: (1) to place the owner of the condemned property in the same pecuniary position as if the property had not been taken, (2) provide a more appropriate means is to spread the burden and cost of service from the narrow class of people, reservists and guardsmen, to society at large. The traditional standard for just compensation is the fair market value (FMV), measured by the market value of the property at the time of taking which equates to the required just compensation. The fair market value standard is limited to those situations in which a "market," as compared to a single prospective purchaser, exists for the property.⁷³ Under the FMV standard, the property owner is entitled to receive what a willing buyer would pay and a willing seller would accept, at the time of the taking.⁷⁴

IV. ADVERSE USE OF CIVILIAN EMPLOYMENT DATA

The DoD has long sought to gain information about the civilian job skills of its Reserve Component members. In the past, Reserve Component members have been reluctant to report their occupational skills for fear that they would be called to active duty to perform their civilian occupation.⁷⁵ Additionally, reservists may be reluctant to provide information concerning their occupational skill because of the disparity in pay associated with their military grade versus their civilian salary and benefits. Likewise, local unit commanders have also been reluctant to encourage their subordinates to report critical civilian occupational skills due to concern about the individual's possible activation to active duty and the attendant negative impact that it is likely to have on a unit.⁷⁶

⁷¹ Active Duty Special Work (ADSW) is a program used to identify reservists with special skills to perform active duty. UCMJ days allows services to recall reserve component personnel to active duty to answer charges of misconduct while previously on active duty. Partnership for Fiscal Integrity (PFI) uses reserve component personnel on a fee for service basis supporting DoD Working Capital Activities, PFI reservists utilize either their civilian and/or military skills.

⁷² See William Michael Treanor, The Origins and the Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 701 (1985), Vermont and Massachusetts legislatures and the Northwest Ordinance in 1777, 1780 and 1787 respectively, began requiring government to provide just compensation for a governmental taking of private property.

⁷³ Ann E. Gergen, Why Fair Market Value Fails As Just Compensation, 14 HAMLINE J. PUB. L. & POL'Y, 181, 193 (1993).

⁷⁴ Michael Debow, Unjust Compensation: The Continuing Need For Reform, 46 S.C. L. REV. 579, 580 (1995).

⁷⁵ RESERVE COMPONENT CIVILIAN OCCUPATION INFORMATION FINAL REPORT, p. 34, December 2002.

⁷⁶ Id.

The use of the CEI data for the purpose of activating Reserve Component personnel for their civilian skills is adverse to the stated purpose of the program.⁷⁷ As stated above, the data is to be used to inform the employer of the employee's rights, to allow for a balanced accession, use and discharge of Reserve Component personnel. The need for soldiers with hard to grow civilian occupation skills has increased as the accession of new troops decreases.⁷⁸

V. COMPENSATION MODEL FOR TAKINGS

In accordance with the United States, property owners are compensated with the fair value of their property that is taken in pursuit of a public purpose.⁷⁹ In *Armstrong v. United States*, the Supreme Court held that the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which should be borne by the public as a whole.⁸⁰

a. Traditional Approach (FMV)

The traditional method of used by governments to compensate private property owners for property by eminent domain is to determine the fair market value of the property at the time of taking. In the typical real property condemnation case, one of three methods is used to determine the fair market value:

- (1) The Comparable Sales method uses the sales price of properties which are comparable in size, location and time to reach a market value for the subject property;
- (2) The Replacement Cost method applies the present cost to construct a comparable structure less depreciation estimated; and
- (3) The Income Capitalization method projects the income property will generate over a reasonably foreseeable future based on the property's past history of income generation, discounting that amount to its present value.⁸¹ Courts use these methods in an attempt to provide the of the subject property owner with adequate compensation while limiting the government's liability for the taking. Balancing the government's desire to pay less and the property owner's desire to be fully compensated often leads to under compensation.

A shortcoming of the traditional method is that it may not provide for full compensation and thereby causing the property owner to bear some of the cost of having his property taken, particularly, the consequential damages arising from the condemnation. As a result, the owner is not put in the same pecuniary position he would have been in if the property had not been taken.

b. Modern approach

In an attempt to comply with the twofold requirement for just compensation, a modification of the traditional compensation method is in order. In order to fully compensate the affected property owner, not only must the fair market value of the property be tendered but all value associated with ownership must be compensated. Therefore, the primary focus should be on assessing the direct value of the property itself then, careful consideration must be given for consequential damages that are reasonably foreseeable and directly associated with the condemnation. By addressing each compensable aspect of property ownership society insures

⁷⁷ *Id.* supra n. 19.

⁷⁸ Eric Schmitt, *After Lowering Goal, Army Falls Short on May Recruits*, N.Y. TIMES, June 8, 2005, at A9.

⁷⁹ U.S. Const. amend. V.

⁸⁰ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁸¹ Michael Debow, *Unjust Compensation: The Continuing Need For Reform*, 46 S.C. L. REV. 579, 582 (1995).

that it bears the entire burden of the taking and puts the owner in the same pecuniary position he would be in had the property not been taken.

VI. RECOMMENDED SOLUTIONS

a. Just Compensation – Full Compensation

Full compensation for Reserve Component personnel activated solely for their civilian occupational skills is necessary to insure the member is in the same pecuniary position he would be in had he not been activated for those skills. In order to achieve full compensation the member's military must be increased to meet the level of his/her civilian compensation. In the case of self – employed members, in addition to salary leveling, an insurance policy protecting against business interruption losses should be included to achieve full compensation.

b. Insurance (similar to SGLI/VGLI)

The government offers an insurance instrument to serve U.S. service members and their families known as the Servicemembers' Group Life Insurance (SGLI).⁸² The program provides death benefits for members and their families. As a means of balancing the need to fully compensate Reserve Component personnel who have been activated solely for their civilian skills and limit the government's liability, an eminent domain insurance program could be created to protect those specifically targeted individuals. The program would provide those members with the requisite monthly income to equate his military pay to his civilian compensation. The policy should provide the money to replace lost employer matching funds in the member's retirement account if applicable. Additionally, the policy should compensate the member for the value of premiums paid to maintain his/her civilian health insurance during the period of military service activation. Self-employed members may require a business interruption insurance protection as well. The premiums for the business interruption should be shared between the member and DoD. Premiums for the other policies should be borne solely by the DoD to insure that the member is fully compensated, not having to bear any of the financial burden of the taking, thereby putting the member in the same pecuniary position he/she would have been in had the taking not occurred.

Since the DoD already maintains records of those members with critical, hard to grow civilian skills, determining who needs coverage will not be difficult. The member is mandated by law to maintain accurate data in the CEI portion of his/her personnel file.⁸³ Additionally, the DoD and the member complete a mandatory annual review of those needs, allowing for the retraction of coverage if the critical skill is no longer needed or an extension of coverage for those members with critical, high demand skills.

VII. CONCLUSION

As a result of the fall of Communism and the subsequent War on Terrorism, the US military has begun a dramatic transformation of its forces. In order to facilitate that transformation, Reserve Component personnel will continue to play a greater role in the Total Force, individually and collectively. To locate individual Guardsmen and Reservists with civilian occupational skills that a combatant commander may require, the CEI data provides a ready resource to pinpoint those targeted individuals. When the targeted Guardsman or Reservist is

⁸² SGLI is a program of low cost group life insurance for servicemembers on active duty, ready reservists, members of the Commissioned Corps of the National Oceanic and Atmospheric Administration and the Public Health Service, cadets and midshipmen of the four service academies, and members of the Reserve Officer Training Corps.

⁸³ Id. at supra n. 11.

mobilized specifically for the use his civilian occupational skill, wholly unrelated to his military skills, the government has instituted a taking.

The private property, the civilian occupational skill, is taken for public use, military application, without just compensation, military pay substituted for higher paying civilian salary and benefits. Although the traditional remedy for taking is “just compensation,” this will not make the plaintiff whole unless market value includes a number of factors traditionally eliminated from the compensation equation. As a result, newer and more flexible remedy must be used to truly compensation the plaintiff for the loss suffered and the value received by the government.