

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Reserve Component Note

Professional Liability Protection for Attorneys Ordered to Active Duty

Section 592 of the Soldiers' and Sailors' Civil Relief Act (SSCRA)¹ provides professional liability protection for certain persons ordered to active duty (other than for training). Specifically, it allows for suspension and subsequent reinstatement of existing professional liability insurance coverage for designated professionals serving on active duty.

The Secretary of Defense recently designated legal services provided by civilian lawyers as professional services under Section 592 for purposes of the Kosovo operation. Therefore, reserve component (RC) judge advocates (JAs) called to active duty under 10 U.S.C. § 12301(d) or § 12304 in support of the Kosovo operation, who provide professional legal services in their civilian occupation, shall be afforded professional liability insurance protection on the same basis as health care providers under 50 U.S.C. app 592.² Consequently, RC JAs called to active duty in support of the Kosovo operation *may* request their professional liability insurance carrier suspend the premiums owed on the policy.

Reserve component JAs will recognize that this protection does not create immunity. Indeed, attorneys inclined to take advantage of the premium waiver provision should proceed very cautiously and review their insurance policy. Many policies contain provisions that suggest that if the coverage were suspended during a period of active duty, the claim would not be covered although it might have occurred during a period when the coverage was in effect. The result—the RC JA would be without liability protection if he did not keep the policy in force during the entire period of active duty. Moreover, the exact meaning of “*failure to take any action in a professional capacity*”³ is unclear.

In the health professional context, Section 592 provides in part:

A professional liability insurance carrier shall not be liable with respect to any claim that is based on professional conduct (including any failure to take any action in a professional capacity) of a person that occurs during a period of suspension of that person's professional liability insurance under this subsection. *For the purposes of the preceding sentence, a claim based upon the failure of a professional to make adequate provision for patients to be cared for during the period of the professional's active duty service shall be considered to be based on an action or failure to take action before the beginning of the period of suspension of professional liability insurance under this subsection, except in a case in which professional services were provided after the date of the beginning of such period.*⁴

Any RC JA taking advantage of the premium waiver should notify clients, arrange for other counsel, and/or take other prudent actions to ensure that clients' matters are properly handled during the RC JA's unavailability. Reserve component JAs must recognize that they remain potentially liable even with these efforts, particularly when the “failure to act” as applied to legal professionals is undefined in the SSCRA. Accordingly, RC JAs may do better for themselves financially by negotiating reduced malpractice protection coverage or limiting coverage to the failure to act protection.

Sole practitioners may find the outline on JAGCNet, Legal Assistance database useful if deploying.⁵ The SSCRA, Section 592, is also on JAGCNet.⁶

*Army Regulation 27-1*⁷ requires RC JAs ordered to active duty for more than thirty days to obtain prior written approval from The Judge Advocate General before engaging in the private practice of law.⁸ The Office of Secretary of Defense documents announcing the Secretary's determination are also on

1. 50 U.S.C.A. §§ 501-593 (West 1999).

2. Under Section 592, a professional liability insurance carrier shall not be liable with respect to any claim that is based on professional conduct (including any failure to take any action in a professional capacity) of a person that occurs during a period of suspension of that person's professional liability insurance.

3. 50 U.S.C.A. § 592(b)(3).

4. *Id.* § 592(b)(3) (emphasis added).

5. See *JAGCNet* (last modified July 19, 1999) <<http://www.jagcnet.army.mil/JAGCNET/LALAW1.nsf/>> (key word: Law Practice).

6. *Id.* (keyword: SSCRA).

7. U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES, para. 4-3c (3 Feb. 1995) [hereinafter AR 27-1].

JAGCNet.⁹ Colonel Hancock, Lieutenant Colonel Conrad, and Major Jones.

Professional Responsibility Note-Legal Assistance

E-mail and Confidential Information

For the reasons discussed below, judge advocates who form individual attorney client relationships (that is, legal assistance and trial defense attorneys) as a matter of practice may want to obtain their client's consent to the use of e-mail as a communication medium at the beginning of the attorney client relationship.

E-mail is quickly becoming a standard method of communication. More and more lawyers use e-mail as a means of communicating with other lawyers and clients. While judge advocates should use technological advances, they should consider the obligation to maintain client confidentiality when making the decision whether to use e-mail to convey client information. Initially, some jurisdictions severely restricted an attorney's use of e-mail to convey client confidential information.¹⁰ Lately, the restrictions have lessened.¹¹ Nonetheless, attorneys must weigh the use of e-mail, or any means of communication, against the interest in maintaining client confidentiality.

To determine one's duty regarding client confidentiality and the use of e-mail, one should use the following analyses. First, is the information to be conveyed "confidential" within the meaning of Rule 1.6?¹² Second, if the information is confidential, what is the attorney's duty to maintain the confidentiality of the information; that is, to what lengths must the attorney go to ensure the information is not improperly disclosed? Third, given that duty, may the attorney convey the information using e-mail?

Army Rule of Professional Responsibility 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation,

except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(d) An Army lawyer may reveal such information when required or authorized to do so by law.

The first step is determining what information is confidential. Interestingly, Rule 1.6 does not use the term "confidential." The rule uses the phrase "shall not reveal." Thus, confidential client information is information that the lawyer must not reveal or disclose, except as permitted by the rule. The rule does not specifically define information as "confidential" or "non-confidential." Rather, the rule begins with the premise that no "information relating to the representation of a client shall be revealed." Thus, all information relating to the representation is confidential information.¹³

All client information is confidential information, however, it need not all remain confidential. The rule carves out one category of client information that must be revealed and four cat-

8. Requests should be submitted to Office of The Judge Advocate General, Chief, Personnel, Plans, and Training Office, 1777 North Kent Street, Suite 10100, Rosslyn, Va. 22209-2194.

9. See *JAGCNet*, *supra* note 5 (keyword: Kosovo).

10. See Tenn. Bd. of Prof. Resp. Advisory Op. 98-A-650 (1998) [hereinafter Tenn. Op. 98-A-650] (requiring encryption or client consent); Iowa Bar Ass'n Op. 96-01 (1996) [hereinafter Iowa Op. 96-01] (requiring encryption); Pa. Bar Ass'n Comm. on Legal Ethics Op. 97-130 (1997) (requiring client consent); Ariz. St. Bar Advisory Op. 97-04 (1997); N.C. St. Bar Op. 215 (1995) (cautioning against using e-mail).

11. See ABA Comm. on Ethics and Prof. Resp. Op. 99-413 (1999); Alaska Bar Ass'n Op. 98-2 (1998); D.C. Bar Op. 281 (1998) (individual circumstances may require heightened security or use of other form of communication); Iowa Bar Ass'n Op. 97-01 (1997) (encryption not required but client consent is); Ky. Bar Ass'n Ethics Comm. Advisory Op. E-403 (1998); N.D. St. Bar Ass'n Ethics Comm. Op. 97-09 (1997); S.D. St. Bar Ethics Op. 97-08 (1997); Tenn. Bd. of Prof. Resp. Advisory Op. 98-A-650(a) (1998).

12. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.6 (1 May 1992) [hereinafter AR 27-26].

egories that may be revealed.¹⁴ First, a lawyer must reveal information to prevent the client from committing certain criminal acts.¹⁵ Second, a lawyer may reveal information that the client specifically permits the lawyer to disclose. Third, a lawyer may disclose information he believes that he should reveal to advance the representation of the client, unless specifically prohibited by the client. Fourth, a lawyer may reveal client information to defend himself in transactions arising out of the representation. Fifth, a lawyer may reveal information as required or authorized by law. If the information fits into one of these categories, the method of communicating the information does not matter.

The next issue is what must a lawyer do to prevent unauthorized disclosure. Reasonableness, as in so many things, is the watchword. A lawyer has a duty to take reasonable steps to protect client information.¹⁶ Closely linked to this concept is the evidentiary concept of a reasonable expectation of privacy. A lawyer may use a means of communication in which he has a reasonable expectation of privacy.¹⁷

A lawyer's reasonable expectation of privacy is inextricably linked to our common experiences of privacy in older forms of communication and our understanding of how each works.¹⁸ Some of the earlier opinions that limited the use of e-mail were based on an incomplete understanding of e-mail and the perception that (1) e-mail is easier to intercept than other means of communication and (2) those who are in a position to intercept e-mail are more likely to do so than those who are in a position to intercept other forms of communication.¹⁹

More recent opinions reflect a better understanding of the mechanics of e-mail and the realization that those with access to others' e-mail are under the same legal constraints as those with access to others' telephone conversations, facsimile transmissions, and mail.²⁰ Some states permit virtually uninhibited use of e-mail to convey confidential information finding that persons do have a reasonable expectation of privacy in e-mail.²¹ Others states require consent from a client or require that the lawyer balance the sensitivity of the information with the risk of disclosure inherent in the form of communication.²²

Missing from all of the opinions on the topic thus far is the unique setting of government e-mail systems. Early opinions were that systems operators and others had unlimited access to e-mail, and these operators could and would intercept e-mail at will. Research, consideration, and changes in statutes, have brought most commentators to the point of view that systems operators and others do not have unfettered access to a person's e-mail. Systems operators have access to e-mail for particular reasons under statute, but their access to e-mail is no more than that which telephone operators or couriers have to those forms of communication. Unfortunately, government e-mail systems administrators do not operate under the same rules and e-mail users probably do not have the same level of expectation of privacy.

By using government e-mail, users consent to its monitoring.²³ Having consented to its monitoring, a user likely has a reduced expectation of privacy. Granted, the sheer volume of e-mail makes it unlikely that a systems operator will pick-out

13. *Id.* ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."). See also ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.1 ("'[C]onfidential client information' denotes 'information relating to the representation of a client' . . .")

14. The ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) has proposed substantial changes to Model Rule 1.6 that would expand the situations in which a lawyer may reveal otherwise confidential information. Model Rule of Prof. Conduct 1.6 (ABA Ethics 2000 Proposed Draft Changes, Mar. 23, 1999) available at <<http://www.abanet.org/cpr/e2k/drafrules.html>>. The rule, if amended, would permit lawyers to reveal information "to prevent reasonably certain death or substantial bodily harm" without regard to criminal activity. The committee suggested allowing lawyers to reveal information to prevent "a crime or fraud that is likely to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services" or to rectify such injury. Lastly, the committee recommended adding an exception to state the current practice of allowing a lawyer to discuss confidential information to obtain guidance on ethical issues.

15. The mandatory nature of this exception is often in conflict with State rules. For example, ABA Model Rule of Prof. Conduct 1.6(b)(1) states that a lawyer "may" reveal information to prevent certain crimes.

16. See ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.4.

17. *Id.* n.6.

18. See *id.* (providing a concise discussion of these issues).

19. See Iowa Bar Ass'n Op. 97-01 (1997); Tenn. Bd. of Prof. Resp. Advisory Op. 98-A-650(a) (1998).

20. See ABA Comm. on Ethics and Prof. Resp. Op. 99-413.

21. See *United States v. Maxwell*, 42 M.J. 568, 576 (A.F. Ct. App.), *aff'd in part and rev'd in part*, 45 M.J. 406 (1996) (one has a reasonable expectation of privacy in e-mail through an on-line service provider) (cited in ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.18).

22. ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.40.

23. Joint Ethics Regulation 2-301a(3), (4).

the one piece of e-mail that you wish to remain confidential, yet the risk exists.

Although judge advocates are not regulated on use of e-mail with client information, the best advice for judge advocates is to follow the caution in a New York ethics opinion:

[L]awyers must always act reasonably in choosing to use e-mail for confidential communications, as with any other means of communication. Thus, in circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinary sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyers control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail. . . . It is also sensible for lawyers to discuss with clients the risks inherent in the use of Internet e-mail and lawyers should abide by the clients wishes as to its use."²⁴

Major Nell, USAR.

Contract and Fiscal Law Note

The Supreme Court "Outfoxes" the Ninth Circuit

The United States Supreme Court rarely grants certiorari in a government contract case. Yet, in *Department of the Army v. Blue Fox, Inc.*,²⁵ the Court granted certiorari in a government contract case to determine whether the Administrative Procedures Act (APA)²⁶ waives the government's sovereign immunity from suits to enforce equitable liens.²⁷ In a unanimous decision, the Court reversed a Ninth Circuit decision that improperly held that the APA compelled it to allow an unpaid subcontractor to sue the United States Army to enforce an equitable lien.²⁸ In so doing, the Court reinforced the "long settled rule" that a waiver of sovereign immunity must be "unequivocally expressed" and strictly construed.²⁹

Background

The facts of the case are very straightforward.³⁰ The Army awarded a contract to the United States Small Business Administration (SBA) in September 1993, to install and to test a telephone switching system at the Army Depot in Umatilla, Oregon. The SBA then subcontracted with Verdan Technology, Inc. (Verdan), pursuant to Section 8(a) of the Small Business Act.³¹

Among other things, the contract required Verdan to construct a facility to house the telephone switching system. However, Verdan chose not to perform this work itself. Instead, Verdan chose to subcontract this work to Blue Fox, Inc., at a cost of \$186,347.80.³²

Blue Fox did not know until after it had completed the subcontract that Verdan's contract did not require it to furnish a payment bond. The Miller Act normally requires a contractor to provide such a bond for construction contracts,³³ but the

24. N.Y. ST. BAR ASS'N COMM. ON PROF. ETHICS OP. 709 (1998).

25. 118 S. Ct. 2365 (1998).

26. 5 U.S.C.A. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (West 1999).

27. An equitable lien is "[a] right, not existing at law, to have specific property applied in whole or in part to payment of a particular debt or class of debts." A court of equity can declare such a lien "out of general considerations of right and justice as applied to relations of the parties and circumstances of their dealings." BLACK'S LAW DICTIONARY 539 (6th ed. 1990).

28. *Department of the Army v. Blue Fox, Inc.*, 119 S. Ct. 687 (1999).

29. *Id.* at 688.

30. See generally *Blue Fox, Inc. v. United States Small Bus. Admin.*, 121 F.3d 1357 (9th Cir. 1997) (reversing *Blue Fox, Inc. v. United States Small Bus. Admin.*, 1996 U.S. Dist. LEXIS 8264 (D. Or. May 24, 1996)).

31. 15 U.S.C.A. § 637(a) (West 1998). This provision and its implementing regulations establish a business development program for small disadvantaged firms. The underlying purpose of the "8(a)" program is to assist small businesses owned and controlled by socially and economically disadvantaged individuals. 13 C.F.R. § 124.1(a) (1998).

32. *Blue Fox*, 121 F.3d at 1359-60.

Army had decided to treat Verdan's contract as a service contract. Consequently, the Army had amended the original solicitation and deleted the bond requirements.³⁴

Verdan subsequently failed to pay Blue Fox \$46,586.14 of the \$186,374.80 subcontract price. In response, Blue Fox twice notified the Army and the SBA, in writing, that it had not been paid—once on 26 May 1994, and once on 15 June 1994. The Army nevertheless disbursed an additional \$86,132.33 to Verdan between 5 July 1994, and 11 October 1994. Then, on 3 January 1995, the Army terminated Verdan's contract for default because of Verdan's failure to complete the contract on time and Verdan's failure to submit required data items.³⁵

Less than two weeks later, Blue Fox obtained a default judgment against Verdan and its officers in the Tribal Court of the Yakima Indian Nation. Unfortunately, Verdan and its officers were essentially "judgment proof"³⁶ since Verdan was insolvent and the judgment exceeded its officers' net worth. As a result, Blue Fox was not able to collect on the judgment.³⁷

Next, Blue Fox sued the Army and the SBA in the United States District Court for the District of Oregon. Blue Fox sought to obtain an equitable lien against any funds that the

Army or the SBA had retained or any funds available or appropriated to complete the telephone switching system at the Umatilla Army Depot.³⁸

Lower Court Decisions

The United States District Court for the District of Oregon—The parties filed motions for summary judgment, and the district court granted the government's motions.³⁹ With respect to Blue Fox's claim against the Army, the district court concluded that it lacked jurisdiction because neither 28 U.S.C. § 1331,⁴⁰ nor the APA⁴¹ constituted a waiver of sovereign immunity given the facts of the case.⁴² According to the district court, the issue was whether the Miller Act gave Blue Fox a right to recoup the money that Verdan owed to Blue Fox from the Army. The district court concluded that it did not.⁴³ The district court held that the Miller Act neither placed a duty on the government to ensure that Verdan furnished the required payment and performance bonds, nor established privity of contract between the Army and Blue Fox.⁴⁴ Therefore, the APA waiver of sovereign immunity did not apply to Blue Fox's suit against the Army.⁴⁵

33. 40 U.S.C.A. §§ 270a-270f (West 1998). The Miller Act currently requires a contractor to provide performance and payment bonds for construction contracts over \$100,000. 40 U.S.C.A. §§ 270a, 270d-1. However, the threshold before 1994 was \$25,000. See Federal Acquisition Streamlining Act, Pub. L. No. 103-355, § 4104, 108 Stat. 3243, 3341-42 (1994) (striking the phrase "exceeding \$25,000 in amount" from 40 U.S.C. § 270a and adding 40 U.S.C. § 270d-1).

34. *Blue Fox*, 121 F.3d at 1359.

35. *Id.* at 1360. Even though the Army terminated Verdan for reasons unrelated to Verdan's failure to pay Blue Fox, the contracting officer specifically noted in the termination notice that one of the Army's "most severe items of concern" was Verdan's failure to pay Blue Fox. *Id.*

36. The term "judgment proof" is "descriptive of all persons against whom judgments for money recoveries have no effect, for example, persons who are insolvent, who do not have sufficient property within the jurisdiction of the court to satisfy the judgment, or who are protected by statutes which exempt wages or property from execution." BLACK'S LAW DICTIONARY 845 (6th ed. 1990).

37. *Blue Fox*, 121 F.3d at 1360.

38. *Blue Fox, Inc. v. United States Small Bus. Admin.*, 1996 U.S. Dist. LEXIS 8264, at *2 (D. Or. May 24, 1996). After the Army terminated Verdan's contract for default, the Army arranged to complete Verdan's contract by modifying an existing services contract with Dynamic Concepts, Inc. The Army partially funded this modification with the undisbursed balance of Verdan's contract (i.e., \$84,910.52). *Id.*

39. *Id.* at *5. In addition to granting the Army's motion for summary judgment, the district court granted the SBA's motion for summary judgment because the SBA did not have any identifiable property in its possession and control to which an equitable lien could attach. *Id.*

40. This code section provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331 (West 1998).

41. Section 702 of the APA provides that:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee therefore acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C.A. § 702 (West 1998) (emphasis added).

42. *Blue Fox*, 1996 U.S. Dist. LEXIS 8264, at *3-*5.

43. *Id.* at *4.

44. *Id.*

The United States Court of Appeals for the Ninth Circuit—A divided Ninth Circuit reversed based on a three-tiered analysis.⁴⁶ First, the court concluded that the APA waiver of sovereign immunity applied to both statutory and non-statutory requests for specific relief.⁴⁷ Therefore, the Ninth Circuit held that the district court erred in assuming that the APA waiver of sovereign immunity did not apply to Blue Fox's suit against the Army simply because the Miller Act did not give Blue Fox a right to the specific requested relief.⁴⁸

Next, the Ninth Circuit concluded that an equitable lien claim is a "non-damages" claim analogous to a surety's equitable right to subrogation.⁴⁹ Relying on *Henningesen v. United States Fidelity & Guaranty Co.*⁵⁰ and its progeny,⁵¹ the court found that a subcontractor could have an equitable right against the government under certain circumstances.⁵² For example, a

subcontractor could have an equitable right against the government where: (1) the prime contractor did not pay the subcontractor; (2) the government knew that the prime contractor had not paid the subcontractor; and (3) the government failed to either pay the subcontractor directly, or withhold payments from the prime contractor.⁵³ As a result, the Ninth Circuit held that "[s]ince the APA waives immunity for equitable actions, the district court had jurisdiction under the APA."⁵⁴

Finally, the Ninth Circuit held that Blue Fox's equitable lien attached to the undisbursed contract funds as soon as Blue Fox notified the Army that it had not been paid.⁵⁵ According to court, the fact that the Army subsequently paid those funds to Verdan was irrelevant since "[t]he Army cannot escape Blue Fox's equitable lien by wrongly paying out funds to [Verdan] when it had notice of Blue Fox's unpaid claims."⁵⁶

45. *Id.* at *5. In his 1997 article, Major Risch succinctly captured the essence of the district court's analysis:

The district court initially looked to *Bowen v. Massachusetts* and the analysis employed by the United States Supreme Court when determining if a suit seeks money damages and is thus barred. In *Bowen*, the Court held if the damages sought were compensation for a suffered loss, the suit sought money damages. Conversely, if the suit was simply a claim for "the very thing to which the plaintiff was entitled," the suit sought specific relief, not money damages, and sovereign immunity was waived under the APA. Accordingly, the district court's analysis focused on whether Blue Fox was entitled to the unpaid contract funds under the Miller Act.

Upon review of the Miller Act's requirements, the district court determined that Blue Fox was not entitled to reimbursement from the Army for Verdan's failure to pay the subcontractor. The court found that the act "neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract." Since the court interpreted the act as imposing no statutory or contractual obligation on the Army to pay the subcontractor, it held that Blue Fox could not seek specific relief under the act and that Blue Fox's claim was for money damages. Accordingly, the court held that Blue Fox's claim was not cognizable under the APA.

Major Stuart Risch, *Recent Decision: Blue Fox, Inc. v. The United States Small Business Administration and the Department of the Army*, ARMY LAW., Nov. 1997, at 53 (citations omitted).

46. *Blue Fox*, 121 F.3d at 1363. The Ninth Circuit predicated its analysis on the following language in *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) (quoting *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)):

We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, where specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' (citation omitted) Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specific remedy.' (citation omitted) Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms.

Id. at 1361. However, the Ninth Circuit improperly concluded that Blue Fox was only seeking the very thing to which it was entitled. See *Blue Fox*, 119 S. Ct. at 691-92.

47. *Blue Fox*, 121 F.3d at 1361.

48. *Id.*

49. *Id.*

50. 208 U.S. 404 (1908).

51. See, e.g., *Pearlman v. Reliance Ins. Co.*, 371 U.S. 131 (1962); *Aetna Casualty and Surety Co. v. United States*, 71 F.3d 475 (2d Cir. 1995).

52. *Blue Fox*, 121 F.3d at 1362.

53. *Id.* at 1361 (citing *Wright v. United States Postal Service*, 29 F.3d 1426 (9th Cir. 1994)).

54. *Id.*

55. *Id.* at 1362.

56. *Id.*

Supreme Court Decision

In a unanimous decision, the Supreme Court reversed the Ninth Circuit.⁵⁷ In writing for the Court, Chief Justice William H. Rehnquist held that:

Section 702 [of the APA] does not nullify the long settled rule that, unless waived by Congress, sovereign immunity bars creditors from enforcing liens on Government property. Although § 702 [of the Administrative Procedures Act] waives the Government's immunity from actions seeking relief "other than money damages," the waiver must be strictly construed, in terms of its scope, in the sovereign's favor and must be "unequivocally expressed" in the statutory text.⁵⁸

In so doing, Chief Justice Rehnquist and the rest of the Court disagreed with the Ninth Circuit's interpretation of its decision in *Bowen v. Massachusetts*.⁵⁹ The Ninth Circuit had interpreted *Bowen* to mean that the APA waiver provisions applied to all equitable actions.⁶⁰ Yet, the Supreme Court's decision in *Bowen* did not depend on the distinction between equitable and non-equitable actions. The Supreme Court's decision in *Bowen* hinged on the distinction between specific and substitute relief.⁶¹

The Supreme Court then concluded that Blue Fox's equitable lien claim was really a claim for substitute relief because an equitable lien merely gives the claimant a security interest in property that the claimant can use to satisfy an underlying monetary claim—it does not give the claimant "the very thing to which he [is] entitled."⁶² As such, Blue Fox's claim constituted a claim for monetary damages that fell outside the scope of the APA's waiver provisions.⁶³

Finally, the Supreme Court addressed the *Henningsen* line of cases upon which the Ninth Circuit and Blue Fox had relied to support the proposition that subcontractors and suppliers could seek compensation directly from the government.⁶⁴ The Supreme Court noted that none of these cases involved a question of sovereign immunity.⁶⁵ Therefore, the Supreme Court had no difficulty distinguishing these cases and concluding that "[t]hey do not in any way disturb the established rule that, unless waived by Congress, sovereign immunity bars subcontractors and other creditors from enforcing liens on [g]overnment property or funds to recoup their losses."⁶⁶

The Future

Each court involved in the Blue Fox case implicitly or explicitly noted that there is a "gap" in the Miller Act. Quoting the United States Court of Appeals for the Seventh Circuit in *Arvanis v. Noslo Engineering Consultants, Inc.*, the district court stated that: "There does seem to be a gap in the statute; there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement."⁶⁷ Judge Rymer, the Ninth Circuit judge who issued the dissenting opinion in Blue Fox, noted that "[u]nder the Miller Act there is no question the Army should not have approved the Verdant contract without ensuring that there was an adequate surety bond, but its failure to do so is not actionable."⁶⁸ Then, quoting the same case that the district court had quoted, Judge Rymer stated that:

The result is . . . unjust. A subcontractor who fulfills his part of the bargain should not suffer because the prime contractor defaulted, and the government contracting officer had not insisted on compliance with the Miller Act. We agree that there is a practical prob-

57. *Blue Fox*, 119 S. Ct. at 693.

58. *Id.* at 688.

59. *Id.* at 691.

60. *Id.*

61. *Id.*

62. *Id.* at 692.

63. *Id.* at 692.

64. *Id.* at 693.

65. *Id.*

66. *Id.*

67. *Blue Fox, Inc. v. United States Small Bus. Admin.*, 1996 U.S. Dist. LEXIS 8264, at *5 (D. Or. May 24, 1996) (quoting *Arvanis v. Noslo Eng'g Consultants, Inc.*, 739 F.2d 1287, 1288 (7th Cir. 1984)).

68. *Blue Fox*, 121 F.3d at 1364 (Rymer, J., dissenting in part).

lem (how widespread we do not know) that is not addressed by the Miller Act, but that is a problem that can only be addressed, and redressed by Congress.⁶⁹

Finally, the Supreme Court noted that “the Miller Act by its terms only gives subcontractors the right to sue on the surety bond posted by the prime contractor, not the right to recover their losses directly from the [g]overnment.”⁷⁰

Interestingly enough, Congress took preliminary steps to address this “gap” during the 105th Congress. On 12 November 1997, Representative Carolyn Maloney (D-N.Y.) introduced a bill to amend the Miller Act.⁷¹ Among other things, this legislation would permit a subcontractor to sue the government if a contracting officer failed to obtain Miller Act payment bonds and ensure that they remained in effect during the administration of the contract.⁷²

To date, Congress has not acted on Representative Maloney’s original bill. Instead, Representative Maloney recently introduced a new bill that excluded the government liability provision she had originally proposed.⁷³ According to a recent

article, this new legislation “is largely based on a memorandum of understanding signed by representatives of numerous trade organizations,” and it eliminates the “troublesome provisions” of the previous legislation.⁷⁴ However, not all trade organizations objected to the government liability provision in the original bill. Indeed, the Painting and Decorating Contractors of America and the American Subcontractors Association, Inc., strongly supported this provision, arguing that a contracting officer’s failure to ensure that a prime contractor obtains the required Miller Act bonds is the “ultimate abrogation of Congressional intent.”⁷⁵

At this point, it is fair to say that the future of *Blue Fox* is uncertain. If Congress enacts the language Representative Maloney originally proposed, it will effectively overturn the Supreme Court’s specific holding in *Blue Fox*. However, given the opposition to this language⁷⁶ and its absence from Representative Maloney’s new bill, it is unlikely that Congress will include a provision in the Miller Act that waives the government’s sovereign immunity anytime soon. Majors Hehr and Wallace.

69. *Id.* (quoting *Arvanis*, 739 F.2d at 1293).

70. *Blue Fox*, 119 S. Ct. at 692-693.

71. H.R. 3032, 105th Cong. (1997).

72. *Id.* The proposed legislation included the following provision:

(h) ACCOUNTABILITY OF CONTRACTING OFFICERS—The first section of the Miller Act (40 U.S.C. § 270a) is further amended by adding at the end of the following new subsection:

(f)(1) The contracting officer for a contract shall be responsible for –

(a) obtaining from the contractor the payment bond required under subsection (a); and

(b) ensuring that the payment bond remains in effect during the administration of the contract.

(2) In any case in which a person brings suit pursuant to section 2 and the court determines that the required payment bond is not in effect because the contracting officer has failed to perform the responsibilities required by paragraph (1), upon petition of the person who brought the suit the court may authorize such person to bring suit against the United States for the amount that the person would have sued for under section 2.

Id.

73. H.R. 1219, 106th Cong. (1999).

74. *Miller Act: Rep. Maloney Offers Miller Act Reform Bill Backed by Primes, Subcontractors, Sureties*, Fed. Cont. Daily (BNA), March 25, 1999, available in WESTLAW, March 25, 1999 FCD d2.

75. *Prompt Payment of Federal Contractors: Hearings on H.R. 3032 Before the Subcomm. on Gov’t Mgt Info. and Tech. of the House Gov’t Reform and Oversight Comm. and the Subcomm. on Commercial and Admin. Law of the House Judiciary Comm.*, 105th Cong. (1998) (statements of the Painting and Decorating Contractors of America and Robert E. Lee, American Subcontractors Association, Inc.), available in 1998 WESTLAW 18088354 and 1998 WESTLAW 18088356, respectively.

76. *Id.* (statement of Deidre A. Lee, Administrator, Office of Federal Procurement Policy) (stating that “the Administration strongly opposes this provision”), available in 1998 WESTLAW 18088349. See also *id.* (statement of Lynn Schubert, The Surety Association of America) (stating that: “Whether the United States should be liable in such a circumstances . . . is an interesting but academic point [because] the ‘problem’ is so unusual it does not justify legislation), available in 1998 WESTLAW 18088355.

USERRA Note

The 1998 USERRA Amendments⁷⁷

On 10 November 1998, Congress amended the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁷⁸ The amendments, part of the Veterans Programs Enhancement Act of 1998,⁷⁹ made three significant changes to the USERRA. First, Congress provided a specific procedure for state employee Reservists to sue their state government employers for USERRA violations in the name of the United States, through the Attorney General of the United States.⁸⁰ Second, Congress extended the reach of the USERRA to United States citizen-soldiers working in foreign lands for United States owned employers.⁸¹ Third, Congress extended the right of federal employees to have their USERRA claims heard by the Merit Systems Protection Board (MSPB), “without regard as to whether the complaint accrued before, on, or after 13 October 1994 “[the date the USERRA was enacted].⁸² This extension of time for the MSPB to hear complaints allows the Office of Special Counsel to represent federal employees for all USERRA complaints filed with the MSPB on or after 13 October 1994.⁸³

While these amendments have only been in effect since November of 1998, already one of the new provisions has been effectively declared unconstitutional by the United States

Supreme Court in their June 1999 decision, *Alden v. Maine*.⁸⁴ The USERRA empowered state employees to sue their state employers for reemployment rights violations either by filing a complaint with the U.S. Department of Labor, which would be prosecuted by the U.S. Justice Department, or by hiring private counsel and suing in federal district court.⁸⁵

In 1996, the United States Supreme Court ruled in *Seminole Tribe v. State of Florida*⁸⁶ that Congress did not have the authority to waive state sovereign immunity by federal legislation to allow Indian tribes to sue state governments for violations of the Indian Gaming Regulatory Act (IGRA).⁸⁷ The Court further declared, in a 5-4 vote, that Congress may not use its powers under Article I of the U.S. Constitution to authorize private citizen lawsuits against States in federal court.⁸⁸ The Court declared such lawsuits violate the Eleventh Amendment to the United States Constitution.⁸⁹ What does this have to do with the USERRA?

Several states seized upon the *Seminole Tribe* case as a defense to USERRA claims raised by state employees.⁹⁰ In the 1996 case of *Diaz-Gandia v. Dapena-Thompson*,⁹¹ the Commonwealth of Puerto Rico argued that the Reservist-plaintiff could not sue the Commonwealth, since under *Seminole Tribe*⁹² and the Eleventh Amendment,⁹³ the court had no jurisdiction to hear the case.⁹⁴ The Commonwealth claimed that it had not vol-

77. Uniformed Serviced Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (1994), codified at 38 U.S.C.A. §§ 4301-33 (West Supp. 1999), as amended by The Veterans Program Enhancement Act of 1998, Pub. L. No. 105-368, §§ 211-213, 112 Stat. 3325, 3329-3332 (1998).

78. *Id.*

79. The Veterans Program Enhancement Act of 1998, §§ 211-213.

80. *Id.* § 211 (codified at 38 U.S.C.A. § 4323).

81. *Id.* § 212 (codified at 38 U.S.C.A. §§ 4303(3), 4319).

82. *Id.* § 213 (codified at 38 U.S.C.A. § 4324(c)(1)).

83. 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans).

84. *Alden v. Maine*, 119 S. Ct. 2240 (1999) (holding that the states do not have to enforce federal laws which allow money damage suits against state agencies in state courts, as a violation of state sovereign immunity and the Eleventh Amendment).

85. 38 U.S.C.A. § 4323.

86. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

87. *Id.* The Indian Gaming Regulatory Act may be found at 25 U.S.C. § 2702 (1994). This legislation was passed pursuant to the U.S. Constitution, Article I, Section 8, Clause 2 (“Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . .”).

88. *Seminole Tribe*, 517 U.S. at 72-73.

89. *Id.* Chief Justice Rehnquist’s theory is that any part of the Constitution enacted prior to the Eleventh Amendment [Article I] cannot be the basis for abrogating state sovereign immunity, as Congress intended to maintain the state-federal status quo. *Id.* at 65-66.

90. See *Forster v. SAIF Corporation*, 23 F. Supp. 2d 1196 (D. Ore. 1998); *Palmatier v. Michigan Dep’t of State Police*, 981 F. Supp. 529 (W.D. Mich. 1997); *Velasquez v. Frapwell*, 994 F. Supp. 1138 (S.D. Ind. 1998), *aff’d*, 160 F.3d 389 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999). *But see Diaz-Gandia v. Dalpena-Thompson*, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (noting that the Supreme Court’s *Seminole Tribe* holding does not apply to the USERRA state employee lawsuit provision).

91. *Diaz-Gandia*, 90 F.3d at 609.

untarily waived its sovereign immunity and Congress had no authority to waive it, using their Article I War Powers.⁹⁵ The First Circuit soundly rejected the Commonwealth's defense, observing that *Seminole Tribe* dealt with the Indian Commerce Clause of Article I, U.S. Constitution,⁹⁶ and that it "does not control the war powers analysis" under Article I.⁹⁷ However, several other states successfully raised the *Seminole Tribe*-Eleventh Amendment defense to state employee lawsuits.⁹⁸ Congress was alarmed by this turn of events and revised the USERRA to protect the reemployment rights of state employee reservists.⁹⁹

In November 1998, Congress passed Section 211 of the Veterans Programs Enhancement Act to "fix" the state employee remedy against state employers.¹⁰⁰ The legislation amends Section 4323 of the USERRA, by allowing the U.S. Department of

Justice to sue on behalf of state employees in the name of the United States.¹⁰¹ This remedy for state employees relies upon the U.S. Departments of Labor and Justice finding that the complainant's case has legal merit.¹⁰² If so, the Department of Justice sues the state in the name of the United States, avoiding the Eleventh Amendment issue.¹⁰³ Upon recovery of damages, the federal government pays the money won to the reservist.¹⁰⁴

What if the state employee wishes to sue his state employer using private counsel, or the Departments of Justice or Labor find that his suit has no merit? The change in the law indicates that the action "may be brought in a [s]tate court of competent jurisdiction in accordance with the laws of the [s]tate."¹⁰⁵ Can the Reservist still file his case in federal court, hoping to get a favorable ruling against the *Seminole Tribe*-Eleventh Amendment defense, like that obtained in *Diaz-Gandia*? The language

92. *Seminole Tribe*, 517 U.S. at 44.

93. U.S. CONST. amend. XI.

94. *Diaz-Gandia*, 90 F.3d at 616.

95. *Id.* The War Powers are generally found in Article I, the U.S. Constitution, at Section 8, clause 1 ("Congress shall have Power To . . . provide for the common Defence[sic]"); clause 11 (" . . . To declare War . . ."); clause 12 (" . . . To raise and support Armies . . ."); clause 14 ("To make Rules for the Government and Regulation of the land and naval Forces . . ."); clause 15 (" . . . To provide for calling forth the Militia to execute the Laws of the Union . . ."); and clause 16 ("To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .").

96. *See supra* note 87.

97. *Diaz-Gandia*, 90 F.3d at 616 n.9. A strong argument can be made that the U.S. Supreme Court should reverse *Palmatier* and *Velasquez* as an exception to the *Seminole Tribe* sovereign immunity bar. There is a clear line of case law and constitutional history to justify such a result. *See Peel v. Florida Dep't of Transportation*, 600 F.2d 1070 (5th Cir. 1979); *Reopell v. Commonwealth of Massachusetts*, 936 F.2d 12 (1st Cir. 1991). These cases held that the Constitutional War Powers in Article I, U.S. Constitution, were a source of constitutional authority over the States to enforce veterans' reemployment rights. The War Powers were never mentioned or considered as an independent source of federal authority to waive state sovereign immunity by either the majority or dissenters in *Seminole Tribe*. *See Alden v. Maine*, 119 S. Ct. 2240 (1999).

98. *See supra* note 90.

99. H.R. REP. NO. 105-448, at 2-5 (1998) (Committee Report on H.R. 3213, which was incorporated by H.R. RES. 592 into H.R. 4110, §§ 211-213, 105th Cong. (1998) (enacted)). *See also* 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans); *Hearing on Pending Legislative Proposals in the Areas of Education, Training and Employment Before the Subcomm. on Veterans' Affairs*, 105th Cong., 12-13, 92-93 (1997) (Testimony and written statement of Espiridion A. (Al) Borrego, Acting Assistant Secretary Department of Labor Veterans' Employment and Training Service); *Hearing on USERRA, Veterans' Preference in the VA Education Services Draft Discussion Bill Before the Subcomm. on Education, Training, Employment and Housing of the House Comm. on Veterans' Affairs*, 104th Cong. 14-23, 82-90 (1996) (testimony and written statement of Jonathan R. Siegel, Associate Professor of Law, George Washington University Law School) [hereinafter Siegel Testimony].

100. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211, 112 Stat. 3315, 3331 (codified at 38 U.S.C.A. § 4323 (West 1999)).

101. *Id.*

102. 38 U.S.C.A. § 4323(a)(1).

103. *Id.* *See* Siegel Testimony, *supra* note 99. The 5-4 Court majority in *Alden v. Maine*, endorsed the idea of the federal government suing in its name on behalf of state employees against state agencies in federal employment law matters. *Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *32) ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a [s]tate, a control which is absent from a broad delegation to private persons to sue nonconsenting [s]tates.") *Id.* The issue arises whether the U.S. Department of Justice, through the U.S. Attorney Offices, has the manpower and financial resources to adequately prosecute all state employee cases. *Cf.* Joanne C. Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPL RTS. & EMPL POL'Y J. 175, 178-179, 217 (1998); *Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *56-*57) (Souter, J., dissenting). *But see* H.R. REP. 105-448 at 8 (Congressional Budget Office (CBO) indicates very little financial impact on the federal district courts would result from the federal government representing state employees in the name of the United States. The CBO indicated only five cases were filed in federal court in 1997, out of about 1200 claims investigated by DOL-VETS).

104. 38 U.S.C.A. § 4323(d)(2)(B). No regulations currently exist to implement this provision.

105. 38 U.S.C.A. § 4323(b)(2).

of the new amendment is unclear.¹⁰⁶ The amended language states that such an action “may” be brought in state court [emphasis added].¹⁰⁷ The question also remains whether state employees have the authority to seek equitable relief in federal courts under the *Ex Parte Young*¹⁰⁸ exception to the *Seminole Tribe* denial of federal court jurisdiction?¹⁰⁹

The Seventh Circuit reviewed the new USERRA language in *Velasquez v. Frapwell*,¹¹⁰ and rejected a plaintiff’s argument that the amended language does not repeal general federal question jurisdiction of the federal courts¹¹¹ to hear a USERRA case for a state employee.¹¹² The Seventh Circuit’s reasoning in *Velasquez* is disturbing. Nowhere in the legislative history of the amended provision did Congress indicate that it wished to limit state employee lawsuits to state courts.¹¹³ State employees not represented by the Department of Justice or rejected for representation would not get the same access to the federal courts as USERRA plaintiffs suing private employers or local govern-

ment employers.¹¹⁴ Congress never intended that state employees receive less protection from reserve status employment discrimination and unequal reemployment remedies compared to private industry or local government employees.¹¹⁵

What can a state employee plaintiff expect if he does sue in state court under the amended USERRA? A state employee plaintiff will face a “common law” state sovereign immunity defense. At common law, state governments are not subject to suit by their citizens without their consent or waiver of sovereign immunity.¹¹⁶ Would the U.S. Supreme Court reverse a dismissal of a state court claim asserting USERRA rights, based upon a common law sovereign immunity defense? The answer is probably no.

The 5-4 Supreme Court majority in *Alden v. Maine* held that the states do not have to entertain federal law based state employee damage suits filed against them in their state

106. Section 4323(b)(1) allows that “an action against a [s]tate (as employer) . . . commenced by the United States . . . shall” be brought in federal district court [emphasis added]. Section 4323(b)(2) provides that a cause of action “may” be brought against a [s]tate (as employer) by a person, “in a [s]tate court of competent jurisdiction in accordance with the laws of the [s]tate” [emphasis added]. Section 4323(b)(3) provides that federal district courts “shall” have jurisdiction over a USERRA suit brought by a person against their private employer [emphasis added]. The use of the word “may” connotes that a state employee has permission to use state courts to sue on USERRA grounds, but that it is not the sole forum for USERRA lawsuits. “In construction of statutes . . . , the word “may” as opposed to “shall” is indicative of discretion or choice between two or more alternatives, but context in which the word appears must be controlling factor.” *United States v. Cook*, 432 F.2d 1093, 1098 (7th Cir. 1970), *BLACK’S LAW DICTIONARY* 979 (6th ed. 1990). Congress did not make clear that federal district courts now lack jurisdiction over state employee USERRA cases. *But see Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1999) (holding that the 1998 amendments to Section 4323 “confer only on state courts jurisdiction over suits against a state employer,” finding Congress’s intent to so limit state employee USERRA lawsuits as “unmistakable”). The Seventh Circuit did not explain the basis for their conclusion. The legislative history of the amendment does not indicate that Congress intended to bar state employees from using the federal courts to resolve USERRA issues. *See supra* note 99.

107. *Id.*

108. 209 U.S. 123 (1908) (noting that an individual may sue a state official for injunctive relief in federal court to remedy a state officer’s violation of federal law.). *See Seminole Tribe*, 517 U.S. at 71, n.14, 72, n.16. The Court further suggested that where an extensive federal administrative remedial scheme is provided for the enforcement against a state of a federal statutory right, that an individual may not rely on the *Ex Parte Young* doctrine. *Id.* at 74. The USERRA does not have a detailed remedial scheme compared to the IGRA in *Seminole Tribe*, therefore USERRA state employee plaintiffs are not precluded from relying on the *Ex Parte Young* doctrine to get into federal court for equitable prospective relief. *See also* Brant, *supra* note 103, at 203-208; Gregg A. Rubenstein, Note, *The Eleventh Amendment, Federal Employment Laws and State Employees: Rights Without Remedies?* 78 B.U.L. REV. 621, 647-650 (1998).

109. 38 U.S.C.A. § 4323(e) (West 1999) states in part: “(e) Equity Powers. The court may use its full equity powers . . . to vindicate fully the rights or benefits of persons under this chapter.”

110. *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999).

111. 28 U.S.C.A. § 1331 (1998).

112. *Id.*

113. *See supra* note 99 and the accompanying text.

114. Congress in passing the 1998 amendments to USERRA explicitly provided for the broadest coverage of reservists, including those living and working overseas, and those federal employees who had claims that arose prior to USERRA’s passage in 1994. It is inconsistent for the Seventh Circuit in *Velasquez* to read the intent of Congress so narrowly as to preclude state employee Reservist USERRA claim access to the federal courts. In *Palmatier v. Michigan Dep’t of State Police*, 1999 Dist. LEXIS 5258 (W.D. Mich. 26 Mar. 1999), the federal district judge declined to follow the 7th Circuit in *Velasquez*. The Michigan federal judge found that the plaintiff did have jurisdiction to have his state employee USERRA case heard in federal court.

115. *See supra* note 99 and accompanying text. There is every reason to believe that the state courts will be less receptive to USERRA plaintiffs, as state judges are less familiar with federal law and remedies. State judges are more inclined to be biased in favor of the state government being sued. State courts often have heavier dockets, slowing the hearing of such cases. Brant, *supra* note 103, at 178. In addition, some states argue that they should not be subject to U.S. Supreme Court review as to how they enforce federal law in their courts. *See* Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?* 106 YALE L.J. 1683, 1786-1790 (1997).

116. *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 66-67 (1989); *AFSCME v. Virginia*, 949 F. Supp. 438, 443 n.4 (W.D. Va. 1996), *aff’d sum nom.*, *Abril v. Virginia*, 1998 U.S. App. LEXIS 10281 (4th Cir. 1998). *See also* Rubenstein, *supra* note 108, at 657-659.

courts.¹¹⁷ *Alden* seems to override the proposition that “where a federal statute imposes liability upon the [s]tates, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court.”¹¹⁸ The Court could conclude that such action violates the Tenth Amendment to the U.S. Constitution.¹¹⁹ The states could argue that Congress has no authority to impose USERRA on the states in their courts, when the federal appellate courts have ruled that state employees cannot file USERRA suits in federal court.¹²⁰

Finally, each state interprets the USERRA differently, resulting in inconsistent application of the law in each state. The language of the amendment indicating that state employee lawsuits will be filed “in accordance with the laws of the [s]tate”¹²¹ guarantees different results in each state, as each state interprets USERRA against its state law.¹²² This amendment invites guaranteed confusion of state case law, as each state attempts to sort out how to handle these cases. Will the right to a jury trial, available for USERRA plaintiffs in federal court,¹²³

apply in each state court case? Currently, no one knows.¹²⁴ A state may claim that analogous state law claims of wrongful discharge are not eligible for jury trials and refuse to uphold the federal case law.¹²⁵ Are state courts required to follow federal USERRA case law for cases tried in their courts? The state courts would have to follow federal court interpretations of the substance of the USERRA, but what about procedural issues?¹²⁶ In light of *Alden*,¹²⁷ this concern may be moot.

The second major amendment of USERRA, by the Veterans Programs Enhancement Act of 1998,¹²⁸ was the extension of USERRA protections to any reservist who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States.¹²⁹ The amended law further covers foreign corporations or businesses as employers under USERRA, if they are “controlled” by a United States employer.¹³⁰ The determination of whether a United States employer controls a foreign business is based

117. *Alden*, 119 S. Ct. at 2240.

118. *Hilton v. South Carolina Railways Comm’n*, 503 U.S. 197, 207 (1991). See also *Howlett v. Rose*, 496 U.S. 356, 367-368 (1990), *Whittington v. New Mexico Dep’t of Safety*, 966 P.2d. 188 (N.M. 1988); *McGregor v. Goord*, 1999 N.Y. Misc. LEXIS 242 (1999) (holding that the Supremacy Clause of the U.S. Constitution supersedes state sovereign immunity and therefore requires state courts to enforce federal law). But see *Alden*, 119 S. Ct. at 2240 (holding that state courts do not have to entertain citizen money damage suits against state governments to enforce federal laws, where the state has not expressly waived its common law sovereign immunity.) As the result of *Alden*, state employees cannot be sure they can get into state court to raise their USERRA claim. *Alden* leaves 38 U.S.C.A. § 4323(b)(2) unenforceable. Section 4323(b)(2) authorized state employees to sue their state agencies in state courts, instead of seeking federal Department of Justice representation in federal district court.

119. See *National League of Cities v. Usery*, 436 U.S. 833 (1976) (holding that the Tenth Amendment prohibited application of the Fair Labor Standards Act minimum wage laws to the states); *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 579-580 (Rehnquist, J., dissenting) (1985) (*Garcia* overruled the 5-4 decision of the Court in *National League of Cities* by a 5-4 margin). Justice Rehnquist noted in his *Garcia* dissent that his views of federalism would soon “command the support of a majority of this Court.” *Id.* With the current Court members, it looks very likely that *Garcia* is soon to be replaced by a Tenth Amendment analysis like that in *National League of Cities* which prohibited federal laws that regulated “the [s]tates as [s]tates,” where they encroached on areas of “traditional governmental functions” such as the reemployment of state agency employees. *National League of Cities*, 426 U.S. at 842, 851-852. See also Brant, *supra* note 103, at 176 n.11, 210 n.157. Professor Brant observed that only Justice Stevens who sided with the majority in *Garcia* is still on the Court, but two of the most vocal *Garcia* dissenters, Chief Justice Rehnquist and Justice O’ Connor, are still active.

120. *Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *30). See *supra* note 97; Siegel Testimony, *supra* note 99, at 18-23, 89-90. See also *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 67 (1989) (“The principle is elementary that a State cannot be sued in its own courts without its consent.”). See also *Alden v. State*, 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S. Ct. 443 (1998).

121. 38 U.S.C.A. § 4323(b)(2) (West 1999).

122. See Brant, *supra* note 103, at 177-79, 216-21. Professor Brant observed that while the Supremacy Clause requires the states to enforce federal law, states have no obligation to make a single forum available for all claims. A state does not have to follow federal law in construing its common law defense of sovereign immunity resulting in inconsistent enforcement of USERRA among the states, depending upon how they characterize the relief authorized by the statute. She finds this result “indefensible.”

123. *Spratt v. Guardian Automotive Products, Inc.*, 997 F. Supp. 1138 (N.D. Ind. 1998).

124. No reported state cases based upon 38 U.S.C.A. § 2323 (b) (2) have raised this issue since the amendment of USERRA in November 1998.

125. Cf. *Keller v. Dailey*, 1997 Ohio App. LEXIS 5727 (Ohio Ct. App. Dec. 16, 1997) (Federal Fair Labor Standards Act case tried in state courts). See Brant, *supra* note 103, at 217-221.

126. *Id.*

127. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

128. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 212, 112 Stat. 3331 (1998), codified at 38 U.S.C.A. §§ 4303(3), 4319 (West 1999).

129. 38 U.S.C.A. § 4303 (3).

upon “the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.”¹³¹ United States employers operating overseas and those foreign businesses they control may be exempted from USERRA coverage, if the employer’s compliance with USERRA would violate the law of the foreign nation workplace.¹³² Congress included the exemption to reassure foreign governments that the United States was not attacking their sovereign authority to regulate employment¹³³

Why was this explicit language necessary to cover overseas reservists under USERRA? In 1991, the United States Supreme Court ruled that extraterritorial application of United States employment discrimination law will be presumed not to apply, unless Congress provides a clear expression of Congressional intent that such a law is to apply overseas.¹³⁴ Congress wanted to ensure that the courts understand their intent that USERRA provides universal coverage for all United States employees.¹³⁵

Who would investigate overseas complaints and initially determine whether a foreign business is controlled by a United States entity? Presumably, the United States Department of Labor Veterans Employment and Training Service (DOL-VETS) would conduct this investigation and initial determina-

tion.¹³⁶ Currently VETS has no overseas investigators. Where would someone file a lawsuit to enforce this new provision? Presumably, in any federal court district where the United States employer “maintains a place of business.”¹³⁷ Currently, few regulations address this new USERRA jurisdiction.¹³⁸ Would reservists who work for the federal government overseas be covered? Yes. The U.S. Merit Systems Protection Board (MSPB) would have jurisdiction to hear their complaints.¹³⁹

Finally, Congress amended the USERRA to give specific authority to the MSPB to hear federal employee USERRA complaints, regardless of when the complaint arose, even if the discriminatory event arose before USERRA was enacted in 1994.¹⁴⁰ This change in law was initiated by *Monsivias v. Department of Justice*.¹⁴¹

The U.S. Bureau of Prisons allegedly disciplined Sergeant Monsivias for absence without leave from his federal prison guard job, for attending reserve military drill, after giving the agency proper prior notice.¹⁴² The Bureau refused to grant Sergeant Monsivias military leave to attend his reserve training.¹⁴³ On 17 March 1997, the Office of Special Counsel (OSC) determined that although the agency’s alleged actions would have violated the predecessor law to USERRA, it was unable to represent Sergeant Monsivias before the MSPB.¹⁴⁴

130. *Id.* § 4319(a).

131. *Id.* § 4319 (c).

132. *Id.* § 4319 (d).

133. *See supra* note 99, 144 CONG. REC. H 1399 (daily ed. March 24, 1998) (statement of Representative Evans).

134. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

135. 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans). *See also* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 546, 110 Stat. 2422, 2524 (1996) (stating that USERRA needs to be amended to protect U.S. citizens employed overseas who are members of the reserve component of the U.S. armed forces).

136. 38 U.S.C.A. § 4321.

137. 38 U.S.C.A. § 4323 (c)(2).

138. *See Restoration to Duty From Uniformed Service*, 64 Fed. Reg. 31, 485, 31, 487 (June 11, 1999) (to be codified at 5 C.F.R. § 353.103) (stating that federal agency USERRA rules apply to overseas employees). No other regulations exist to flesh out the procedure for investigating overseas employers.

139. *Id.*

140. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 213, 112 Stat. 3331 (1998), codified at 38 U.S.C.A. § 4324(c)(1) (West 1999). This section of the Act, as amended, reads:

The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to . . . , without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

141. *Monsivias v. Department of Justice*, complaint with the Office of the Special Counsel. *See also* 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans).

142. *Id.*

143. *Id.*

The OSC opined that the alleged violation occurred before USERRA was enacted in 1994.¹⁴⁵ Under pre-USERRA reemployment rights law, the OSC did not have authority to represent federal employees before the MSPB on reemployment rights cases.¹⁴⁶ This amendment is intended to resolve the issue of OSC representation of federal employees with pre-USERRA reemployment rights cases before the MSPB, and to extend MSPB jurisdiction over pre-USERRA reemployment rights cases.¹⁴⁷ Congress did not address whether this new provision overrules the MSPB's 180 day [from the date of alleged violation] filing date regulation.¹⁴⁸ The MSPB has not yet addressed this issue in any published opinions or by revising its filing time limit regulations.¹⁴⁹

Because of the U.S. Supreme Court's ruling in *Alden*,¹⁵⁰ Congress must again look at remedies for state employees who suffer USERRA violations at the hands of their state employers.¹⁵¹ Congress must meet the challenge and formulate a constitutionally viable remedy for state employees. Perhaps Congress should consider enacting an explicit conditional waiver provision in state National Guard funding legislation,

providing that a state will not receive any federal funds for its National Guard until it enacts a statute waiving sovereign immunity in state and federal courts for USERRA money damage suits from state employees [38 U.S.C.A. § 4323]. The Supreme Court in *Alden* cited with approval such a funding incentive to obtain state voluntary waiver of sovereign immunity.¹⁵² The Supreme Court has already recognized the substantial funding provided by the federal government for state National Guard entities.¹⁵³ Such a funding proviso has been very successful in getting state universities to reconsider their bans on military recruiting.¹⁵⁴ The federal government could argue that if the states want money for their National Guard, then they should waive their USERRA sovereign immunity defenses so state employee reserve and National Guard soldiers have a remedy against state agency misconduct. Legal counsel should be looking for new Congressional legislation and new regulations by the Department of Labor, the OSC, the Office of Personnel Management, and the MSPB to implement these new USERRA changes, and to respond to *Alden v. Maine*.¹⁵⁵ Lieutenant Colonel Conrad.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. 5 C.F.R. § 1201.22(b)(2) (1999).

149. *Id.*

150. *Alden v. Maine*, 119 S. Ct. 2240 (1999).

151. In light of *Alden v. Maine*, it would appear that a slim majority (5-4) of the current U.S. Supreme Court is poised to void individual state employee enforcement of USERRA. This cannot be good news for state employee veterans and reservists seeking money damages for past wrongs from their state agency employer under USERRA. State employees with valid USERRA claims who cannot get federal representation are now without any effective remedy other than suing their state agency officials, in a non-official capacity for misconduct. This remedy is not very useful when you compare the "shallow pockets" of state agency managers versus the "deep pockets" of State treasuries. See *Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *33, *57). See also *Marbury v. Madison*, 5 U.S. (5 Cranch) 137, 163 (1803) [Marshall, C.J.]. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

152. *Alden*, 119 S. Ct. (U.S. LEXIS 4374, at *32) ("Nor, subject to constitutional limitations, does the [f]ederal [g]overnment lack the authority or means to seek the [s]tates voluntary consent to private suits. Cf. *South Dakota v. Dole*, 483 U.S. 203 (1987)."). See Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 MINN. L. REV. 793 (1998); Vasquez, *supra* note 115, at 1707, 1707 n. 112; *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding use of congressional spending power to "encourage" states to adopt minimum drinking age statutes). But see Anthony Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (May 1987); Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995); James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 191-194 (1998) (Congress may not induce states to act using its Spending Clause [U.S. Const. art. I, § 8, cl. 1] powers, if Congress could not require the states to act under Congress's enumerated powers).

153. *Perpich v. Department of Defense*, 496 U.S. 334, 351 (1990) ("The [f]ederal [g]overnment provides virtually all of the funding, the materiel, and the leadership for the [s]tate Guard units.")

154. See Brett S. Martin, *Military Bans Cost Schools Federal Funds*, NAT'L JURIST, Oct. 1997, at 8; Bob Norberg, *New Law Imperils SSU Funding; Military Recruiting Ban Sticking Point*, PRESS DEMOCRAT (Santa Rosa, Cal.), Dec. 14, 1996, at B1; George Snyder, *Sonoma State Lifts Ban on Military Recruiters*, S.F. CHRON., Dec. 18, 1996, at A26; Terry Carter, *Costly Principles: Pentagon Forces Law Schools to Choose Between Federal Funding and Backing of Gay Rights*, ABA J., Dec. 1997, at 30, 31. See Pub. L. No. 104-208, Div. A, Title I, § 101(e) [Title V, § 514], 110 Stat. 3009-270 (1996) (added as a note to 10 U.S.C. § 503) (stating the language of the military recruiting ban conditional federal funding waiver).

155. *Alden v. Maine*, 119 S. Ct. 2240 (1999).