

## **Air America Association Member Commentary by William Merrigan, Esq.**

### **DNI Air America Retirement Report to Congress is Released: DNI Concludes Congress Should Not Grant Retirement Benefits to Air America Employees for Their Proprietary Services**

In Public Law 111-84 Congress directed the DNI to file a report on Air America (and related corporations) which Congress stated was an entity "owned and controlled by the United States." The DNI report itself, filed July 2011, states at page 1 that AAM was "owned by the U. S. Government and operated or managed by the CIA," and at page 6 that it was "wholly owned" by the CIA.

A government corporation is defined at 5 U.S.C.103 as being any corporation "owned or controlled by the United States". It is well recognized that employees of government corporations are Federal employees, and entitled to retirement benefits, except in those few cases where the statute creating the corporation specifically states otherwise.

Because employees of government owned corporations are automatically Federal employees, the DNI/CIA seeks to prevent retirement benefits by stating AAM was not a government corporation, as it was not listed as a government corporation at 31 U.S.C. 9102, which normally is legally required. The reason we were not listed is that the government ownership of AAM was classified top secret (page 8 of the report), and this obviously means it could not be publicly listed in the U.S. code.

The DNI/CIA report also says we should be denied status as Federal employees (and not given the retirement benefits) because we were not hired (appointed) by use of government standard forms SF50 or SF52. The use of government hiring forms would of course have betrayed the secret that AAM was a government entity, as well as raised questions among the great majority of employees who did not know about the government ownership. This explains why at the time most employees did not expect Federal benefits. Any fair assessment will tell you that since the employees are entitled by law to the benefits; the lack of any expectation is no more germane than an opposite argument that an individual who is not aware of a criminal statute is excused for not complying with that statute.

It is unjust and unfair to deny benefits based upon this "Catch 22" situation.

The report compares the small benefits, if any, received by some AAM employees, under the AAM savings plan, with normal Federal civil service benefits. The huge disparity and resulting inequity is apparent.

It does contain some inaccuracies of which I will mention only a few for now:

a. Page 16 states AAM employees "claimed and received" a Federal tax exemption based on foreign residency, which Federal employees could not do. This is not true. Some employees no doubt used this exemption, but other, such as those in Taiwan paid local Chinese taxes whose rates were higher than the U.S. rates. In such case there was no need to use the foreign resident exemption because the large amounts paid in China offset the smaller U.S. amount. This is the

same as a resident of Virginia who works in Maryland offsetting taxes paid in one state against that due in the other.

b. Page 17 states that employees received retirement contributions based upon 6% of their total compensation "Subsequent to October 15, 1946" and "Before the effective date of the Plan" (which was in 1963). This also is false. The contributions employees were permitted to make, and matched in part by the company, were based on compensation earned only after the beginning date of the plan which was March 30, 1963.

c. Page 25 has a schematic of Retirement Benefits returned to surviving families in cases of crewmembers killed in the line of duty. Under the heading of "AAM Retirement Plan Payout," the information given in most cases is "No data" or "N/A." Since this may mislead some readers, I have personally analyzed the available information for Air America crewmembers killed on CIA flight missions. In most cases, the amount of the Retirement Plan returned to the surviving families was "zero." To clarify, eligible Air America employees had the option of investing in the AAM Retirement Plan. Upon death, any money that was invested by the employee was returned to the family. What this data suggests is that many Air America employees did not contribute or were not eligible to contribute to the optional retirement plan and, as a result, surviving families did not receive any Retirement Plan Payouts. This is not to be confused with AAM Death Benefits paid to families (per the schematic on page 25), which are a separate matter.

d. Page 12, footnote 36 states AAM crewmembers were not required to conduct search and rescue missions for military personnel in distress. This is not correct as they were required to conduct SAR missions, often at personal monetary expense, and saved the lives of numerous military personnel in doing this. There is no understandable reason for the CIA to make this assertion.

The report mainly discusses the question of whether we are entitled to benefits under current law. It ignores the facts that:

a. Senator Reid and other members of Congress are trying to end the inequity here by adding new law that will give benefits. Congress is not trying to reargue the past Court decisions, so the DNI focus on current law is a waste of time, and has cost the taxpayers some \$350,000 for the contractor that wrote this report. Although the report was due April 30, 2010 the CIA contractor was allowed to work on the report until July 31, 2011, which was unseemly on the part of the CIA as it knew that many of the employees were old and dying, and as, expected, many did die during the extended contract period.

b. It ignores the law as it existed when AAM personnel were employed (1950-1975). At that time there was no requirement to utilize Standard Forms 50 or 52. This requirement was added by OPM retroactively after we filed retirement claims when the secrecy ended. Congress noted this in House Report 100-374 where it was critical of this OPM action and stated persons performing government service as proprietary employees should be allowed to rely on the law that applied when the individuals were employed. Although the report cites the Acosta court case as support for denying benefits it neglects to inform Congress that the proprietary

employees in the Acosta case were in fact granted retirement by Congressional action in Public Law 100-23. It also fails to advise Congress that employee of proprietary companies operated by the OSS, the CIA predecessor, were also granted retirement credit.

The DNI/CIA was asked by Congress for any recommendations it may have on the "advisability" of providing benefits to former AAM employees, along with any opinions the CIA Director may have on the matter.

The CIA Director did not express any opinion.

On the question of advisability the Report does not focus on equitable treatment of former employees, even though it does discuss their heroic actions in support of the U.S. Instead it addresses "What serves" the interest of the CIA (page 26). This is a respectable issue of course but it is not further developed except to state there is no "clear and compelling case" for granting benefits here.

The report also states that granting benefits would not "withstand public scrutiny and legal precedence". The question of public scrutiny is one for Congress to decide. There are numerous precedent cases of granting benefits to proprietaries owned by the OSS, the Navy, the CIA and other agencies

This conclusionary response of the DNI, with no substantiating discussion, is copied almost verbatim from the attached CIA letter of 5 October 2005, written in response to Senator Reid's letter of November 25, 2003, which advised he was planning this legislation.