Preventing Sextortion
PAGE 3

July 2017 Volume 10, Issue 1

The Advisor

Region Legal Service Office Southeast

BRIEFING

Introduction from the Editor

BY LT WARREN BROOKES
FORT WORTH, TX

I hope everyone has managed to stay cool, as summer appears to have arrived in full force! As we move into the hot spells that seem to plague the Southeastern region, it is important that we don't let the heat get to our heads and affect our judgment. With the new advances and features we find in technology, communication has become so much easier. These advances, however, make poor choices easier as well. It has become much more important for us to always be mindful of what we are putting online. Remember: once you put it on the internet, it will stay on the internet.

Furthermore, when we make poor decisions, it affects more than just us. Families and friends can suffer from our bad choices also. Those decisions weigh even heavier when one has dedicated his or her life to service in the Navy. People will associate us and our behavior with the Navy, and we want our image to be as strong and positive as possible. So go have fun, stay cool, and make this a summer to remember. As always, if you need any assistance your legal assistance and staff attorneys are just a phone call away.

RELIGIOUS ACCOMMODATION

BY LN1 BILL WILSON
FORT WORTH, TX

DoDI 1300.17 provides policy and guidance for the accommodation of religious practices within the Military Services. DoD policy is to accommodate the doctrinal or traditional observances of the religious faith practiced by individual members when these doctrines or observances will not have an adverse impact on military readiness, individual or unit readiness, unit cohesion, health, safety, good order, discipline, mission accomplishment, or any other military requirement.

SEE ACCOMMODATION, PAGE 9

The Way Forward from Marines United

Dealing with Inappropriate Online Postings

BY LT LANDRY REDDING
JACKSONVILLE, FL

A black mark on the Navy's reputation. Recent instances of indecent viewing, recording, and distributing of intimate images have highlighted the need for a strong deterrent effect on such behavior. Secret Facebook groups that share nude photos and hidden shower cameras on submarines have shocked the nation. The Navy needs a shift to ensure this behavior is not tolerated by not only the top brass but also beneath the deck plates. The military justice system, administrative processing, and training will all play significant roles in effecting this change.

Punishment for offenders. The military justice process plays a role in punishing individuals who participated in this type of misconduct and deterring future offenders. Careful judgment is necessary when deciding whether to use non-judicial punishment, administrative separation, or court-martial to change this behavior and improve good order and discipline.

UCMJ articles 92, 120c, & 134. Article 120c covers a wide range of "other sexual misconduct" including indecent viewing, visual recording, and broadcasting. The misconduct covered involves knowingly viewing, recording, or distributing images of the private area of someone who has a reasonable expectation of privacy and did not consent to the viewing, recording, or distributing. Private area is defined as naked or underwear-clad genitalia.

In the context of a Facebook page, there are multiple ways this could be charged. The one who posts an intimate photo without consent could be charged with indecent broadcasting by making the photo available to everyone else in the Facebook group. If that person also took the photo, then indecent visual recording could be charged. The members of the group could be charged with

SEE MARINES UNITED, PAGE 2

Marines United, Cont'd

indecent viewing for accessing the page. For many of these charges, court-martial will be the proper forum, especially for indecent visual recording and broadcasting. Some instances of viewing could potentially be settled at Captain's Mast if very minor; however, the safer route for an Article 120 is to take it to a court-martial or at least send the case to the Trial Service Office for evaluation. A court-martial will send the appropriate message to the command and the Navy that this conduct is unacceptable and will stand up to the scrutiny of a watchful American public.

Indecent broadcasting has recently been codified into Navy Regulation–Article 1168, Nonconsensual Distribution or Broadcasting of an Image. This allows for charging indecent broadcasting as an Article 92—Orders Violation. There are some drawbacks to consider when charging under Article 92 instead of Article 120c. First, the description of "intimate image" is more specific than under Article 120. The regulation includes the term "private," similar to Article 120; however, it adds an additional element: the person in the photo must be identifiable from the picture itself or from information conveyed with the image. The difference seems slight; however, it makes it more difficult to prove the orders violation because now the government has to prove not only the distribution of the photo without consent but also that the person is identifiable. At non-judicial punishment (NJP), this might not make much of a difference because the burden of evidence is preponderance, but at a court-martial the prosecution would have to prove beyond a reasonable doubt that the intimate image was taken of an identifiable person. By contrast, this additional burden is not present under Article 120c.

Additionally, there is a great disparity in the maximum punishments between Article 120c and an Article 92. At NJP, potential punishments will be the same, but at court-martial the exposure for the accused under an Article 92 violation is only two years of confinement versus seven years for indecent broadcasting under Article 120c. Both articles allow for bad conduct or dishonorable discharges at a general court-martial.

Article 134 is another option if the conduct of the accused does not fit the exact definition of an Article 120c or Article 92 violation. Article 134 also prohibits indecent conduct, a much less specific charge. Indecent conduct occurs if the accused commits conduct that is both indecent and prejudicial to good order and discipline. In other words, the conduct is immoral and relates to sexual impurity which is grossly vulgar, excites sexual desire, and depraves morals.

Administrative Processing. The Navy has added nonconsensual distribution of an intimate image as a basis for mandatory separation processing for commission of a serious offense. MILPERSMAN 1910-142 incorporates Navy Regulation, Article 1168, so it incorporates the same elements as charging an orders violation under Article 92. The benefit of an administrative separation board (ADSEP) is that the burden of proof is preponderance of the evidence or more likely than not. When the facts are less severe, an ADSEP could be a much quicker way of separating a service member with an other than honorable discharge. An additional benefit is that it provides a shore command an option to process the Sailor without risking a mast refusal.

Proactive Responses. Much of the Navy's response to these issues has been reactionary: the Navy is changing regulations and modifying the MILPERSMAN to respond to what has already happened. The Navy and individual commands also need to consider how to prevent these issues without having to use punishment or administrative separation after something has already occurred. Currently, service members are inundated with trainings and posters. By all means, those should be used as well, but also consider some out-of-the-box solutions. Training officers could get creative and plan interactive trainings that go through some common scenarios of how service members acquire intimate images with or without consent and what it means to distribute them.

The problem has certainly been discovered by the Navy and the American public. The Navy has responded, but more work needs to be done. Judicious use of military justice and the administrative separation process can create a strong deterrent, and proactive training can preempt continued harm. ■

PREVENTING SEXTORTION

BY LN2 MATTHEW FEENEY *GULFPORT, MS*

The person on the other side of that video is really cute–and totally into you! "Why don't you take your shirt off and we'll have some fun?" they say. Things get carried away, and, suddenly, an angry man is on camera and tells you that your romantic interest is just 15, and he will post your video to your command's Facebook page unless you wire him $1,500. Then you reach for your debit card...

Sorry, Shipmate: you've been hit with a sextortion scam.

What is sextortion? Sextortion is a cybercrime perpetrated against unwitting victims who are approached in casual conversation via social media and then seduced into engaging in online sexual activities. After fulfilling the sexual requests, which are recorded without the victim's knowledge or consent, the victim is threatened with public exposure if he does not wire money to the perpetrator.

Examples of this scam. Unfortunately, sailors in our region have been victims of sextortion. In one case, a sailor was scammed out of $2,000 after he exchanged nude photos with a woman he met on a dating website. A male called the sailor and stated that the woman in the photo was his 15 year old daughter and a rape victim. The caller then demanded that the sailor wire money to help pay for counseling and other expenses. The sailor paid the money, and sometime later received another phone call from a "private investigator" requesting the sailor pay another $4,500. He refused and notified his chain of command.

Many of these scams go unreported. Furthermore, money is never returned to the victims since most of the scammers are set up overseas, where the Navy and NCIS lack jurisdiction.

SEE SEXTORTION, PAGE 10

DRUG & ALCOHOL SELF-REFERRALS

LT JOHN KELLEY, MAYPORT FL

When handling drug and alcohol abuse, we want members to be able to get the help they need, but commands also need to know when a member is subject to disciplinary action and/or administrative separation (ADSEP) processing following a self-referral. This short article aims to condense the relevant information from OPNAVINST 5350.4D, the Navy's drug and alcohol policy instruction, into a few paragraphs that can be quickly referenced.

Alcohol Self-Referrals. Under OPNAVINST 5350.4D, a valid alcohol self-referral has three elements. It must 1) be initiated by the member; 2) be for the purpose of seeking treatment; and 3) be disclosed to a qualified self-referral agent. A qualified agent can be the unit DAPA, a member of the command triad, a Navy drug and alcohol counselor, a chaplain, a medical professional, or a Fleet and Family Services (FFSC) counselor.

To shield the member from discipline, the alcohol self-referral must not stem from an alcohol-related incident (ARI). OPNAVINST 5350.4D defines ARIs as offenses punishable under the Uniform Code of Military Justice (UCMJ) or civilian law where alcohol consumption was the "primary contributing factor" in the opinion of the offending member's CO. Common ARIs include a member incurring a military or civilian DUI/DWI, coming to work under the influence, or receiving an alcohol-related NJP. If a member self-refers and there is no evidence of a prior ARI for which the member is trying to avoid discipline, a command must allow the member to complete whatever treatment follows the self-referral. If the treatment is successful with no further incidents, OPNAVINST 5350.4D dictates that no disciplinary action may be taken against the sailor.

Disciplinary action can be taken, however, if a member self-refers for the purpose of shielding him- or herself from discipline. In other words, the member must genuinely be seeking help in order to trigger the self-referral disciplinary shield. The determination as to whether there is sufficient evidence that a member is trying to set up a disciplinary shield rather than legitimately seeking help ultimately lies with the CO, but commands are always free to reach out to their SJA for advice in these situations.

So when a member commits an ARI and then self-refers, what are the command's options? After any ARI, a member is required under Navy policy to be screened for alcohol dependency and it is generally best practice to first let the member complete that process and any subsequent treatment. However, following treatment, the full range of appropriate disciplinary and/or separation action can be taken against the member for that ARI. In the interests of fairness and justice, the self-referral should be taken into account when making any decisions at the command level (especially if it appears that the member was legitimately seeking help), but Navy policy does not bar the member from being disciplined and/or separated as a result of that ARI.

Commands should always keep track of a member's treatment and aftercare progress, because alcohol treatment failure is a common basis for separation. Treatment failures come in many forms: an ARI any time after the member completes Level 1 (or above) treatment as a result of a prior incident, failure to complete prescribed treatment (which includes a refusal to complete or non-amenability to treatment), as well as failure to participate in or follow a prescribed treatment or aftercare plan. SEE REFERRALS, PAGE 7

Navy Ball Fundraising & the "Double Life"

BY LT JOHN SCHWIETZ *PENSACOLA, FL*

Normally, living a double life is a suspect practice best reserved for two-faced liars, cheats, and scoundrels attempting to conceal shameful dealings. However, as it relates to Navy Ball fundraising, this otherwise immoral existence can ironically represent a best practice, as Section 3-209 of the Joint Ethics Regulations (JER) prohibits servicemembers from creating improper endorsements or the appearances thereof while fundraising. The Regulation states:

Endorsement of a non-Federal entity, event, product, service, or enterprise may be neither stated nor implied by DoD or DoD employees in their official capacities and titles, positions, or organization names may not be used to suggest official endorsement or preferential treatment of any non-Federal entity.

With this in mind, to keep their official and unofficial or personal capacities wholly separate, servicemembers should—and, in fact, must—live a sort of "double life" when fundraising. Servicemembers can follow three simple steps to help ensure they comply with the Regulation: (1) choose a funding source; (2) implement a disclaimer; and (3) avoid subtleties that could be misinterpreted.

First, as servicemembers volunteer to help fund a Navy Ball, they must choose to raise money from one of two independent sources. That is, either they secure financing exclusively through Navy funds or they raise outside funds through unofficial sources. Because of various limitations placed on official Navy funds and the seemingly limitless financing options available through unofficial sources, most units raise funds unofficially. They do this by creating a private organization known as a non-federal entity (NFE). In turn, the servicemembers work within the NFE—in their personal capacities—to solicit funds from the public.

Second, servicemembers should equip themselves with and regularly implement a proper disclaimer during fundraising activities. The purpose of such a disclaimer is to dispel any notion that the fundraising efforts are associated with the Department of Defense. Below is an example of such a disclaimer:

The [Name of Organization] is a non-federal entity operated and controlled by individuals acting in their private capacities. It is not part of the U.S. Department of Defense or any of its components and has no governmental status.

A best practice for disclaimer use is to implement it in all electronic and print media as well as in oral communications and public announcements where the NFE's name is used. The disclaimer clarifies that the NFE is not an official entity. This will also mitigate the risk of anyone perceiving the fundraiser to be an official Navy function that could otherwise lend to the notion that the Navy endorsed the NFE or any organization the NFE contracted with.

The third and final step to living the "double life" for purposes of this Article is to avoid subtleties that could be misinterpreted. Wearing uniforms while fundraising in public is a classic example. To be clear, this is absolutely prohibited. Regardless of the event the NFE partakes in, no member should wear official uniforms. In fact, a best practice in this regard is to avoid wearing anything that includes military logos or insignia altogether. Another way servicemembers can subtly run afoul of the ethics rules is by using official government resources during fundraising. A common misstep here is use of government email to recruit volunteers for the NFE or to solicit outside funding. Other forbidden government resources to look out for include, but are not limited to, personnel, vehicles, letterhead, and equipment.

While there are some exceptions to the rules above, when it comes to Navy Ball fundraising almost all guidance directs command leadership to take extra measures to avoid any appearances of improper endorsements. With that, servicemembers are encouraged to live a "double life" when fundraising and steer clear of any activities that blur the lines between the personal and official capacities. These practices will help units avoid confusion as to whether or not their unofficial fundraising activities appear to be official. ■

Gambling on Duty & on Installation

BY LN1 ALEXIS LOWE *MERIDIAN, MS*

Gambling, as defined by 41 C.F.R. § 102.74.395 (b), is a game of chance where the participant risks something of value for the chance to gain or win a prize. Some examples of games of chance are raffles, lotteries, and betting pools. In games of chance a participant is usually spending money or using any other items of value to possibly be able to win a prize. Prizes can include but are not limited to currency and gift certificates to stores or restaurants or even favors or privileges. The entire definition must be in order to be considered gambling. For example, if raffle tickets were given to all of the command regardless of whether command members purchased them or made donations, this would not be considered an instance of gambling.

Gambling should not be conducted on any government owned or leased property nor on duty for the government by any employee. OPNAVINST 3120.32D further states that gambling

SEE GAMBLING, PAGE 5

Gambling, Cont'd

with playing cards, dice, internet websites, or other apparatuses or methods on board naval units is prohibited. Gambling with subordinates can violate several Articles of the UCMJ.

Some exceptions apply. In particular, SECNAV has approved two clear-cut occasions which allow the Navy and Marine Corps Relief Society and MWR to conduct raffles or bingo on installation. During the NMCRS Active Duty Fund Drive, Commanders or Commanding Officers are allowed to employ what would otherwise be "gambling" as a way to fund-raise so long as the following conditions are met:

(1) Local or State Law does not prevent using such games of chance;
(2) Administrative controls are in place;
(3) No amounts received are listed as tax deductible or charitable; and
(4) Casino-type games are not utilized.

CNICINST 1710.3 specifically authorizes MWR to use bingo, Monte Carlo events, raffles, and gaming devices within certain guidelines. The Combined Federal Campaign (CFC) may also use raffles and lotteries if authorized and approved by the appropriate authority.

DoD employees may enter into private wagers if they have a personal relationship with someone and it is conducted exclusively within their Government living quarters, given that they do not run afoul of any restrictions regarding fraternization.

It is important to remember that the use of Government resources for communications is for official use only. Government phones or computers should never be used to gamble.

Key Principles.

(1) Gambling is prohibited on station unless related to one of the exceptions outlined above.

(2) You may conduct private wagers within your government quarters, but take care not to engage in fraternization as gambling with a subordinate is a UCMJ violation.

(3)Government resources should only be used for official and authorized purposes.

References 41 CFR 102.74.395, DOD 5500.7R (JER), SECNAVINST 5340.7, OPNAVINST 3120.32D, AND CNICINST 1710.3 ■

Child Custody Modifications in Military Divorce

By LCDR Joshua Kelne
Mayport, FL

When I counsel clients on the nature of a divorce, I invariably start by giving an outline of the five distinct areas of a typical case. These five areas are the legal dissolution of the marriage, equitable distribution of assets, spousal support, child support, and time-sharing (also known outside the state of Florida as child custody). Time-sharing can be a very difficult aspect of divorce for our military clients.

From a military perspective, one key issue when dealing with time-sharing is what happens when a parenting plan requires modification because of a military move. Under the best of circumstances, these moves can be handled amicably. More contentious and complex situations can create confusion as to which state has jurisdiction to make decisions about the child. For example, if a servicemember transfers from the home state of the child, and a former spouse moves to another state as well, which state will then have jurisdiction over the child?

In the event that a military member must move due to a temporary assignment, mobilization, or deployment, most jurisdictions have statutes providing for temporary modification due to military service. In such cases, the military member may elect for a family member, including a stepparent, to exercise the visitation rights of the military parent. Upon the return of the military parent, the previous court ordered visitation or ratified agreement is effective. Alternative arrangements can be made between cooperative parents by written agreement.

These temporary assignments and the law governing temporary modifications usually exclude Permanent Changes of Station (PCS), making the situation more prickly for PCSs. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), exclusive and continuing jurisdiction over child custody rests with the state in which the child has lived with a parent for six straight months before the commencement of the court proceeding. So, for example, if a divorce action is brought in the state of Florida and a parenting and time-sharing plan is made part of the final judgment, Florida retains continuing and exclusive jurisdiction over the persons and the custody matters.

Like most states, Florida requires a parent to file a Petition to Relocate under these circumstances. The parent filing the petition has the burden of establishing that the relocation is in the child's best interests. Most states list the factors taken into account when determining the best interests of the child. Often military members will PCS, and they choose

See Modifying Custody, Page 6

Filling Out the SF-91 after An Accident

By LT Alison Malloy
Pensacola, FL

Needless to say, if your command's government owned vehicle (GOV) is involved in a motor vehicle accident (MVA), the first priority will be the safety and well-being of those involved. However, in the aftermath of a crash, there are also legal considerations to keep in mind since MVA's often result in insurance claims and/or litigation. The Navy's Torts Claims Unit (TCU) handles these matters when Navy assets/personnel are involved. To assist in the potential claims against or on behalf of the Navy as a result of a GOV MVA, a Standard Form 91 (SF-91) "Report of Motor Vehicle Accident" must be completed for any accident in which the GOV is involved and forwarded to the TCU at tortsclaimsunit@navy.mil. The SF-91 should be completed regardless of who was at fault, and whether or not there were injuries or visible vehicular damage.

All command personnel who are authorized to operate the GOV should be trained on proper completion of the SF-91 as it is usually the driver of the vehicle that fills out the majority of the form (Sections I through IX). Completion of the SF-91 should be initiated as soon as possible after the accident while memories are fresh and accident details are readily available. To that end, a blank copy of the SF-91 should be kept in the glove compartment of every GOV.

The supervisor who instructed the driver to operate the vehicle (for example, the Senior Watch Officer or Command Duty Officer) will complete Section X entitled "Details of Trip During Which Accident Occurred." The information requested in Section X relates to whether the driver was acting in the scope of his/her federal employment when the accident occurred. This distinction is an important one. Generally speaking, a federal employee who caused damage while operating in the scope of their employment will not be held personally liable for damage they caused; whereas, an individual who was operating outside the scope of his/her employment may be held personally liable for damage they caused during that time. The TCU will refer to Section X and particularly the "Exact Purpose of the Trip" when making this scope determination, so it is crucial that the supervisor provide accurate and thorough answers.

Personnel should be completely forthcoming on the SF-91. The form will likely be compared with police reports during the claims/litigation process and the TCU adjudicator will be contacting the command if discrepancies are noted. Additionally, personnel should spell out acronyms and fully explain military terms in case an attorney with no military experience has to review the form during litigation.

If the damage caused during the GOV's MVA is estimated to be greater than $5,000 or if personal injuries were sustained, then a litigation report ("LITREP") will be required (as per JAGMAN §210) in addition to the SF-91. A judge advocate must be contacted before a LITREP is initiated and must oversee the investigation to ensure that it is protected as attorney work product. Please contact your Staff Judge Advocate or local Command Services office if you have determined that a LITREP is appropriate or if you are unsure if a LITREP is required. If a LITREP is required, then the SF-91 form will be an enclosure to that report. If it has been determined that neither a LITREP nor any other command investigation is required, then the command should send the completed SF-91 to the TCU as soon as possible to allow TCU to begin preparing for any potential claims. Before sending the form to TCU, ensure the form is signed and that complete contact information is provided for the drivers, passengers/witnesses (if applicable), supervisor, and police officers.

Your local SJA shop is standing by to provide additional guidance if your command's GOV is involved in an MVA. ■

Modifying Custody, Cont'd

to make verbal or written agreements with the other parent modifying child custody. During the tour of duty (which as we all know can be years), the other parent may have a change in life circumstance which requires a move. These individuals often fail to seek legal advice before moving to a new state and are therefore unlikely to file a petition to relocate. After six months in the new state, the question arises as to which state has jurisdiction over the custody agreement of the child.

This is where the UCCJEA is instructive. Once a State has made a time-sharing determination or has ratified such an agreement, that state retains exclusive and continuing jurisdiction over the matter until a court determines that there is no longer a significant connection to the state or that neither parent resides in that state. This represents a very uncertain situation for the military member who may intend to return to the state which has jurisdiction in the first place. It may be possible to establish that the military member has significant contacts with the original state, for example, maintaining real property, claiming that state as a Home of Record, or even maintaining vehicle registration. In effect, claiming to be a domiciliary (or resident) of the home state may establish significant connections in which the state could maintain exclusive and continuing jurisdiction. There may be some disputes in the courts on this issue, however, as the overriding concern in these actions is the "best interest of the child," and legal residence in a state without being physically present speaks little to the best interest of a child.

When considering moves and orders, it is essential to identify these issues and direct our clients not only in the law and in its application, but also in the procedural steps in following the application of state statutes. Depending on the facts of the case, following the procedural steps may provide relief to a military member and ensure the connection between child and parent despite the transient nature of military life. ■

USFSPA: SMALL AMENDMENT, BIG IMPACT

BY LT JOHN SCHWIETZ
PENSACOLA, FL

On December 23, 2016, section 641 of the National Defense Authorization Act (NDAA) (Public Law 114-328) amended the Uniformed Services Former Spouse Protection Act's (USFSPA) (10 U.S.C. § 1408) definition of "disposable retirement pay." As the designated agent for distributing retirement pay, Defense Finance and Accounting Service (DFAS) is responsible for calculating the "new" disposable retired pay amount under the Amended USFSPA. Accordingly, DFAS described the new definition as follows:

In the case of a division of military retired pay as property (that becomes final prior to the date of a member's retirement), the military member's disposable income is limited to 'the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order' and increased by the cost-of-living amounts granted to military retirees from the time of the (divorce) to the date the member retires.

In layman's terms, this amendment changes the way courts will divide military retirement pay upon divorce. Also, considering that divorces have a significant impact on servicemembers and their families, this relatively small textual amendment will likely have a big impact on spouses contemplating divorce. RLSO Southeast's Navy Civilian Legal Assistance Attorney and subject matter expert, Ms. Samantha Ellis shed more light on this amendment's impact. Ms. Ellis explained that the intent of the amendment is to guarantee that retirement pay is "statutorily frozen" based on the member's rank at the time of divorce. She added, "this ensures former spouses will not receive an inequitable windfall from the servicemember's post-divorce promotions and pay increases." Ultimately, servicemembers' former spouses will now be able to move on with their careers with the peace of mind that the law will not require them to give their exes more money than they are entitled to.

DFAS added online guidance on submitting court orders under the new law on its Notice of Statutory Change page at https://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.htm. There, DFAS notes that, in a case where the order becomes final prior to retirement, the parties must provide a court order that includes a division of military retirement pay. Orders must also include "variables" depending on the date the member entered active duty.

As it relates to the first two variables, which apply to all applicants, they must provide:

(1) a fixed amount, a percentage, a formula, or a hypothetical that the former spouse is awarded and the member's years of creditable service at the time of divorce; or in the case of a reservist, the member's creditable reserve points at the time of divorce.

(2) In regard to the third variable, members should provide different information depending upon whether they entered service before or after September 8, 1980. For example, members who entered the service before that date must provide their respective pay grades at the time of divorce. Alternatively, if the member entered military service on or after that date, the member should provide his or her "High-3" amount at the time of divorce.

Finally, members should be aware that DFAS provides a helpful sample order online. The sample breaks down the recommended order language based on whether the divorce involves "Active Duty Awards" or "Reserve Awards When the Member is Still Drilling." The date the member entered service is also a factor. Notably, DFAS instructs that, if the court order's award language does not include all three variables, DFAS will not approve the order and will require the court to clarify the award. ■

REFERRALS

Drug Self-Referrals. A valid drug abuse self-referral (look to the same three criteria for alcohol self-referrals) always initiates drug dependency screening by a medical officer or licensed independent practitioner (LIP). If a member satisfies all valid self-referral criteria and screens as drug dependent, the referral does act as a shield against disciplinary action as long as the member participates in and completes treatment. However, in this situation the command must initiate ADSEP processing for drug abuse.

If a member does not screen as drug dependent, that member is not shielded from disciplinary action stemming from any misconduct they may have committed. So if a member is not drug dependent but used or attempted to use drugs, they are subject to discipline and ADSEP processing.

Remember to consult with your SJA if you have any questions about drug or alcohol self-referrals. ■

4 Steps for Analyzing Sovereign Immunity Waivers in Environmental Statutes

BY LTJG GREGGARY E. LINES
PENSACOLA, FL

Since everything sounds better in Latin, this article begins with some Latin. *Rex non potest peccare*, (the king can do no wrong) — or as we know it, sovereign immunity— is an ancient doctrine that bars suits against the government. The Federal Government not only creates regulations for the environment, but also owns and operates on up to one third of the nation's land. Through waivers of sovereign immunity, Federal agencies—the DoD and the DON—can be held accountable, to a degree, for compliance with federal, state, and local pollution control laws. (See Breen, Barry, Federal Supremacy and "Sovereign Immunity Waivers in Federal Environmental Law," 15 ELR 10326 (1985)). This article aims to provide a basic outline for analyzing sovereign immunity and environmental laws.

Sovereign immunity is closely related to federal supremacy, articulated most famously in *McCulloch v. Maryland* 17 U.S. 316, 405 (1819)(discussing the Supremacy Clause Art. VI. CI. 2). The doctrine is also touched upon by Article III § 2 and the 11th Amendment. The history of sovereign immunity in environmental regulations is as long and complicated as the Mississippi River. This accountability has incrementally increased over the last few decades as sovereignty has been waived to varying degrees in legislation like the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act. Unfortunately, there is no uniform waiver of sovereign immunity within environmental law, and every statute has to be examined individually to determine the level of compliance necessary. Within every statute there are six areas where the Navy may be required to act/refrain: i) substantive compliance with state law; ii) procedural compliance with state law (permits and approvals); iii) the payment of fees; iv) penalties for noncompliance; v) state-directed cleanup of hazardous waste sites; and vi) specialized waivers for particular facilities. *Id.*

There are four key steps to navigating the complexities of environmental regulations and determining whether federal sovereign immunity has been waived for a particular requirement.

First, examine the federal statute in question to determine whether there has been a clear and unambiguous federal waiver of sovereign immunity whereby state law applies to federal facilities and corresponding military activities. Only Congress can waive sovereign immunity, and thus even some executive orders may not provide a valid waiver of sovereign immunity. The waiver must be clear and unambiguous, and the legislative intent has no bearing on any analysis. *EPA v. Cal ex rel State Water Resources Board*, 426 U.S. 200, 211 (1976). Care should also be taken to ensure that the Federal statute's definition of "Federal agency" and "person" includes the DoD and Navy.

Second, consult state law. The state statute must include Federal agencies within its definition of "person" or otherwise specifically address Federal agencies within the state statutory scheme. Be watchful for provisions that specifically exclude Federal agencies.

SEE IMMUNITY WAIVERS, PAGE 9

Tests for Immunity Waivers	Elements
Massachusetts Test (*U.S. v. Massachusetts*, 435 U.S. 44 (1978)) (OPNAVINST 5090.1Chapter II § 2.1-6)	1. Is the charge in question imposed on all regulated entities without discriminating against federal agencies? 2. Does the charge fairly approximate the cost to the state or local authority making the service available? 3. Does the charge generate revenue over and above the cost of the relevant programs it supports? (if so, then it is likely a tax instead of a fee)
San Juan Cellular Telephone Company v. PSC of Puerto Rico, 967 F.2d 683 (1st Cir. 1992)	Spectrum Test Classic Tax = enacted by many or all citizens to raise money contributed to a general fund for the benefit of the entire community Fee = may serve regulatory purpose directly or indirectly *must look at the charge's ultimate use
Matter of Forest Service Test (based on Valero Terrestrial Corp. v. Caffrey, 205 F.2d 130 (4th Cir. 2000)	Classic Tax: 1. Imposed by legislature upon many or all citizens 2. Raises money 3. Is spent for the benefit of the entire community Fees Imposed by an agency upon those subject to its regulation May serve a regulatory purpose May raise money to be placed in a special fund to help defray the agency's regulation-related expenses ** An important factor is the purpose behind the regulation. If the ultimate use of the revenue benefits the general public, the charge will be deemed a tax.

Accommodation, Cont'd

Requests for religious accommodation from a military policy, practice, or duty that substantially burdens a servicemember's exercise of religion may be denied only when the military policy, practice, or duty furthers a compelling governmental interest (military requirement essential to mission accomplishment) or is the least restrictive means of furthering that compelling governmental interest. Requests that do not substantially burden a servicemember's exercise of religion should not be evaluated under the same standard. The needs of the servicemember should be balanced against the needs of mission accomplishment. The request may only be denied if it is determined that the needs of mission accomplishment outweigh the needs of the servicemember. Accommodation of a member's religious practices cannot be guaranteed at all times and is subject to military necessity. Servicemembers who submit requests for religious accommodations will comply with the policy, practice, or duty from which they request accommodation, including refraining from unauthorized grooming appearance, wearing unauthorized apparel, or applying unauthorized body art until the request is approved.

The commanding officer may resolve requests for accommodation of religious practices that do not require a waiver of military department or service policies regarding the wearing of military uniforms, wearing of religious apparel, grooming, appearance, or body art standards. All requests for accommodation that can be approved by the commanding officer shall be approved or denied, usually within one week of the date of request. Any request for accommodation that is denied is subject to appeal to the next higher level of command and subsequently to the Chief of Naval Operations (CNO) or Commandant of the Marine Corps (CMC) as appropriate. The next level of command will either overturn or uphold the contested decision. Denied requests regarding the wear of religious apparel shall be appealed directly to the CNO or CMC, whose decision is not subject to appeal.

Commanders should accommodate religious dietary observances to the fullest extent possible through a standard core menu, Meals Ready to Eat, Religious (MRE-R), or other appropriate means. Commanding officers may authorize individuals to provide their own supplemental food rations for religious dietary observance at sea or in the field, as long as unit health, safety, or readiness is not compromised.

Requests to waive immunization requirements based on religious objection are balanced against the risk to the member and the unit, and requirements such as alert status, deployment potential, and availability of the member for reassignment. To assure consistent application of these guidelines, immunization waivers will be decided by the Surgeon General of the Navy or headquarters level designee. Requests should be submitted to Chief, Bureau of Medicine and Surgery via the commanding officer and Deputy CNO, Manpower, Training and Education. Commanding officers may subsequently revoke waivers for service members at imminent risk of disease due to exposure or to conform to international health regulations incident to foreign travel or deployment.

MILPERSMAN 1731-010 provides guidance regarding religious days of observance and holy days. Members of the Naval Service whose religious convictions require them to observe religious services on a day other than that specified by their command, except by reason of compelling military necessity, are afforded the opportunity to observe the requirements of their religious faith. When excused from duty for a religious day of observance, the workweek of the individual should not be less than that of other personnel and may include duty on the command observed day. Commanding officers are encouraged to give favorable consideration for leave or special liberty requests from personnel desiring to observe significant holy days of their faith and should be mindful of major religious observances.

Regarding the wear of religious apparel, 10 USCS § 774 provides that a servicemember may wear an article of religious apparel in uniform unless wearing the item would interfere with fulfilling one's military duty or the item is not "neat" or "conservative" as determined by SECNAV.

Consult DoDI 1300.17, or speak with the Command Chaplain or Staff Judge Advocate to learn more. ■

Immunity Waivers, Cont'd

Third, review the governing policy, Executive Orders, and DoD and Service Directives that could also address whether the DoD complies with the state provisions. The DoD and Navy may not legally be subject to state/local regulation because of sovereign immunity. However, there may still be programs and policies imposed upon the Navy that require compliance. These can come in the form of Executive Orders, DoD, or Navy Regulations, etc.

Fourth, if there is a clear waiver of sovereign immunity and a fee or tax is assessed, ensure that a fee/tax analysis is conducted. There are various tests for determining whether a state/local government's charge is a fee or tax. The DoD does not have to pay a tax because of federal supremacy over state and local governments. However, Federal entities must pay fees if the sovereign immunity waiver in the statute so directs. Ultimately, to be a fee the charge must be indiscriminately imposed on all persons/entities, must be approximate for the value of the service provided, and the charge should not generate extra revenue. It is important to look at the ultimate use of the funds generated. The graphic on page 8 provides a guide to these tests.

Always reach out to regional environmental counsel before agreeing to pay any amount assessed under an environmental statute or regulation. But if you go through this analysis first, your discussion with counsel will be more focused and productive, and you will be able to say, *"vini, vidi, vici,"* with any sovereign immunity issue in environmental law. ■

ORF! I Did It Again!

Proper Use of Official Representation Funds

BY LT MEDARDO MARTIN
MAYPORT, FL

When carefully deployed, Official Representation Funds (ORF) can fund some events and gift purchases. You must take care when using ORF, however, as it is all too easy to unintentionally misuse funds and find yourself on the cover of *Navy Times*. Here are some questions you need to ask yourself when dealing with ORF.

Am I trying to spend this money on official courtesies?

ORF is primarily used for extending official courtesies to authorized guests. This can include hosting events to maintain the standing and prestige of the United States, luncheons or receptions at DoD events, entertainment of local authorized guests for civic or community relations, new commander receptions, entertainment of authorized guests incident to port visits abroad, official functions in observance of foreign national holidays, and dedication of facilities.

Note that expenditures must be "modest," per the instruction.

Can I use ORF for gifts?

Under the right circumstances, yes. ORF can be used to purchase gifts, mementos, or tokens for authorized guests. Gifts may not cost more than $335 (subject to inflation figure set by GSA) if given to authorized guests.

What is an authorized guest?

ORF can only be expended for, or in honor of, certain individuals known as authorized guests. The list is detailed in SECNAVINST 7042.7K, paragraph 6a. In the interest of brevity, it includes distinguished citizens of foreign countries, senior non-DoD government officials at the state and federal levels, distinguished US citizens, and other specific classes of individuals listed in the instruction. If you're not sure if someone is an authorized guest, you should be careful to reference the instruction and ensure they fit one of the definitions.

So I have an event and there are some authorized guests. I can use ORF for it, right?

Not necessarily. Official courtesies are subject to required ratios of authorized guests, so there will be some math on this test. If the total number of invitees is less than 30 persons, at least 20 percent expected to attend should fit the authorized guests category. If the total number of invitees is greater than 30, it must be a minimum of 50 percent. In other words, if it is a smaller function, you can get away with mostly DoD people vice authorized guests. But if it's a big enough party to have more than 30 people mingling over a bowl of fruit punch, at least half of those people should be authorized guests if you want to use ORF.

Most of my guests are DoD with a significant number of authorized guests. Is ORF totally out of the question?

Not quite. DoD personnel in excess of the defined ratios can attend by paying a pro rata share.

More math? I thought lawyers hated math?

We do. Luckily, SECNAVINST 7042.7K, Enclosure (2) has provided a handy example of how to deal with this issue. An official guest list contains 50 requiring a 50 percent ratio. Only 10 of those are authorized guests. Accordingly, only 10 of the DoD personnel can be properly funded with ORF. This means 20 people (10 authorized, 10 DoD) can be paid for with ORF of the 50 on the guest list. This works out to 40% of the guest list. The remaining 60% of the cost must be paid either on a pro rata basis by the additional 30 DoD Personnel or it can be divided among all DoD attendees.

Suppose the total cost of the event is $10 per person, or $500. In real terms this means you should either make a distinction between the 10 guests who don't have to pay and charge the rest of the DoD guests $10 each, or simply charge all DoD personnel $7.50 each.

So what specifically can I use ORF for?

Expenses may include but are not limited to food and refreshments, alcohol for receptions or meals, gratuities for services rendered by non-governmental personnel, disposable supplies like napkins and paper plates or perishable flowers and candle arrangements, rental of material (such as tables, chairs and glasses) for the event. Basically you can use it to pay for throwing an appropriate party or reception.

So if I hit all these wickets, I can use ORF to fund my event?

Perhaps. Read SECNAVINST 7042.7K to start. If you have more specific questions definitely consult a JAG near you before expending ORF! ■

SEXTORTION, CONT'D

How can my troops and I avoid becoming victims?

1. Adjust your security settings on social media, and screen friends to make sure you know and trust them.
2. Remember that scammers target servicemembers: limiting references to your military affiliation can prevent being targeted.
3. Avoid sharing sexually explicit material online.
4. If you sense during an otherwise normal chat that you may be a victim of a crime, do not make any payments. Save all communications and forward them to NCIS. If you want to make an anonymous tip, send a text to 274637 (CRIMES). ■

Region Legal Service Office Southeast
Building 4
P.O. Box 116
NAS Jacksonville
Jacksonville, Florida 32212-0115

Commanding Officer
CAPT Patrick Gibbons

Executive Officer
CDR David Gonzalez

Senior Enlisted Leader
LNCM Jacquelyn Woodall

Region Legal Service Office Southeast supports the operational readiness of Department of Navy assets in the Southeastern United States by providing responsive, timely, and accurate legal guidance, support services and training in the areas of military justice and administrative law. RLSO SE headquarters is located onboard Naval Air Station Jacksonville, Florida and has detachments throughout the Region and Guantanamo Bay, Cuba. The RLSO SE geographic area of responsibility includes the states of Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, Tennessee, Missouri, Oklahoma, Kansas, Arkansas, and Texas as well as Cuba, Puerto Rico, South America and portions of Mexico.

Staff Judge Advocate Offices

Commander, Navy Region Southeast	(904) 542-2133
Command Services Director	(904) 542-3330
Naval Air Station Jacksonville	(904) 542-2942
Naval Station Mayport	(904) 270-5445 x3009
Naval Submarine Base Kings Bay	(912) 573-4732
Naval Air Station Key West	(305) 293-2833
Naval Station Guantanamo Bay	(757) 458-4834
Naval Air Station Pensacola	(850) 452-4402
Naval Air Station Meridian	(601) 679-2340
Naval Construction Battalion Center Gulfport	(228) 871-2627
Naval Air Station Joint Reserve Base New Orleans	(504) 678-9589
Naval Air Station Corpus Christi	(361) 961-3568
Naval Air Station Fort Worth Joint Reserve Base	(817) 782-7990
Naval Air Station Whiting Field	(850) 623-7231
Naval Air Training Command (NATRACOM)	(361) 961-3578
Naval Air Technical Training Center (NATTC)	(850) 452-8573
Center for Information Dominance (CID) Corry Station	(850) 452-6290
Naval Support Activity Mid-South	(901) 874-5794