



# Sorry, 71 FED. REG. 1 (2006)

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Apologies have received a good deal of attention lately, both from the standpoint of their effect on private civil litigation<sup>1</sup> and their place in criminal<sup>2</sup> and international law.<sup>3</sup> These are welcome contributions, but they overlook another area in which apologies can play a valuable role: mistakes government makes when dealing with individuals.<sup>4</sup> I have recently had occasion to consider this on behalf of a client – Army Chaplain James J. Yee – who

was vilified (and held in solitary confinement for 76 days) in a national security case that crumbled before trial. Whether or not federal law currently provides some other remedy for him,<sup>5</sup> it remains to be seen whether – all charges against him having been dismissed, and nonjudicial punishment<sup>6</sup> for adultery and downloading pornography having been overturned on appeal<sup>7</sup> – the Army, the Department of Defense, or the Commander in Chief will apologize.

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- 1 E.g., Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003); Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000).
- 2 Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004).
- 3 Richard B. Bilder, *The Role of Apology in International Law* (paper presented at the State Apologies Conference, University of North Carolina at Chapel Hill, Oct. 22, 2004). Prof. Bilder's paper will appear in *THE AGE OF APOLOGY* (Mark Gibney, Rhoda E. Howard-Hassman & Niklaus Steiner eds., United Nations Press) (forthcoming).
- 4 Official apologies directed to ethnic and other groups have also been the subject of recent study, see, e.g., Melissa Nobles, *Official Apologies and their Effects on Political Membership in Democracies* (paper presented at American Political Science Ass'n meeting, Philadelphia, Aug. 2003), [web.mit.edu/polisci/research/mnobles/official\\_apologies\\_in\\_democracies.pdf](http://web.mit.edu/polisci/research/mnobles/official_apologies_in_democracies.pdf), but typically involve heads of state or national governments, rather than agencies within a government. I believe such cases involve issues that are different in kind from individualized apologies, although, at least where domestic group injustice is concerned, the same memorialization machinery as that suggested here may be equally apt.
- 5 See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1062–66 (2004).
- 6 Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (2000).
- 7 *Convictions Dropped for Muslim Chaplain at Guantánamo Bay*, N.Y. Times, Apr. 15, 2004, at A24.

Apologies to vindicated individuals are not unheard of. Dr. Wen Ho Lee, a Los Alamos National Laboratory physicist who was the subject of a lengthy federal indictment, received an apology in open court from a district judge before whom he pleaded to one count of mishandling nuclear secrets in 2000.<sup>8</sup> Four of my clients have received apologies from responsible federal officials. The country itself eventually apologized for the Japanese-Americans' "relocation" in World War II.<sup>9</sup> We have also tried to correct unfairness to individuals in other situations where we conclude that an error has been made.<sup>10</sup>

Despite these exceptions, we obviously do not have a culture of public administration<sup>11</sup> that encourages apologies when government errs. One reason for this – aside from the natural reluctance of those in authority to admit an error – may be the absence of a procedure for publishing apologies. The four my clients received were in the form of private letters. Judge Parker's apology to Dr. Wen Ho Lee exists in court

records, was memorialized in a report generated by Senator Arlen Specter,<sup>12</sup> and was reported in the media. What is needed is a way to reach the public directly rather than filtered through news media that may not reproduce the official text, and to do so without the vagaries of competition among newsworthy events for space in a limited "news hole."

I propose the creation of a new section in the *Federal Register: Apologies*. The *Federal Register* is probably one of the driest publications ever printed, but it is official and it reaches a broad audience – especially now that it is available in electronic format.<sup>13</sup> An Apologies section would demonstrate the government's sincerity on the rare occasions it does apologize.<sup>14</sup> Such a section could be established by simple order of the Director of the Federal Register. That official enjoys the power to publish (in addition to executive orders, proclamations, other presidential documents, and documents required to be published by law) any other document that "is the official action of the

8 James Sterngold, *Nuclear Scientist Set Free After Plea in Secrets Case; Judge Attacks U.S. Conduct*, N.Y. Times, Sept. 14, 2000, at A1, col. 6; see also James Sterngold, *A Judge's Indignation*, N.Y. Times, Sept. 15, 2000, at A1, col. 4.

9 Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. App. §§ 1989(a), 1989a(a) (2000)).

10 In 2000, Congress enacted a measure exonerating Captain Charles B. McVay III, who was convicted by court-martial following the sinking of the USS *Indianapolis* on July 30, 1945. National Defense Authorization Act for Fiscal Year 2001, § 545, 114 Stat. 1654, 1654A-116 (2000). The same legislation included a provision vindicating the Army and Navy commanders in Hawaii at the time of the attack on Pearl Harbor. *Id.* § 546, 114 Stat. 1654A-119. We are not alone in this respect: in 1998, the President of France apologized to Captain Dreyfus's descendants. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 114 @ n.92 (1998) (citing Alexander Chancellor, foreword to "Pride and Prejudice: Easier Said Than Done," *The Guardian*, Jan. 17, 1998, at 8).

11 Or of politics. See David Firestone, *Being a Politician Means Never Having to Say You're Sorry*, N.Y. Times, Aug. 23, 1998, Week in Review, at 2, col. 1.

12 The report was never approved by the subcommittee under whose auspices it was prepared. It is available online at [www.fas.org/irp/congress/2001\\_rpt/whl.html](http://www.fas.org/irp/congress/2001_rpt/whl.html).

13 The official *Federal Register* web site is [www.gpoaccess.gov/fr/](http://www.gpoaccess.gov/fr/).

14 The *Federal Register* already includes occasional agency apologies, as when an agency expresses regret for an error or causing confusion in one of its issuances. *E.g.*, 69 FED. REG. 10,141, 31,617 (2004). At times, it may also include a private citizen's apology. FDA, *Laverne M. Charpentier; Denial of Hearing; Final Debarment Order*, 67 FED. REG. 71,574, 71,575, col. 2 (2002).

agency concerned”<sup>15</sup> and whose publication he considers “would be in the public interest.”<sup>16</sup> Congress has prohibited the publication of “comments or news items of any character,”<sup>17</sup> but there is no reason to read that clause as covering – and thus excluding – official apologies.

What would be published? Apologies, of course, unless the recipient affirmatively requests nonpublication in the interest of privacy. To the extent that publication is a way of achieving justice for citizens and accountability for officials and agencies, the section could also include notices briefly describing other settings in which an agency or official, rather than having offered an apology, has been determined to have committed some arbitrary or capricious act. Examples include cases in

which a court or agency awards fees under the Equal Access to Justice Act because the government’s position was not “substantially justified,”<sup>18</sup> a criminal defendant is acquitted, or a court refers a Freedom of Information Act case to the Office of Special Counsel to determine whether a document has been withheld arbitrarily or capriciously.<sup>19</sup>

Perhaps once there is an Apologies section in the *Federal Register*, federal officials will issue more apologies. Of course there is always the chance that the need to publish apologies in the *Federal Register* may make federal agencies even less disposed to apologize than they have been in the past, since issuance would presumably require publication of unpleasant or unflattering facts. But we live in hope. *GB*

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15 1 C.F.R. § 5.4(c) (2004).

16 1 C.F.R. § 5.3 (2004); see generally 1 C.F.R. § 5.1(a) (2004); 44 U.S.C. § 1505(a) (2000).

17 44 U.S.C. § 1505(b) (2000).

18 5 U.S.C. § 504(a)(1) (2000); 28 U.S.C. § 2412(d)(1)(A) (2000).

19 5 U.S.C. § 552(a)(4)(F) (2000). Any resulting disciplinary actions should also be made known to the public.