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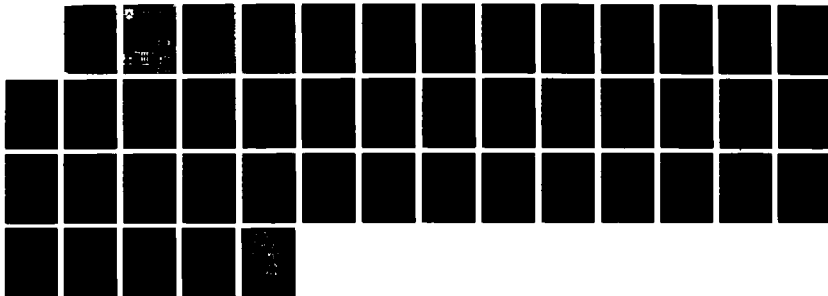
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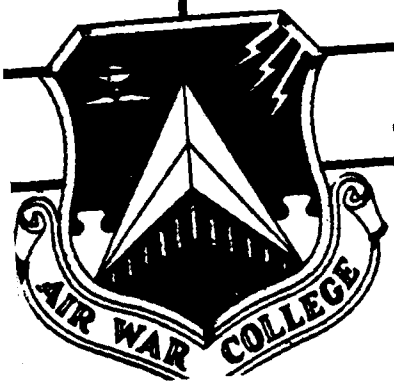
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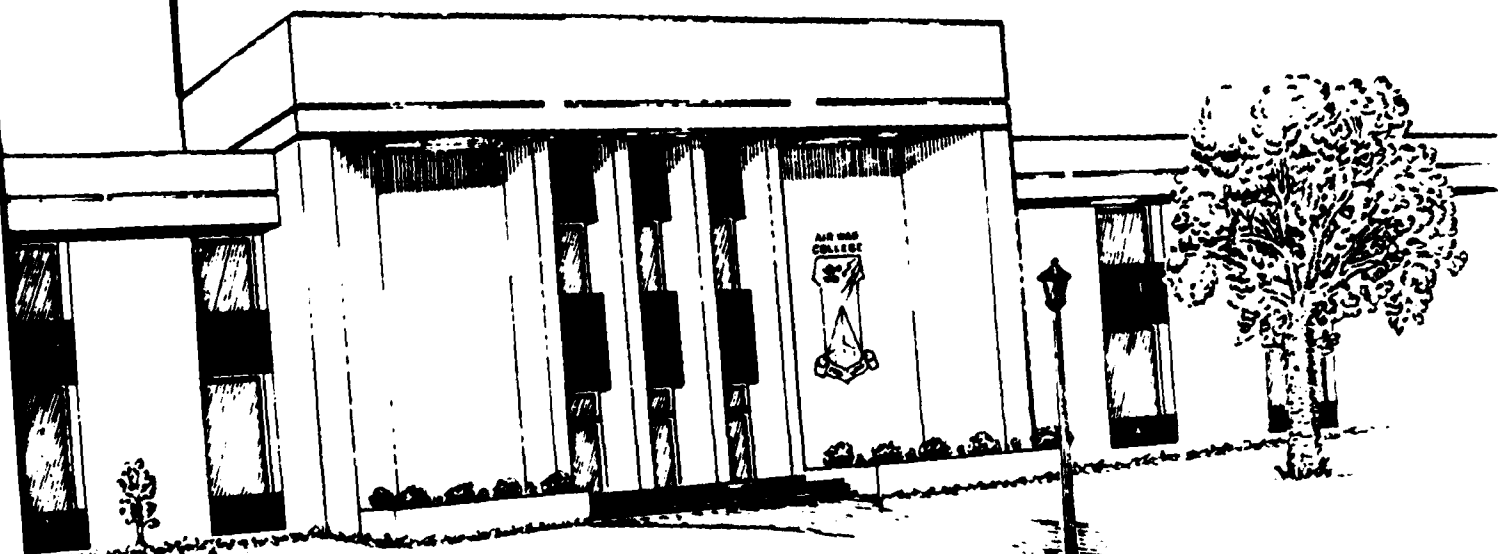
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THE EVOLUTION OF A CUSTOM IN THE AIR
FORCE: FRATERNIZATION

By COLONEL KAREN S. WRIGHT

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THE EVOLUTION OF A CUSTOM IN THE AIR FORCE: FRATERNIZATION

by

Karen S. Wright
Colonel, USAF

A RESEARCH REPORT SUBMITTED TO THE FACULTY
IN
FULFILLMENT OF THE RESEARCH
REQUIREMENT

Thesis Advisor: Dr. Barton J. Michelson
Technical Advisor: Lt. Colonel J. Jeremiah Mahoney

MAXWELL AIR FORCE BASE, ALABAMA

May 1987



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AIR WAR COLLEGE RESEARCH REPORT ABSTRACT

TITLE: The Evolution of a Custom in the Air Force:
Fraternization

AUTHOR: Karen S. Wright, Colonel, USAF

A discussion of the custom of fraternization is followed by a description of the historical evolution of this custom from 1621 to the present. A review of the military law, also from 1621 to the present, the current Manual for Courts-Martial and the Uniform Code of Military Justice concludes with a discussion of United States v. Johanns, and a recent court-martial of a woman officer charged with fraternization. Finally, the sole Air Force regulation dealing with fraternization, and two regulations that permit circumstances under which fraternization could take place are reviewed. The author concludes that the lack of an explicit, well-defined Air Force policy on fraternization will continue to foster nonstandardized enforcement of this custom. The Air Force policy of, "not to have a policy", on fraternization because it is too difficult does not meet today's need for firm, explicit guidance.

BIOGRAPHICAL SKETCH

Colonel Karen S. Wright (B.S., Education, Oklahoma State University; M.Ed., Our Lady of the Lake University) taught school in Denver, Colorado, Germany and Italy before being commissioned in 1966 through Officer Training School (OTS). She has extensive experience in personnel, serving in various consolidated base personnel offices (CBPO), as CBPO Chief, then Director of Personnel at a large technical training center, and as a staff officer at the Air Force Military Personnel Center. As the Chief of the Personnel Inspection Branch, Air Training Command (ATC) Inspector General, she was involved in the writing of the ATC regulation on fraternization and was the chief investigator in an ATC fraternization case. Her experience was broadened through tours as an OTS instructor and as the Director of Plans for the USAF Recruiting Service. Colonel Wright is a graduate of the resident programs of Squadron Officer School, Air Command and Staff College, and the Air War College, class of 1987.

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CHAPTER I

INTRODUCTION

The 1973 edition of Webster's New Collegiate Dictionary defines 'custom' as:

1a: a usage or practice common to many or to a particular place or class or habitual with an individual. b: long-established practice considered an unwritten law. c: repeated practice. d: the whole body of usages, practices, or conventions that regulate social life...(1:559)

The United States Air Force has many customs that meet this Webster's definition of a custom: Saluting officers of a superior grade; extending social courtesies to people who are superior in grade; saluting the flag; and, avoiding wrongful fraternization, just to name a few. Each of these examples are common to all Air Force personnel, are long established practices considered as unwritten law, are repeated practices, and regulate social life. Air Force Regulation 30-1, Air Force Standards, discusses customs as:

Our customs and courtesies are proven traditions--some written and some unwritten--that explain what should and should not be done. They are acts of respect and courtesy in dealing with other people. They have evolved as a result of the need for order, as well as the mutual respect and sense of fraternity that exist among military personnel. (2:4)

The custom of fraternization dates back as early as 1621, when King Gustavus Adolphus of Sweden wrote his Code of Articles that included the prohibition of certain types of contact between his army officers and their men. The evolve-

ment of the concept of a strong social class distinction as the justification for a social separation between officers and soldiers came to the forefront during the Middle Ages.

However, this "social class" justification for social separation--fraternization--started to change during the Revolutionary War and eventually evolved to the justification of the need to maintain military discipline and order. During World War II, the social class distinction lines between officers and enlisted personnel were substantially blurred by the effects of mass mobilization.

For many years, the custom of fraternization was not considered a problem in the Air Force. Many regulations surreptitiously encouraged fraternization, as did customs such as "Boss and Buddy Night" at enlisted clubs. Then, in an address to the Air Force Academy on April 12, 1982 General Bennie Davis, then Commander of the Strategic Air Command, stated,

I will focus on a single issue which, if left unchecked, can destroy the very core of our military structure--the issue of fraternization--social contact between officers and enlisted personnel which results in undue familiarity.... This is not a social class issue in any sense--it is a bedrock traditional military value which has, at its heart, the maintenance of discipline in the force, not only for wartime operations, but for peacetime as well. (3:2)

Then a bombshell hit the Air Force in the case of the United States v. Johanns--a male officer who had sexual relationships with three enlisted women. On October 26,

1983, the Air Force Court of Military Review made two distinct findings in his case that greatly impacted the Air Force:

...the custom in the Air Force against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable. (4:17)

and,

...at the time of the offenses in issue, there did not exist a clearcut standard for gauging so called 'fraternization' in the Air Force; as a result, alleged violations grounded on fraternization are not actionable under the UCMJ. (4:17)

In order to understand how the Johanns case 'happened,' this paper will present the historical evolution of the custom of fraternization, discuss the evolution of military law as it pertains to fraternization, and discuss the pertinent regulations pertaining to fraternization.

CHAPTER II
HISTORICAL EVOLUTION

Bans against close officer/soldier, associations are traceable back through the Code of Articles of King Gustavus Adolphus of Sweden, dated 1621 (5:5)

...the Articles of King Gustavus Adolphus... provided in Article 116: Whatever is not contained in these Articles and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withall, whatsoever offense finally shall be committed against the orders, that shall the severall Commanders make good, or see severally punished unlessee themselves will stand bound to give further satisfaction for it. (6:548)

It appears Article 116 was the first "catchall" provision for the enforcement of military discipline and made commanders responsible for that enforcement.

Although the Articles of ...Adolphus did not expressly forbid any social association between the ranks of the Army, they did prohibit certain types of contact between officers and their soldiers. Article 116...prohibited any conduct 'repugnant to Military Discipline.' Article 133 barred indiscriminate lending by officers to their subordinates. (6:555)

Early Roman military law regulated relationships between personnel of different grades by, "...recogniz[ing] that undue familiarity between military personnel of different ranks had an adverse effect on military discipline." (7:62) During the Middle Ages, a wide social class

distinction existed between nobles and peasants, and extended to the army. Nobles were officers, peasants were soldiers, and there was no such thing as upward mobility. A noble could lose his title and holdings by socializing with anyone but another person of equal stature. This social class distinction is considered the origin of our custom against fraternization.

The custom against fraternization evolved from this background. The concept was simple: an officer and a gentleman was entrusted with certain duties and responsibilities over the soldiers under his supervision. An officer violated that trust by becoming too familiar with his subordinates. (7:64)

The social class justification for the separation or 'undue familiarity' between officers and enlisted men began to change during the Revolutionary War. Over many years, the justification evolved to the need to maintain military discipline and order. "...fraternization was the single greatest problem the general [George Washington] encountered upon assuming command of the Continental Forces." (5:6) General Washington stated, "Discipline is the soul of the army. It makes small numbers formidable, procures success to the weak, and esteem to all." (8:5)

Captain Andrews' Fundamentals of military Service written in 1910 noted that, "Familiarity between officers and enlisted men, and between noncommissioned officers and privates, is inadmissible." (9:272) This written guidance was followed in the 1917 Officer's Manual that, "... familiarity

is most subversive to discipline." (10:50-51) Then, the 1921 Army Instruction Pamphlet stated:

Undue familiarity between officers and enlisted men is forbidden...and this requirement...is founded solely upon the demands of discipline ...discipline requires our immediate, loyal, cheerful compliance with lawful orders of the superior...and these objectives cannot be readily attained when there is undue familiarity between the officer and those under his command. (11:14)

The custom of undue familiarity continued through World Wars I and II, even though the social class distinction lines blurred. During the two World Wars, many upper-class, wealthy men (nobles) entered the enlisted ranks and many blue-collar men (peasants) entered the officer ranks through performance on the battlefield. There was no longer a basis in their backgrounds for social class distinction between officers and enlisted men.

During this era, The Officer's Guide explained simply that: Officers and enlisted men have not generally associated together in mutual social activities. No officer could violate this ancient custom with one or two men of his command and convince the others of his unswerving impartiality. The soldier does not need or desire the social companionship of officers." (5:16)

The addition of large numbers of women entering the services during World War II in both officer and enlisted status further blurred the distinction between officers and enlisted personnel, as normal heterosexual behavior took place. During World War II, General Dwight D. Eisenhower's

thoughts on heterosexual fraternization were, "I want good sense to govern such things. Social contact between sexes on a basis that does not interfere with other officers or enlisted persons should have the rule of decency and deportment--not artificial barriers." (7:83)

The shift in justification for the fraternization custom from social class to military discipline and order permitted the beginning of the expansion of the custom to include undue familiarity between officers of different ranks or enlisted members of different ranks. (7:73)

Lieutenant General James Doolittle, appointed by the Secretary of War in 1946, chaired a special board, "...to study officer-enlisted man relationships and to make recommendations...[for] changes in existing practices, laws, regulations, etc., which are considered necessary or desirable in order to improve relations between commissioned and enlisted personnel." (7:83) Two months of study led the board to conclude that poor leadership by a few officers and a "...system that permits and encourages a wide official and social gap between commissioned and enlisted personnel" were the primary causes of poor relationships between officers and enlisted. (7:83)

The [Doolittle] Board's recommendations included:

....

4. That all military personnel be allowed, when off duty, to pursue normal social patterns comparable to our democratic way of life.

5. That the use of discriminatory references, such as "officers and their ladies; enlisted men and their wives," be eliminated from directives

and publications issued in military establishments.

....

7. That the hand salute be abandoned off Army installations and off duty...

....

11. The abolishment of all statutes, regulations, customs, and traditions which encourage or forbid social association of soldiers of similar likes and tastes, because of military rank.

12. That necessary steps be taken to eliminate the terms and concepts, 'enlisted men' and 'officer,' that suitable substitutes be employed (e.g., members of non-commissioned corps, members of commissioned corps, etc.), and that all military personnel be referred to as 'soldiers.'

Although these recommendations were never adopted, they demonstrate that the original social class justification for the custom against fraternization was no longer valid or desirable. (7:83-84)

CHAPTER III
JUDICIAL EVOLUTION
1621-1944

The practice of using military justice to ensure order and discipline has a long history. The Articles of King Gustavus Adolphus of Sweden, traceable to the year 1621, were an antecedent to early British and United States military law. While the King's Articles did prohibit certain types of contact between officers and their soldiers, they did not expressly forbid any social association.

Drawing upon the Articles of Gustavus Adolphus, the British issued the first Articles of War in the 1600s. One of these early British Articles prohibited any disorderly conduct which was not barred by the other Articles. By the mid 1700s, the development of the original Articles had resulted in a general disciplinary article and an article prohibiting scandalous and infamous behavior by an officer. The purpose of these two articles differed. The general disciplinary article was intended to apply to offenses against discipline which were not expressly recognized by the other British Articles. The article governing officers' conduct pertained only to officers whose dishonorable conduct was scandalous and infamous. Although British military authorities do not appear to have tried many cases of fraternization, at the time the American Articles of War originated, prosecution occurred only under the article governing officers' conduct.

The American Articles of War provided the American antecedents to the general disciplinary article, Article 134, and the article governing officers' conduct, Article 133, of the UCMJ. The judicial interpretation of these American Articles and their application to particular kinds of fraternization initially paralleled prior

British application and interpretation. Later application and interpretation, however, differed and provided part of the foundation for current prosecution and judicial analysis of the fraternization offense under the Code.

When the Second Continental Congress adopted the Articles of War for its newly-formed army in 1775, two of the Articles were a general disciplinary article and an article governing officers' conduct. These articles corresponded to their British counterparts pertaining to disciplinary offenses and officers' behavior. The amendment of these original American Articles of War late in 1775 retained the two designated articles but also added the only American article in either the Articles of War or the later Code that expressly prohibited social association by an officer. (6:555-556)

The American article that expressly prohibited social association by an officer was retained until Congress enacted the *Uniform Code of Military Justice* in 1950. This American article prohibited officers from associating with other officers dismissed from the military for cowardice or fraud. Although the first two early American Articles were applied to fraternization, the associational article apparently was rarely, if ever, used. (6:557)

Although the wording of these articles remained virtually unchanged throughout their existence, their application to fraternization changed dramatically. In the beginning, officers and noncommissioned officers (NCOs) were charged almost exclusively under the article governing officers' conduct. Later, officers and NCOs were prosecuted primarily under the general disciplinary article. However, those cases prosecuted under other than the predominant

article used at that time indicated, "...under certain circumstances even early military commanders believed that some kinds of fraternizing activity by an officer did not demean status but did offend discipline." (6:558)

During this time, the Judge Advocate General's Board of Review generally held that convictions for fraternization could be sustained only under the general disciplinary article (Article 96).

Its rationale was that the officers' conduct did not disgrace or dishonor him within the meaning of Article 95 [Officers' behavior]. The conduct, however, did violate the military custom against social fraternization between officers and enlisted men.

The Board of Review's analysis of the offense during this period provided that almost any social association between an officer and enlisted person violated the military prohibition against fraternization. Despite sometimes disavowing that effect, the Board of Review sustained convictions under Article 96 [general disciplinary article] merely because association had occurred. (6:559)

In 1944, the Board of Review stated, "Social fraternization between officers and enlisted personnel is prohibited by military custom and not by any specific provision of the Articles of War. The basis of the custom is military discipline." (6:559)

The Uniform Code of Military Justice

The Uniform Code of Military Justice was enacted in 1950 and brought with it the three articles under which the offense of fraternization may now be prosecuted: Articles

92, 133, and 134. While Article 92 had no antecedent in the American Articles, both Articles 133 and 134 retained wording similar to the American Articles 95 and 96. "...fraternization continued to be a disciplinary offense rather than a status-based offense." (6:560).

The Air Force Judge Advocate General released an opinion on officers and fraternization with enlisted personnel in 1971. This opinion stated, in part:

2. Social contact between officers and enlisted men is limited only to the extent that the contact would undermine the mission and operational effectiveness of the Air Force. There is a custom in the military service, one of long standing and well recognized as such, and fulfilling all the requirements set forth in the Manual for Courts-Martial for its breach to be an offense under UCMJ, Article 134, that officers shall not fraternize [or] associate with enlisted men [These] guidelines are provided . . . recognizing that in any effective supervisory situation, whether it be civil or military, there must be present in the relationship some degree of authority, respect, discipline, and morale. Without these elements the job simply cannot be accomplished in a safe and efficient manner. (6:564)

The Court of Military Appeals adopted the current definition of fraternization through the reviews of two Navy cases, United States v Lovejoy, and United States v Pitasi. The court held that:

A violation of Article 134 occurred if the fraternization was not innocent acts of comradeship and normal social intercourse between members of a democratic military force...thereby indicating that normal association was not conduct prejudicial to order and discipline and did not violate the general article....The decisions implied,

however, that some kinds of association were permitted under the Code." (6:563-564)

Article 92: Uniform Code of Military Justice

Currently there is no basis for an Article 92 violation of wrongful fraternization in the Air Force. Air Force Regulation 30-1 (Air Force Standards), describes the custom prohibiting fraternization, but is not a punitive regulation:

A service member violates Article 92 by disobeying a lawful regulation issued by a military service....However, the Courts of Military Review and Court of Military Appeals hold that only transgressions of punitive regulations violate Article 92. A service regulation is punitive if it contains words of prohibition and announces that its violation subjects the service member to criminal prosecution under the UCMJ....As presently worded, [AFR 30-1] should not serve as the basis of a conviction under Article 92. (6:565-566)

Air Force Regulation 30-1 specifically states in the preface that it should not be used as a basis for disciplinary charges under Article 92. However, it explicitly states it may be used as evidence of customs of the Air Force under the Uniform Code of Military Justice.

Article 133: Uniform Code of Military Justice

Article 133 never uses the word fraternization, but is an article from which disciplinary actions are based when fraternization is charged. Article 133 states, "Any commissioned officer...who is convicted of conduct unbecoming an officer...shall be punished as a court martial may direct." (4:2)

The lack of guidelines indicating under which

article fraternization should be charged has permitted the recent conviction and attempts to convict officers under Article 133. Considering the disciplinary basis of the fraternization offense and the purpose of Article 133 to prohibit disgraceful or dishonorable activity by an officer, these charges were more properly brought under Article 134, the general disciplinary article. (6:570)

Until the 1940's, fraternization was almost exclusively prosecuted under American Article 95, concerning officers' conduct (predecessor to Article 133).

During that period, [before the 1940s] the military services and courts considered social association between officers and enlisted men demeaning to the status of an officer in violation of the antecedent articles. Later, in the 1940's the services and courts shifted their view to the effect of fraternization from demeaning of an officer's status to prejudicial to unit discipline....continued prosecution of fraternization under Article 133 requires its characterization as disgraceful or dishonorable activity. This characterization conflicts with the expressed basis of the military fraternization policy which indicates that wrongful fraternization is not dishonorable or disgraceful but injures discipline by its creation of the potential for abuse of authority and unequal treatment of subordinates. (6:570-571)

Article 134: Uniform Code of Military Justice

Article 134 is the general disciplinary article that incorporates military customs including the prohibition against fraternization.

The incorporation results from an historical merger of military customs into the antecedents of the general disciplinary article. The present Manual for Courts-Martial, in its guidelines for Article 134, recognizes the existence of this merger under the UCMJ. However, the continuation of the merger requires that the custom remain consistent with existing military statutes and

regulations and be currently observed. (6:573)

"Article 134 prohibits all conduct which prejudices military order and discipline and does not violate a specific disciplinary article in the Code...this article also prohibits other actions unrelated to discipline and order by its discrediting clause." (6:549)

The Manual for Courts-Martial states the requirements of a military custom under Article 134 as: Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned.

Fraternalization has never been specifically prohibited by an article of the Uniform Code of Military Justice, but has traditionally been prosecuted as a violation of military custom. (4:6) "Only in the 1984 edition does the MCM [Manual for Courts-Martial] include wrongful fraternization among the sample violations of Article 134, UCMJ." (4:16)

The 1984 Manual for Courts-Martial for the first time established a specific criminal offense of "fraternization" for certain officer-enlisted relationships. The elements of this offense are:

- (1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
(12:)

The above elements are taken from the Pitasi and Free cases and are based on longstanding custom of the service.

The Manual for Courts-Martial also provides the following general explanation of the offense of fraternization:

The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted person is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer. (7:117-118)

United States v. Johanns

The case that finally prompted the 1984 change to the Manual for Courts-Martial to include wrongful fraternization

among the sample violations of Article 134, Uniform Code of Military Justice, was United States v Johanns. Captain Johanns was an unmarried missile crew commander stationed at Minot Air Force Base, North Dakota. While the Officers' Club was closed for redecoration, officers were authorized to use the noncommissioned officers (NCO) Club. Capt Johanns frequented the NCO Club and met three female NCOs (one NCO was married); he dated all three and had sexual intercourse with all three. During this time, Captain Johanns asked his supervisor, a colonel, about the propriety of his social involvement with these female NCOs. The colonel said he thought it was "actionable fraternization," but did not know if that was the Air Force policy. However, the colonel did give him an article on fraternization that purported to explain the Air Force policy (7:87)

The Air Force Court of Military Review subsequently determined as the article given to Captain Johanns by the colonel concluded, that it was no longer a violation of Air Force custom to fraternize with enlisted members absent a command or supervisory relationship.

Capt Johanns was convicted by a general court-martial in July 1982 of wrongfully fraternizing with three enlisted women. These fraternization charges were unusual in that the case did not include the type of aberrant behavior generally seen in previous fraternization cases. However, the Air Force decided these acts represented private

matters, and that officers should be held to higher standards than enlisted members, as an officer holds a special position of public trust and honor. Captain Johann's behavior was deemed not just in poor taste or unsuitable, it was dishonorable and disgraceful to him and the military profession. (13:11)

The Court of Military Appeals opinion, written by Chief Judge Everett, chastised the Air Force for not writing a regulation specifically dealing with fraternization as had been recommended fourteen years earlier in Pitasi. He noted that clear directives as to permissible contacts between officers and enlisted persons will obviate the issues present in this case. He specifically stated that restrictions on contacts-- male/female or otherwise--where there is a direct supervisory relationship, can be imposed. (7:88)

In the Pitasi case (20 C.M.A. 601, 44 C.M.R.31 (1971)), the Court of Military Appeals stated military authorities still have:

...the obligation of providing some guidelines by which an officer, or those who are called upon to sit in judgment as members of a court-martial, may test what conduct is or is not violative of the 'custom.' While the drafting of an appropriate regulation might be difficult, we recommend it to the responsible military authorities.' (7:87)

The failure of military authorities to draft an appropriate regulation was in large part responsible for the appellate decisions in the Johann case. (7:87) In 1983, the Court of Military Review affirmed a conviction of adultery (one female noncommissioned officer was married) in violation of Article 134, and, based upon the adultery,

conduct unbecoming an officer and a gentleman, in violation of Article 133. The convictions of fraternization, in violation of Article 134, were set aside and dismissed. (4:18)
In addition, the Court made two distinct findings:

...the custom in the Air Force against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable. [emphasis in original]

...at the time of the offenses in issue, there did not exist a clear cut standard for gauging so called 'fraternization' in the Air Force; as a result, alleged violations grounded on fraternization are not actionable under the UCMJ. (4:17)

Although most courts-martial occur at base level, the outcome can be challenged at various levels.

Challenges to the validity of the fraternization offense have mainly occurred in the military appellate courts. The structure of the military appellate system is as follows. The initial appellate court, the service Court of Military Review, reviews all court-martial convictions from a particular service where the approved sentence 'affects a general or flag officer or extends to death [or involves] dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.' Article 66, 10 U.S.C. 866(b)(1982). The highest military appellate court, the Court of Military Appeals, reviews all cases where the sentence affirmed by the Court of Military Review involves a general or flag officer or the death penalty. It also reviews cases that the service Judge Advocate General orders sent to the court for review or upon petition of the accused and good cause shown. Article 67, 10 U.S.C. 867(b)(1982). (6:554)

United States v. Hays

In November 1986, 2d Lieutenant Naomi Hays, the deputy commander of a missile crew stationed at Little Rock Air Force Base, Arkansas, was tried for adultery and fraternization at a general court-martial. The trial judge, Lieutenant Colonel J. Jeremiah Mahoney, provided 10 pages of written instructions to the members of the court. Included in these instructions was a definition of fraternization and custom:

Fraternization. Traditionally, in the context of courts-martial, the term is limited to misconduct by commissioned officers in their relations with enlisted members. Fraternization may span the entire spectrum of amicable human social interaction, ranging from the nature of a passing greeting on the street, to formation of close personal or intimate relationships.

Not all contact or association between officers and enlisted persons is an offense. To be wrongful and constitute a violation of Article 134, acts of fraternization with enlisted members by officers must be more than innocent acts of comradeship and normal social intercourse. Whether the contact or association in question is an offense depends upon the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

The basis for the prohibition of fraternization is not social inequality, but the command and leadership role of the officer corps in the pre-

servation of military discipline. Fraternization constitutes an offense under Article 134 of the UCMJ only insofar as it violates a custom of the Air Force.

Custom. Custom means more than a method of procedure, or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which, by common usage, have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. (14:6)

Lt Hays was convicted of two counts of adultery and one count of fraternization. She was sentenced November 10, 1986 to dismissal from the Air Force and forfeiture of her \$1,274 monthly pay. The court found that she had committed sodomy with a married sergeant under her command while on alert duty and adultery with a married captain in a different missile combat crew. (Air Force Times, 24 Nov 86) Her case is pending review by the Air Force Court of Military Review.

CHAPTER IV

REGULATIONS PERTAINING TO FRATERNIZATION

The Air Force has never published a regulation that specifically prohibits "fraternization." Two regulations permit circumstances under which fraternization could take place, Family Housing Management and the Air Force Open Mess Program.

In January 1987, a highly-placed general officer stated in an address to the Air War College class, that the Air Force policy on fraternization, "...is to not have a policy." The logic was that, "a bad policy is worse than no policy," and the Air Force did not know how to write a good policy. However, he further stated the Air Force will prosecute officers "to the fullest extent," as fraternization is "deleterious to good order and discipline."

Air Force Standards

Air Force Regulation 30-1, Air Force Standards,

...was initially published in 1971, as a non-punitive guide summarizing existing standards of personal and professional conduct....At that time, the guide did not address the subject of fraternization. In a 1977 revision, a new paragraph was added, reading:

OFFICER AND ENLISTED RELATIONSHIP. Two important characteristics of the officer and enlisted relationship are loyalty and mutual respect. It is inappropriate for us either to degrade or complain about each other either in public or private. We are all professionals and as such we must treat each other with dignity and respect. Since we live and work in a very close environ-

ment and endure common hardships; officer and enlisted personnel frequently develop close personal friendships. However, friendships must not interfere with judgment or duty performance. [emphasis in original] (4:62-63)

Air Force Regulation 30-1 was again revised and reissued on May 4, 1983. This regulation now stated it is directive in nature, but is not to be used as a basis for charging a violation of an order under Article 92, Uniform Code of Military Justice (see Chapter III, page 13 for a discussion of Article 92) (2:2)

Air Force Regulation 30-1 also uses the word "fraternization" as it pertains to professional relationships and provides a discussion of "professional relationships":

7. Professional Relationships:

a. Professional relationships are essential to the effective operation of the Air Force. In all supervisory situations there must be a true professional relationship supportive of the mission and operational effectiveness of the Air Force. There is a long standing and well recognized custom in the military service that officers shall not fraternize or associate with enlisted members under circumstances that prejudice the good order and discipline of the Armed Forces of the United States.

b. In the broader sense of superior-subordinate relationships there is a balance that recognizes the appropriateness of relationships. Social contact contributing to unit cohesiveness and effectiveness is encouraged. However, officers and NCOs must make sure their personal relationships with members, for whom they exercise a supervisory responsibility or whose duties or assignments they are in a position to influence, do not give the appearance of favoritism, preferential treatment, or impropriety. Excessive socialization and undue familiarity, real or perceived, degrades leadership and interferes with command authority and mission effectiveness. It is very important that the conduct of every

commander and supervisor, both on and off duty, reflects the appropriate professional relationship vital to mission accomplishment. It is equally important for all commanders and supervisors to recognize and enforce existing regulations and standards.

c. Air Force members of different grades are expected to maintain a professional relationship governed by the essential elements of mutual respect, dignity, and military courtesy. Every officer, NCO, and airman must demonstrate the appropriate military bearing and conduct both on and off duty. Social and personal relationships between Air Force members are normally matters of individual judgment. They become matters of official concern when such relationships adversely affect duty performance, discipline, and morale. For example, if an officer consistently and frequently attends other than officially sponsored enlisted parties, or if a senior Air Force member dates and shows favoritism and preferential treatment to a junior member, it may create situations that negatively affect unit cohesiveness; that is, positions of authority may be weakened, peer group relationships may become jeopardized, job performance may decrease, and loss of unit morale and spirit may occur. (2:18-20)

Military Family Housing

Until 1950, the regulation for the assignment of family housing did not address military members married to each other. The 1950 regulation change stated these members, "...need not be assigned to government quarters where the best interests of the service are otherwise served."

(4:29) Finally, in 1957, officer-enlisted marriages were recognized:

IF ONE SPOUSE IS AN OFFICER OR WARRANT OFFICER, AND THE OTHER IS AN ENLISTED PERSON, assignment to family-type public quarters is not considered to be in the best interest of the service, and such assignment will not normally be made. In this case, both members will be permitted to

reside jointly off the base, regardless of the availability of public quarters for their occupancy.

... in 1977 a new regulation made assignment of officer/enlisted couples in base housing no different than assignment of any other married service member--not only permissible, but mandatory if vacant quarters were available. (4:29-30)

The most recent edition of Air Force Regulation 90-1, Family Housing Management, 19 June 86 states, "Assignment of MFH [Military Family Housing] members who have spouses in the military service are made according to Table 5-4." This table states that, when the two spouses have the status of commissioned officer and enlisted, neither has dependents in their own right, and family housing is available, they can choose which housing they will live in--either officer or enlisted. (15:)

Open Mess Use

Air Force Regulation 30-1, Air Force Standards, provides guidance on the use of open mess facilities when both husband and wife are not eligible for membership in the same open mess:

Open mess members are permitted to use only their own club (or a like club at another base through reciprocal agreement). If both husband and wife are not eligible for membership in the same open mess, by virtue of their grade, the noneligible member may use the mess facility of their member spouse only when accompanied by their spouse. For such unofficial visits, the nonmember spouse will not be in uniform. Officer and enlisted open mess members may occasionally be guests at one another's open mess for officially sanctioned functions, wearing the uniform appropriate to the occasion. As a guest, your conduct and behavior

must remain above reproach. (AFR 215-11)
(2:18)

Air Force Regulation 215-11, Air Force Open Mess Program, 20 June 1985 states: "In the interest of recognizing the appropriateness of professional relationships, each installation should operate separate open mess facilities for officer and enlisted personnel." However, when the MAJCOM commander determines separate facilities are impractical, a consolidated open mess is authorized. The regulation specifies that, in this case, "...every effort should be made to designate separate officer and enlisted dining and bar areas." Facilities that do not permit at least separate bar activities are discouraged.

Air Force Regulation 215-11 guidance for officer-enlisted marriages is very similar to Air Force Regulation 30-1, Air Force Standards:

If both husband and wife are not eligible for membership in the same open mess, by virtue of their rank, the non-eligible member may use the mess facility of the member spouse only when accompanied by his or her spouse. For such unofficial visits, the nonmember spouse will not be in uniform. (15:8)

In summary, the Air Force has no regulation that specifically prohibits "fraternization." The current Air Force Regulation 30-1, Air Force Standards, discusses fraternization under "Professional Relationships," and states, "There is a long standing and well recognized custom in the military service that officers shall not fraternize or associate with

enlisted members under circumstances that prejudice the good order and discipline of the Armed Forces of the United States." This is only time the word "fraternize" is used in the Standards regulation. This is also the first time the regulation warns it is directive in nature, but it should not be used as a basis for discipline under Article 92 of the Uniform Code of Military Justice (see Chapter III, page 13, for a discussion of Article 92). However, it also states the regulation may be used as evidence of customs of the Air Force in actions under the Uniform Code of Military Justice.

Also, the military family housing and the open mess usage regulations permit circumstances under which fraternization could take place. In an officer-enlisted marriage, if neither has dependents in their own right and military family housing is available, the couple can choose to live in either officer housing or enlisted housing. The open mess regulation permits a consolidated (officer and enlisted) club under certain circumstances. Also allowed, when both husband and wife are not eligible for membership in the same open mess by virtue of their grade, the noneligible member may use the mess facility of their member spouse when accompanied by their spouse. However, the nonmember spouse must not be in uniform. The Air Force Standards regulation also states officer and enlisted open mess members may occasionally be guests at one another's open mess for officially sanctioned

functions, wearing the uniform appropriate to the occasion.

Summary

The prohibition against fraternization in the Air Force is based on custom. The sole regulation that mentions fraternization is Air Force Regulation 30-1, Air Force Standards. This Standards regulation discusses fraternization under "Professional Relationships," but the discussion is very general and leaves much to individual interpretation: "There is a long standing and well recognized custom in the military service that officers shall not fraternize or associate with enlisted members under circumstances that prejudice the good order and discipline of the Armed Forces of the United States."

Legally, fraternization pertains only to officer-enlisted relationships in certain circumstances. Fraternization has only recently been listed as an example of behavior that can be charged under Article 134 of the Uniform Code of Military Justice. Article 134 is the general disciplinary article that incorporates military customs, including the prohibition against fraternization. In 1984, the Manual for Courts-Martial established five specific elements that must be satisfied for a person to be charged with the offense of fraternization. The accused must: Be a commissioned or warrant officer; have fraternized on terms of military equality with one or more enlisted member(s); and have known the person(s) to be enlisted member(s). In addition, the fraternization must have violated the custom of the accused's

service that officers shall not fraternize with enlisted members on terms of military equality, and, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces. These elements were taken from the United States v. Pitasi and United States v. Free cases and are based on a long standing custom of the service.

In the Pitasi case in 1971, the Court of Military Appeals stated the military authorities had the obligation to provide some guidelines to test what conduct is or is not violative of the 'custom' of fraternization. The Air Force never provided these guidelines, and this lack of guidelines proved crucial to the case of United States v. Johanns in 1982. Captain Johanns was convicted in 1982 by a general courts-martial of fraternizing with three enlisted women. The Court of Military Appeals, in their Johanns opinion, chastised the Air Force for not providing guidelines, as had been recommended 14 years earlier. In 1983, the Court of Military Review affirmed a conviction of adultery in violation of Article 134 and, based upon the adultery, conduct unbecoming an officer and gentleman, in violation of Article 133. Captain Johann's convictions of fraternization, in violation of Article 134, were set aside and dismissed. In addition, the Court issued two important findings:

...the custom in the Air Force against fraternization has been so eroded as to make criminal

prosecution against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable.

...at the time of the offenses in issue, there did not exist a clear cut standard for gauging so called 'fraternization' in the Air Force; as a result, alleged violations grounded on fraternization are not actionable under the UCMJ.

Fraternization could be charged today in violation of three Articles of the Uniform Code of Military Justice: Articles 92, 133 and 134. Article 92 is for the violation of a lawful regulation. The only regulation dealing with fraternization is Air Force Regulation 30-1, Air Force Standards, but it specifically states it should not be used as a basis for disciplinary charges under Article 92. Article 133 prohibits disgraceful or dishonorable activity by an officer. However, fraternization is not necessarily disgraceful or dishonorable (as adultery, for example), therefore the most appropriate article to use is Article 134. Article 134 is the general disciplinary article that incorporates military customs, including the prohibition against the custom of fraternization.

At the present time, the most clear cut Air Force policy on fraternization is to not have a policy, based on the logic that a bad policy is worse than no policy. While the Air Force searches for the right policy to promulgate, the officer corps is still being held accountable, at least

tacitly, under the Uniform Code of Military Justice for fraternization which violates a military custom.

Conclusions

The Air Force does not have a specific policy on fraternization, other than to prosecute officers when they get "caught", and guidelines have yet to be issued. The 1984 Manual for Courts-Martial lists fraternization as an example of an offense only under Article 134, and lists five elements that must be satisfied before the accused can be convicted. Most importantly, only officers can be charged with fraternization as a criminal offense.

The only regulation to discuss fraternization, Air Force Regulation 30-1, does not limit it to officer-enlisted relationships. The regulation also charges noncommissioned officers to make sure their personal relationships with people they supervise or whose duties or assignments they can influence, do not give the appearance of favoritism, preferential treatment, or impropriety. Then, the regulation says social and personal relationships between Air Force members are normally matters of individual judgement, BUT become matters of official concern when the relationship affects duty performance, discipline and morale.

What does all this mean? All Air Force members are supposed to maintain their personal relationships in a professional manner at all times. Obviously, most fraternization depends on whom is judging the behavior. If it is

determined that wrongful fraternization has occurred, only an officer can be charged under Article 134 of the Uniform Code of Military Justice.

Where do we stand? The Air Force is against fraternization, but cannot define and issue a specific regulation or guidelines. Some commanders stamp out fraternization the minute they think they see it. Other commanders look the other way until it becomes a problem and demands action.

What must the Air Force do? Take a definitive position and spell out what behavior is and is not permitted so members will know what is expected of them, and commanders may enforce standards uniformly throughout the Air Force.

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