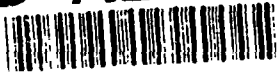


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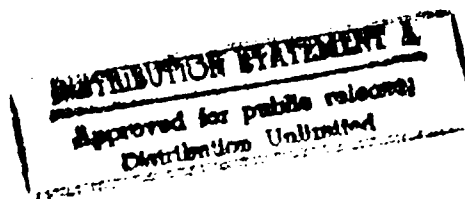


SMOKE NOT: WHAT YOUR COUNTRY CAN DO FOR YOU
A Tobacco Use Policy for the U.S. Marine Corps

by

Neal A. Puckett, J.D., LL.M.
Major, U.S. Marine Corps

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(A Tobacco Use Policy for the U.S. Marine Corps)

by

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Major, U.S. Marine Corps

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Advanced Research Program.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Abstract of
SMOKE NOT: WHAT YOUR COUNTRY CAN DO FOR YOU

The United States Marine Corps can no longer justify to the American taxpayer the extraordinary expense of medical treatment for Marines who suffer from tobacco related diseases. Those expenses involve treating active duty Marines and former Marines in the Veterans Administration health care system. The Marine Corps should condition future enlistments upon an agreement to abstain from the use of tobacco products, and phase out tobacco use by Marines already on active duty. Such a policy is economically sound, legally enforceable, and undeniably beneficial to the personal health and combat effectiveness of Marines of the 21st century.

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EXECUTIVE SUMMARY

Marines must be mentally and physically prepared to undergo the rigorous training required to prepare for a combat environment. When Marines develop chronic diseases associated with tobacco use, the taxpayer pays for providing health care either through Navy medicine or through the Veterans Administration. There are common sense steps that can help control the phenomenal costs in dollars and lives. We owe it to our Marines and the taxpayers to explore such measures.

Smoking and the use of spit tobacco are addictive behaviors with significant withdrawal syndromes. Smoking has measurable adverse economic effects for the smoker and his or her employer. Expenses include health care, absenteeism and lost productivity.

This proposal has two phases. Beginning 1 January 1995, every applicant for commissioning in the Marines would agree not to use tobacco products during the period of his or her active duty. The use of tobacco products would be grounds for disciplinary action or involuntary separation from the service. Beginning 1 January 1996, the same requirements would apply to all enlisted recruits.

Those already on active duty must also forego tobacco use. The Marine Corps would give notice on 1 January 1994, that the tobacco ban will become mandatory on 1 January 1996.

The reason the Marine Corps should spearhead this effort is that it would involve the smallest population for service-

wide implementation. The Marine Corps has a universal reputation for maintaining very high fitness standards for its members. It is logical that the Marines would take the lead in maintaining a very high standard for individual health.

Most directives on smoking exist as limitations on where a person can smoke. Yet considering the EPA's classification of second hand smoke as a carcinogen, those restrictions may be inadequate.

The bases for establishing the proposed ban will be a contractual agreement for new recruits, and a compelling governmental interest overriding current Marines' interests. The Feres doctrine, barring most lawsuits by service members against their superiors, would probably prevent internal challenges. If not, banning tobacco use among Marines both on and off-duty bears a rational relationship to the accomplishment of legitimate governmental objectives, and thus would be constitutional.

Means of dealing with violators would depend upon the means of detection, and the individual Marine's motivation to abstain. The existing graduated approach to maintaining good order and discipline would ensure compliance for those who would test the ban.

Successful recruiting techniques can reduce to a negligible level the potential negative impact of this policy on enlisted recruiting. The announcement of a tobacco free

Marine Corps, given today's health trends, can do nothing but enhance the pride Americans feel about the Corps.

A tobacco use ban would require some auxiliary support from the Navy Drug Screening Labs to be successful. Continuing to sell tobacco products in the Marine Corps Exchange or commissaries at Marine Corps installations would be counterproductive to maintaining the ban.

The Marine Corps program could provide a data base for DoD-wide application after the system has adapted to change. The ready availability of successful leadership principles and leaders ensures those adjustments can be made with minimal disruption. The Marine Corps can and should eliminate tobacco use. Ensuring the personal health and combat effectiveness of Marines should be the primary goals as Marine Corps leaders plan to meet the challenges of the future.

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INTRODUCTION

The Marine Corps is facing a critical juncture in its long and glorious history. It is undergoing a tumultuous introspective analysis to reshape its force structure to meet the challenges of the future. A limiting factor on that task is a shrinking defense budget, which is demanding some hard decisions regarding roles and missions and personnel management policies. The Corps must be innovative in effecting cost cuts that have a minimal impact on its combat readiness. This may require more than smart budget cuts. It may mean incorporating proactive measures to get the most "bang" from the limited "bucks" the Corps will have. A tobacco free Marine Corps can be one of those measures.

Marines serve a unique role in our country. They must be fit and healthy and ready to give life or limb in furtherance of U.S. foreign policy. An individual must meet certain mental and physical standards to enlist in the Corps. An applicant must pass aptitude tests. There are minimum and maximum height and weight, visual acuity, and audio frequency standards. Most critically, an applicant cannot be suffering from any debilitating disease or other infirmity, such as high blood pressure, heart or lung disease, or have missing or paralyzed limbs. The primary reason for these restrictions is to ensure that the recruit is mentally and physically prepared to undergo the rigorous training required to prepare for a combat environment.

Once a Marine begins active duty, the Corps constantly encourages him or her to maintain a healthy lifestyle, including a reasonable level of physical fitness. All Marines receive periodic physical examinations by U.S. Navy medical and dental professionals to maintain their health. Marines are regularly screened for potential drug abuse through the urinalysis program. Those suspected of alcohol abuse are channeled into one of three levels of alcohol abuse awareness training or inpatient treatment, depending upon the severity of the problem. Those programs have proven to be cost effective and extremely successful in salvaging motivated and productive Marines.

It is entirely consistent that the Marine Corps is actively educating Marines about the health hazards associated with tobacco use. In addition, Navy medicine has made available various forms of tobacco and smoking cessation education and treatment, including sporadic availability of nicotine patches and chewing gum. These combined efforts have met with considerable success. The 1992 Worldwide Survey of Substance Abuse and Health Behaviors Among Military Personnel reports gradually declining rates of tobacco use.¹ Yet there

¹Briefing on Initial Findings for Public Health Service by Robert M. Bray, Ph.D., Research Triangle Institute, 27 October 1992. Marines reporting any cigarette use within the past 30 days went from 53.4% in 1980 to 39.2% in 1992. Marines reporting heavy smoking within the past 30 days went from 34.5% in 1980 to 20.7% in 1992.

is no indication that voluntary measures will ever result in a satisfactory solution to the problem.

Some Marines who use tobacco while on active duty will develop chronic diseases. Such diseases include lung cancer, emphysema and chronic bronchitis, most cases of which are caused by smoking. Smoking can also precipitate asthma, pneumonia, heart disease, stroke, and cancers of the cervix, larynx, oral cavity, esophagus, bladder, pancreas, and kidney.² Those diseases may develop while the Marine is on active duty. The Navy health care system is then responsible for providing health care to the Marine, perhaps culminating in medical retirement including up to 100% disability. Other active duty tobacco users may leave active duty or retire and continue their tobacco use. Such use may cause chronic diseases, which may then be treated by the Veterans Administration medical system or CHAMPUS, (Civilian Health and Medical Program of the Uniformed Services). In either case, the U.S. government, (read: U.S. taxpayer), bears the expense of the Marine's nicotine addiction. The cost of treating a terminal cancer patient can be astronomical.³ If there are common sense steps that can help control these phenomenal

²U.S. Department of Health and Human Services, Smoking, Tobacco, and Health: A Fact Book. (Washington: DHHS Publication No. (CDC) 87-8397, Revised 10/89).

³The cost to the Veterans Health Administration of treating patients for diseases associated with smoking in fiscal year 1991 was \$254,474,134 for 60,704 patients. Source: Mr. Pat Scheer, Director, Smoke Free Program, Office of Environmental Medicine and Public Health, Department of Veterans Affairs.

costs in dollars and lives, do we not owe it to our Marines and the taxpayers to explore such measures?

The Commandant of the Marine Corps generally has the authority to determine the physical and mental standards which Marines must possess or agree to attain. In other words, not every person who would like to enlist in the Marines can do so. Besides meeting specified physical and mental standards, the prospective Marine must be willing to follow certain behavioral restrictions under penalty of law. The Uniform Code of Military Justice (UCMJ), a federal statute, proscribes certain conduct in which non-Marines may feel totally free to engage. Examples range from being late for work, taking a day off, being contemptuous of superiors, substandard job performance or slovenly appearance, to recreational drug or alcohol abuse, and harassing or assaultive conduct. The point is that the Marine Corps, under federal statutory authority, has nearly unfettered discretion to establish and enforce limits on behavior that might be unenforceable if applied to the general population. The primary justification for such broad authority is the maintenance of good order and discipline, a uniquely military concept.

In exchange for conforming his or her lifestyle to the requirements of the Corps, a Marine receives a base salary according to rank, augmented by various allowances. Included as part of the compensation is 30 days of vacation per year, along with free medical and dental care. The latter benefit

makes the federal government a guarantor or insurer of health services for every active duty Marine. Because the government is an insurer, those regular medical and dental examinations have been made mandatory (including vaccinations and inoculations). Drug or alcohol abuse screening has also been justified as a reasonable invasion of privacy. The Marine Corps has even required Marines to undergo inpatient drug or alcohol abuse treatment. Most Americans now recognize the devastating effects on personal health and safety of drug or alcohol abuse. Unfortunately, tobacco use has similarly recognized adverse consequences, yet it continues without restriction except as to local rules providing smoke-free areas. This paper will examine the economic and health consequences of tobacco use, propose a tobacco use policy for the Marine Corps, and analyze the feasibility and enforceability of such a policy.

ECONOMIC EFFECTS OF TOBACCO USE

There is no longer any dispute that smoking and the use of spit tobacco, (called "smokeless tobacco" by the tobacco industry), are addictive behaviors. Nicotine, which is the active ingredient in tobacco, is an addictive drug. Like alcohol, heroin and cocaine, tobacco has a psychoactive effect that is accompanied by behavioral changes. These drugs are used compulsively and have significant withdrawal syndromes.⁴

⁴Jack E. Henningfiel and R. Nemeth-Coslett, "Nicotine Dependence: Interface between Tobacco and Tobacco-Related Disease," Chest, February 1988, 93(Suppl), p. 50S.

Once a person becomes addicted to tobacco use, that behavior has measurable adverse economic effects. Apart from the fact that a pack of cigarettes can average \$2.00 to \$2.50 per pack, secondary costs to others, including employers, can be significant. Consider the time and productivity lost to smoking rituals, defined as the time it takes to go somewhere to smoke, light up, puff, and return to the work area. A 1983 study found that such rituals amounted to eight minutes per smoker per day, and cost between \$80 and \$166 per smoker, per year in 1980 dollars.⁵ Another study arrived at a figure of thirty-three minutes per smoker per day above and beyond lunch breaks, costing about \$2710 per smoker per year in lost productivity.⁶ Smokers also miss more days of work and take more sick leave than nonsmokers. One study reported that smokers miss eight more days of work per year than nonsmokers.⁷ Another study reported that absenteeism rates are 30-50% higher for smokers, costing the employer an extra \$330 per year per smoker in 1980 dollars.⁸ The most important

⁵Marvin M. Kristein, "How Much Can Business Expect to Profit From Smoking Cessation?" Journal of Preventive Medicine, 1983, vol. 12, p. 367.

⁶Frederic W. Jackson and Rolf H. O. Holle, "Smoking: Perspectives 1985," Journal of Primary Care, June 1985, pp. 212-13.

⁷G. R. Lesmes, "Corporate Health Care Costs and Smoke-Free Environment," presented at the Medical Leadership Conference: Effects of Cigarette Smoking-A Global Perspective, Washington, D.C., 18 July 1991.

⁸Jackson and Holle, p. 212.

point is that smokers are simply not as healthy, and thus more prone to illness than nonsmokers.

What does it cost to take care of smokers when they become ill? Studies have shown that smokers use the health care system 50% more than nonsmokers.⁹ One study estimated the increased health care costs associated with increased risks of acquiring lung cancer, coronary heart disease and emphysema. A representative group is men, aged 35 to 39, for whom estimated additional health care costs for moderate smokers was \$35,563 in 1980 dollars. By contrast, the economic benefits of quitting for that same category were estimated at \$22,895.¹⁰ These figures become even more significant when multiplied by the number of smokers in a particular work force.

How much does it cost to care for a patient who contracts a tobacco use related illness? One source estimated expenses as an average of total charges per occurrence for the twelve month period ending June 1991. The data reflected bronchitis and asthma cost \$607, pneumonia and flu cost \$1190, and respiratory cancer cost \$9405.¹¹ The average length of

⁹Judy C. Nixon and Judy F. West, "Cost Reductions From a Smoking Policy," Employee Benefits Journal, March 1989, p. 30.

¹⁰Gerry Oster, Graham A. Colditz and Nancy L. Kelly, "The Economic Costs of Smoking and the Benefits of Quitting for Individual Smokers," Journal of Preventive Medicine, 1984, vol. 13, pp. 383 and 386.

¹¹Mutual of Omaha, Semiannual Group Actuarial Report, 1991 "Current Trends in Health Care Costs and Utilization," (Omaha: 1991).

disability for patients with these respiratory diseases was 3.8 weeks. Since Marines are generally healthier and more fit than the average American, it would be reasonable to assume that the applicable health care costs are probably at the lower end of these estimates.

Additional expenses include lost earnings to the employee from increased frequency of illness and premature death. Mortality is 70% to 270% higher in smokers.¹² Additional expenses result from increased frequency of accidents, fire and property damage attributable to smoking, and extra maintenance and cleaning costs from smoke, burns and ashes. The total economic impact estimates range from \$336-\$601¹³ to \$5620¹⁴ per smoker per year. In fairness, not all studies agree. One author has observed that advocates for the tobacco industry have questioned the figures relating to lost time and productivity and absenteeism.¹⁵ Overwhelming evidence, however, supports the inescapable conclusion that besides being a costly habit for the smoker, smoking creates significant additional expenses for the employer.

¹²William L. Weis, "Can You Afford to Hire Smokers?" Personnel Administrator, May 1981, p. 73.

¹³Kristein, p. 359.

¹⁴Jackson and Holle, et al., p. 212.

¹⁵Elizabeth B. Thompson, "The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?" Vanderbilt Law Review, March 1990, p. 497.

TOBACCO USE IN THE MILITARY

The initial findings of the recently completed 1992 Worldwide Survey of Substance Abuse and Health Behavior Among Military Personnel were presented in a brief to the Public Health Service on October 27, 1992, by Robert M. Bray, Ph.D., of Research Triangle Institute.¹⁶ Those findings, compared to similar surveys taken since 1980, show a gradual decline in the rate of tobacco use in the Marine Corps. Yet Dr. Bray has demonstrated in past studies that military personnel are generally much more likely than civilians to be smokers and heavy smokers.¹⁷ One survey question asked whether the respondent used any cigarettes during the previous thirty day period. In 1980, 51% reported some cigarette use while 34.2% reported heavy smoking. In 1992, 35% reported smoking at all with 18% admitting heavy smoking. The 1992 survey also reflected the prevalence of cigar and pipe smoking, and spit tobacco use during the preceding twelve months. As for cigar/pipe smokers, 2.2% reported smoking five or more days per week. Spit tobacco use was reported at 7% in the five or more days per week category, while 2.4% used it 1-4 days per week. Dr. Bray concluded in his 1991 article that his

¹⁶Bray, see note 1.

¹⁷Robert M. Bray, Mary E. Marsden and Michael R. Peterson, "Standardized Comparisons of the Use of Alcohol, Drugs, and Cigarettes Among Military Personnel and Civilians," American Journal of Public Health, July 1991, p. 868.

findings suggested the need for the military to intensify its efforts to eliminate cigarette smoking.

The good news about these statistics is that tobacco use is steadily decreasing. The decrease is probably due largely to a growing awareness of the health risks associated with nicotine addiction. Health professionals of the armed services have actively promoted healthier life styles and have warned of the risks of tobacco use. Another positive influence has been a public trend toward accommodating nonsmokers in public buildings, restaurants and shopping malls. Peer and social pressure has undoubtedly been responsible for a significant portion of the downward trend. Everyone knows someone who has kicked the tobacco addiction due to encouragement by co-workers or family members.

The bad news is that the trend may be near the bottom of its curve. That means that without additional proactive measures, there will always be many in the military population who use tobacco. The economic costs of caring for them are gradually going to cut a statistically larger piece of the shrinking defense budget. All the costs previously cited, but primarily the health care costs, are becoming less justifiable as more health data arrive. Dr. Lytt I. Gardner, Jr., of the Walter Reed Army Institute of Research, offered statistics for veterans attending VA hospitals between 1970 and 1982. The age-specific incidence rates for cancers of the lung, bronchus, larynx, oral cavity and esophagus were consistently

higher than rates for similar age intervals for the general population.¹⁸ He projected those figures over a lifetime of 18 to 74 years and estimated an average relative risk for the VA population at two to one over the general population for the diseases mentioned. Dr. Gardner also addressed Dr. Bray's findings' failure to account for the cause of the disparity between the incidence of smoking in military and civilian populations. The suggestion is that perhaps the military has been selecting people who are predisposed to smoke, such that current efforts may never eliminate tobacco use.¹⁹

The recent announcement by the Environmental Protection Agency (EPA), declaring environmental tobacco smoke (ETS) a Class A carcinogen, only weakens the case for continuing to allow Marines to smoke. Further research is now focusing on the detrimental effects of passive smoke inhalation on nonsmokers.²⁰ An avalanche of health statistics will not deter some from their addiction to nicotine. The problem may require a stronger disincentive.

A MODEST PROPOSAL

Beginning 1 January 1995, every applicant for commissioning in the Marines would agree not to use tobacco

¹⁸Lytt I. Gardner, Jr., Ph.D., "Substance Abuse in Military Personnel: Better or Worse?" American Journal of Public Health, July 1991, p. 838.

¹⁹Ibid, p.838.

²⁰Mike Snider, "Secondhand Smoke May Affect Us All," USA TODAY, January 22-24, 1993, sect. A, p. 1.

products during the period of his or her active duty. There would be a clause written into the contract (or statement of understanding) that would be explained to the applicant. The officer recruiter would explain that because a nonsmoker is healthier, less prone to illness, and less likely to get a debilitating disease associated with tobacco use, he or she is a stronger and more effective member of the team. He or she is also less expensive to provide health care for, both while on active duty and when the Marine later qualifies for VA medical care. Marines also often have to live, train and work in very close quarters, and morale improves when the smoker versus nonsmoker friction is gone.

The recruiter would further explain that once on active duty, the use of tobacco products will be grounds for disciplinary action or involuntary separation from the service. Intermediate measures could include voluntary or mandatory smoking cessation treatment, in cases where the Marine shows excellent potential for further service and a strong motivation to quit.

Beginning 1 January 1996, the same requirements would apply to all enlisted recruits, provided the program was successful for officer recruiting. The pilot program for officers only allows it to be introduced in a smaller segment of the military population. Recruiting commanders may then modify recruiting techniques and approaches to prepare for total force recruiting.

What about the Marines already on active duty who use tobacco? Their health and welfare are certainly no less important than that of new recruits. Should they give up tobacco use? Absolutely, and for the same reasons advanced in support of requiring abstinence by the recruits. Leadership is primarily by personal example. The program would be arguably stressful to establish during the first one or two years, but the dividends will make it worthwhile. Those who remember the difficulty surrounding the implementation of the urinalysis screening program more than a decade ago will recognize the initial hurdles. They will also realize that eventually the Corps will clear those hurdles. The Marine Corps would give notice on 1 January 1994, (with counseling and smoking cessation programs provided to all who want to quit), that the tobacco ban will become mandatory on 1 January 1996. Those who feel incapable of conforming to the new health standard would face the same decisions as any Marine who is no longer willing to comply with the demands of the Corps. Officers not eligible for retirement would have the option to resign. Those eligible for retirement could retire.

The primary reason the Marine Corps should spearhead this effort is that it would involve the smallest numbers of future recruits, and the smallest population for service-wide implementation. The Marine Corps has a worldwide reputation for maintaining very high physical fitness standards for its members. It is a logical extension of that image that the

Marines would take the lead in maintaining a very high standard for individual health as well. Statistics also suggest that the Marine Corps has the highest prevalence of tobacco use of the armed services.²¹ If it works in the Marine Corps, the Department of Defense could adopt the program for all services by the year 2000.

WFOA - IS THAT LEGAL?

Wait a minute! Don't people have a right to smoke? After all, smoking is not illegal, is it? Well, the answer is yes and no. People **do** have a right to smoke, and smoking is **not** illegal. Yet in certain circumstances, the state can require people to give up or agree to forego a right if there is a significant state interest that outweighs that right. The following legal analysis will focus on restrictions applicable to public safety or military employees only. The extent to which private employers may apply such restrictions is beyond the scope of this paper.

Most current directives on smoking exist as limitations on where a person can smoke. Nearly all government office buildings have a policy permitting smoking only in designated rooms or offices. The significant interest protected by those restrictions is that of the nonsmokers who want to avoid ETS. Many would argue that those restrictions adequately safeguard

²¹1992 Worldwide Survey Initial Findings: 39.2% of Marines reported some cigarette use during the past 30 days, while 20.7% reported heavy smoking. 16.3% of Marines reported 5 or more days per week of spit tobacco use.

the health interests of nonsmokers. They are patently legal and have withstood challenges in court.²² Yet considering the EPA's classification of ETS as a Class A carcinogen, the adequacy of those restrictions may be subject to closer scrutiny. Does the smoking area share the same ventilation system as the rest of the building? What about smoking spaces aboard a ship or submarine? Recent research questions whether it is even possible to keep smoke contained to those who are willing to expose themselves to it.²³

There are circumstances where Marines may not smoke on duty. Any duties involving the handling or storing of hazardous or explosive materials also involve a prohibition on smoking. Marine recruits may not smoke during their entire period of recruit training (approximately three months). Officers and drill instructors may not smoke in the presence of recruits. Marines may not smoke in government vehicles, nor may they smoke in uniform in public (an often-ignored uniform violation). There are no legal grounds for objecting to any of these reasonable restrictions.

²²Rossie v. Wisconsin Department of Revenue, 133 Wis. 2d 341, 395 N.W.2d 801 (Ct. App. 1986), rejected a state employee's claims that smoking restrictions violated the equal protection clause of the fourteenth amendment and impaired the obligation of contract under the state or federal constitution. The basis for the complaint was that the employee's office was not designated as one of the authorized smoking areas pursuant to the new Wisconsin Clean Indoor Air Act.

²³Snider, p. 1.

More controversial would be restrictions that include off-duty tobacco use. Marines have often proclaimed that what they do off-duty is nobody's business. That comment may even be heard during the same conversation in which the same Marine says he is a Marine 24 hours a day. The latter fact is a justification for a total ban on tobacco use for Marines.

POTENTIAL CHALLENGES TO OFF-DUTY TOBACCO RESTRICTIONS

The basis for establishing the proposed ban will be a contractual agreement for new recruits. The basis for requiring Marines already on active duty to quit will be a compelling government interest overriding their existing liberty, privacy and contractual interests. The former case is easier than the latter, but both bases are legal and enforceable.

The Feres²⁴ doctrine bars lawsuits by active duty service members challenging the authority of their superiors. The purpose for the doctrine is to prevent individuals from invoking the federal or state courts to frustrate the maintenance of good order and discipline within a military organization.²⁵ It has been used most often in the past to

²⁴Feres v. United States, 340 U.S. 135 (1950). The Supreme Court held that servicemen may not recover under the Federal Tort Claims Act on claims that arise out of or in the course of activity incident to their service.

²⁵United States v. Shearer, 473 U.S. 52 (1985). The Supreme Court noted that the test for applying the Feres doctrine was whether the serviceman's suit "requires the civilian court to second-guess military decisions, . . . and whether the suit might impair essential military discipline." If the answers are yes, Feres will probably bar the lawsuit.

bar lawsuits alleging military medical malpractice or torts arising from the performance of military duties. The doctrine would probably bar a challenge by an active duty smoker based upon an alleged violation of constitutional rights resulting from a ban on tobacco use.²⁶ In other words, a Federal District Court would probably dismiss a Marine smoker's lawsuit without ever reaching the merits of the complainant's case. Should such a challenge survive the invocation of the Feres doctrine, analogous civilian challenges provide some insight into probable outcomes.

Professor Mark A. Rothstein, Director of the Health Law Institute at the University of Houston, has provided a useful analysis of the legal principles in this area.²⁷ He divided the public employment law cases into three categories. First, it appears that the courts have generally upheld restrictions on the work day conduct of public employees, particularly public safety employees. That is true even if the restrictions infringe upon an individual's freedom of

²⁶Chappell v. Wallace, 462 U.S. 296 (1983). The Supreme Court, in a strongly worded opinion, held that the Feres case rationale bars suit by members of the military against their superior officers personally for violation of their constitutional rights. The Court said that the basis for the decision in Feres was the unique and special relationship between the Government and its military personnel, and effects of the maintenance of such suits on military discipline.

²⁷Mark A. Rothstein, "Refusing to Employ Smokers: Good Public Health or Bad Public Policy?" Notre Dame Law Review, 1987, Vol. 62, p. 940.

expression, lifestyle, or individual habits.²⁸ Second, courts have usually validated restrictions on off-duty conduct if the conduct compromised the effectiveness of the individual or the governmental organization.²⁹ Third, restrictions on off-duty conduct will not pass muster if there is only a minor employment-related governmental interest which is outweighed by fundamental employee constitutional rights.³⁰

The U.S. Constitution guarantees that the government cannot take a citizen's life, liberty or property without due process of law.³¹ Yet the controversial abortion rights case of Roe v. Wade held that the government may deprive an individual of those rights if it has an important enough interest that outweighs the importance of the individual

²⁸Ibid. p. 955. See, e.g., Kelley v. Johnson, 425 U.S. 238 (1976) (upholding hair-length regulations for police; challenged regulation also prohibited smoking in public).

²⁹Ibid. p. 955. See, e.g., Pettit v. State Board of Education, 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (upholding discharge of 48 year-old elementary school teacher who, with her husband, was a member of a "swingers" club and had pleaded guilty to the misdemeanor of "outrageous public indecency"); Broderick v. Police Commissioner, 368 Mass. 33, 330 N.E.2d 199 (1975), cert. denied, 423 U.S. 1048 (1976) (requiring completion of questionnaire inquiring into police officers' activities following weekend of debauchery).

³⁰Ibid. p. 955. See, e.g., Andres v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976) (prohibiting refusal to rehire unwed mother as school teacher); Murray v. Jamison, 333 F. Supp. 1379 (W.D.N.C. 1971) (unconstitutional to discharge building inspection dispatcher because he was the Grand Dragon of the Ku Klux Klan of North Carolina).

³¹U.S. Constitution, Amendments V and XIV.

rights.³² The Supreme Court of the United States has also identified a right to privacy.³³ That right, although not specifically listed in the Constitution, has been gleaned through judicial interpretation. If the right to be deprived is "fundamental," the government must have a "compelling" interest in infringing upon the right, and then must do so by the least restrictive means available. Yet if the individual right is not fundamental, the test applied is whether there is a rational basis for the restriction, and whether the restriction is reasonably related to that basis.³⁴ Privacy rights deemed fundamental so far include only those rights pertaining to marriage, procreation, contraception, family relationships, and the rearing and education of children.³⁵ The Court has shown a reluctance to add to the list of fundamental privacy rights.³⁶ It seems unlikely that the courts will classify as fundamental the right of an individual to smoke in the privacy of the home and off-duty. Thus, a realistic analysis of the constitutionality of an off-duty

³²Roe v. Wade, 410 U.S. 113 (1973).

³³Griswold v. Connecticut, 381 U.S. 479 (1965).

³⁴Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).

³⁵Carey v. Population Services International, 431 U.S. 678, 684-85 (1977).

³⁶Bowers v. Hardwick, 478 U.S. 186 (1986) (refused to acknowledge fundamental privacy right in consensual homosexual acts between adults within the privacy of the home).

tobacco use restriction must surely apply the less stringent standard to a due process challenge.

The first question is whether off-duty tobacco use is a liberty or privacy interest which enjoys any protection by the Constitution. If one assumes that it is, any such interest would likely not be a fundamental one. Thus the next question is whether a ban on off-duty tobacco use bears a rational relationship to the accomplishment of a governmental objective. The primary government objective in this case lies in insuring that the active duty Marine force is more healthy and fit to perform combat missions. A secondary objective is in minimizing health care costs for the active and former active force and minimizing economic losses resulting from tobacco use. Banning tobacco use among Marines both on and off-duty bears a rational relationship to the accomplishment of those governmental objectives. Banning on-duty use but permitting off-duty use would defeat many benefits of a total ban.

The State of Massachusetts enacted a statute that forbids police officers, firefighters, and other specified public safety employees to smoke on or off-duty. It keeps those agencies from hiring smokers and requires termination of newly hired employees who later begin to smoke. It further allows public safety employees who smoke to continue to do so without consequences. The law also includes a "wellness program," the primary goal of which is smoking cessation. The state thus

strongly encourages employees "grandfathered" under older hiring policies to quit smoking.³⁷ The statute was the first statewide ban, although municipalities have passed ordinances that accomplish the same objective. It was the compromise worked out between the public safety employee unions and the state. The state already had a statutory presumption that any lung or respiratory disease which gave rise to total disability or death to a firefighter was job-related. The consequence of such a connection is an entitlement to disability benefits, unless the state can prove otherwise. The union wanted to retain the presumption because it lessened the burden of its members applying for the benefits. The state wanted to eliminate the presumption to keep from paying benefits to firefighters who contracted lung disease from smoking rather than from the hazards of the job. The compromise kept the presumption, but prevented future hiring of smokers.³⁸

There have been no court challenges to the statute thus far. One case has examined an off-duty smoking restriction on a public employee. The court held in Grusendorf v. City of Oklahoma City,³⁹ that the restriction was a reasonable exercise of the state's police power and thus constitutional.

³⁷Thompson, p. 493.

³⁸Allan R. Gold, "Police and Fire Departments Face Massachusetts Smoking Ban," The New York Times, 2 October 1988, p. 20.

³⁹816 F.2d 539 (10th Cir. 1987).

The case concerned a fire department policy forbidding trainee firefighters to smoke any time, on or off the job.

Grusendorf, a trainee who had signed an agreement not to smoke, was observed smoking during a lunch break. After his dismissal he claimed that his constitutional rights of liberty, property and privacy had been invaded without due process. The court first held that only his liberty and privacy interests were affected, there being insufficient "property" interests involved in retaining a job.⁴⁰ The court used a four-step analysis to examine the ban. First, was there a liberty or property interest violated? Second, was the interest fundamental? Third, if not, did the state have a prima facie case establishing a rational basis for the interference with the liberty? Fourth, if so, did the plaintiff show that the interference was arbitrary or irrational?⁴¹ The court assumed that the fourteenth amendment protected the liberty and privacy interest of firefighter trainees in off-duty smoking. Answering the first issue in the affirmative, the court went on to hold that the liberty was not a fundamental right. That holding is consistent with the earlier analysis of the extent to which courts will be willing to add to the list of fundamental rights. The Grusendorf court then found that the state had shown that the off-duty smoking prohibition was rationally related to a

⁴⁰Ibid. p. 540.

⁴¹Ibid. p. 542-43.

legitimate purpose. It assumed good health and fitness were essential for firefighters, and smoking undermined that good health. Finally, the court held that the plaintiff had failed to carry his burden of showing the regulation to be irrational or arbitrary.⁴² The off-duty smoking ban was therefore held to be constitutional.

A possible approach to invalidating such restrictions may be to argue that prohibiting new employees from smoking while permitting current employees to smoke violates the equal protection clause of the fourteenth amendment. The Grusendorf court acknowledged that the regulation's inapplicability to firefighters already on the job was not entirely rational. The argument is that the rationale that justifies a smoking ban for trainees also applies to other members of the force. That argument could be lodged against the Massachusetts law as well. Since newly hired smokers are not a constitutionally protected class, the regulation would only need to have a rational basis to be upheld. Health, fitness and cost reduction would not seem to be sufficient grounds for treating new recruits differently than other Marines. The potential equal protection argument militates in favor of phasing in a tobacco use ban applicable to all Marines. The advanced warning to those already in uniform would serve notice that continued active duty will require that smokers may need to take advantage of existing smoking cessation programs.

⁴²Ibid. p. 543.

ENFORCEMENT

Elizabeth B. Thompson, writing in the Vanderbilt Law Review, raised the question of the means of enforcing the Massachusetts law. One major flaw in that statute is that it failed to provide guidance for enforcement.⁴³ The Marine Corps has an advantage in enforcement since it already has a full range of time tested means of maintaining good order and discipline.

The initial issue involves identifying violators of the ban. They could be identified by others, turn themselves in, or be detected via the routine urinalysis screening already employed to detect drug abuse. None of these means of detection pose any potential violation of rights of military personnel. Marines are generally under a duty to report any violations of the UCMJ, which a violation of the order to refrain from tobacco use would be. The program would encourage turning oneself in for help as a means to provide tobacco cessation training. As was provided for in an earlier Marine Corps drug and alcohol abuse prevention program, no negative consequences would attach to such an action. Finally, the courts have upheld the constitutionality of the urinalysis program, after many challenges, as a reasonable intrusion on a Marine's privacy to ensure a drug-free fighting force. Detecting the presence in a urine specimen of cotinine, a nicotine metabolite, involves a simple thin-layer

⁴³Thompson, p. 524.

chromatography test, which could be added to the current drug screening and confirmatory test battery at minimal additional expense.⁴⁴ The response to detection of violators would depend upon the means of detection, and the individual Marine's motivation to succeed in refraining from future use of tobacco. A first offense would neither be grounds for involuntary separation from active duty nor significant nonjudicial or judicial punishment. The current, graduated approach to maintaining good order and discipline would ensure compliance for those who would test the ban.

Some may argue that simply lighting up a few cigarettes would be the perfect way to cut short an enlistment contract after receiving valuable training at Uncle Sam's expense. That potential avenue already exists for anyone who would seek to avoid serving his or her entire period of enlistment. Marines have attempted to get administratively discharged by purposely violating regulations to make a nuisance of themselves. That tactic has met with mixed success, as good leadership can usually detect such motivations for breaches of discipline. Marines have had their military occupational specialties voided, and been required to serve in another field. Those results negate the "previous experience" portion

⁴⁴Telephone conversation with Dr. Buddha Paul, a toxicologist at the Navy Drug Screening Laboratory at Norfolk, Virginia, 26 January 1993. Dr. Paul says the lab currently employs 64 technicians, and the positive rate for the 500,000 samples submitted to his lab each year is down to one percent. He said the lab employed 80 technicians ten years ago when the positive rate was approximately ten percent.

of a job resume. Should a recalcitrant smoker use that method of seeking an early release, the type of discharge may not meet with the Marine's liking. A characterization as anything less than honorable might foreclose some employment opportunities. Administrative penalties include government recoupment of reenlistment bonuses and school costs. Further, repeated violations of regulations often result in judicial proceedings which can result in loss of rank, pay, liberty and punitive discharge from the service. Punitive discharge usually eliminates the possibility of ever receiving any VA benefits.

RECRUITING IMPLICATIONS

Any new policy which impacts recruiting standards must be examined in terms of its effect on the continued availability of enough applicants for enlistment. One cursory reaction to a tobacco use ban might be that fewer young Americans may be willing to enlist in the Marines. That argument against the policy is a straw man. The Marine Corps has already begun to calculate reduced accessions based upon the requirement to reduce its end strength. So the Corps is modifying the concept of "enough." A survey of the October 1992 Officer Candidate School class revealed that of 130 candidates, only one was a smoker, and only 13 had ever smoked. Twelve used spit tobacco one to four times per week.⁴⁵ Phase I of the

⁴⁵Telephone conversation with Lieutenant C. T. Augustus, Medical Corps, U.S. Naval Reserve, General Medical Officer, U.S. Marine Corps Officer Candidate School, Quantico, Virginia, 29

program could thus anticipate no appreciable decline in the available pool of applicants for officer commissioning programs. As for the implementation of Phase II, enlisted recruiting, several counterarguments apply. First, the Corps already requires its recruits to abstain from tobacco use during the entire period of recruit training. All smokers understand that policy before they ever ship off to boot camp. They still go. The results of several studies have shown that the symptoms of nicotine withdrawal peak in the first day or two following cessation and last about one month. Furthermore, there is no evidence of a prolonged nicotine withdrawal syndrome.⁴⁶ The implication is that it is but a small step to require a Marine's newly acquired healthy lifestyle to continue from graduation day until he or she leaves active duty.

Recruiting has always been the skillful application of successful marketing techniques. "Selling" a tobacco free Marine Corps would be easier than detractors might imagine. The nonsmoking applicants need no persuasion. In fact, their numbers may increase by virtue of a well-publicized tobacco free policy. Good recruiters could also sell smoking applicants on the idea. Recruiters are already highly skilled

January 1993. LT Augustus agreed to maintain those statistics for future OCS classes.

⁴⁶U.S. Department of Health and Human Services, The Health Benefits of Smoking Cessation: A Report of the Surgeon General, (Washington: 1990), pp. 529-30.

touters of increasing physical fitness and self esteem in persuading potential enlistees that the Corps is the right place for them. Recruiters explain the daily rigors of life at boot camp. They speak of arising at 4:00 a.m. for running, calisthenics and perhaps a double running of the obstacle course. Then a hurried breakfast is followed by additional academic or physical training, which continues until dark under very stressful conditions, interrupted only for lunch and supper. Anyone willing to submit to three months of such training would consider a requirement to give up smoking as a minor additional burden. The recruiter could show a smoking applicant some statistics on the costs to him or her of continuing the habit. The recruiter could then point out some reasons that the applicant engages in the self-destructive behavior. It would then be easy to contrast that unhealthy lifestyle with that offered by the Corps. Esprit de corps, better physical fitness and health, increased pride and self-esteem are all benefits of becoming one of the Few, the Proud, the Marines. Joining the Corps has never been a matter of what you have to give up to be a Marine. It has always been a matter of what the Marines can do for you to make you a better person. Abstinence from tobacco can be a positive feature of becoming a Marine for a smoker who is not particularly proud of that aspect of his or her life. Thus, current recruiting techniques can reduce to a negligible level the potential negative impact of this policy on enlisted recruiting.

The public has always been justifiably proud of the Marine Corps. The announcement of a tobacco free Marine Corps, in the wake of current highly publicized health trends, can do nothing but enhance that pride. There may be a few active duty smokers who would grumble for a while. But time would pass and this policy would surely enjoy a lasting reputation as the right thing to have done at the right time in history.

AUXILIARY SUPPORT

A tobacco use ban would require some auxiliary support to be successful. The Navy would need to agree to incorporate a test for cotinine into its urinalysis lab procedures. That would involve negligible initial expense since it would not involve any increase in the number of samples currently processed. The lab would only need to screen and confirm for one more substance, and only on samples provided by Marines. It may initially require a few more confirmatory tests on samples screening positive. Yet according to a Dr. Paul, a toxicologist at the Navy's Norfolk Drug Screening Laboratory, the lab would need no additional equipment.⁴⁷ Since urinalysis detection would be a routine screening tool after the program begins, there would be at least two years during which to make any necessary budgetary adjustments.

⁴⁷Telephone conversation with Dr. Buddha Paul, a toxicologist at the Navy Drug Screening Laboratory at Norfolk, Virginia, 26 January 1993.

The Marine Corps currently operates a very effective alcohol abuse awareness program.⁴⁸ It consists of three levels of information and treatment designed to prevent continued or increased levels of abuse. Commanders, who administer the program, rely on trained counselors for personal contact with Marines who may have an alcohol abuse problem. It would require little additional training for those counselors to include tobacco cessation training into their programs. The program may initially experience a dramatic increase in the number of Marines seeking such services. After two years, the numbers should significantly decrease. The problem of treatment of the most serious chronic tobacco users would require some sort of approach similar to Level III treatment for alcohol abuse. Inpatient treatment would probably not be required, so presumably such treatment would be less expensive. After two to three years, though, such serious cases should only rarely arise. Thus, the provision of any additional medical resources would be a short term expense. After a couple of years, a few recalcitrant or "accidental" smokers should not represent a major drain on medical services. One key to keeping that number to a minimum would be to reduce Marines' convenient access to tobacco.

⁴⁸U.S. Marine Corps, Marine Corps Substance Abuse Program, MCO P5300.12 w/ ch 1, 2, and 3. (Washington: 25 June 1984).

Continuing to sell tobacco products in the Marine Corps Exchange or commissaries at Marine Corps installations would be counterproductive to maintaining the ban. The argument against that measure is that it reduces the revenue generated by those organizations, which negatively affects MWR funds. Yet if Marines are not smoking or dipping, they are not going to need to buy those products anyway. Dependents or other DoD employees on the installation could purchase their tobacco products off the installation.

EXTERNAL CHALLENGES

The tobacco industry is likely to be the most vocal opponent of a ban on tobacco use. The fear would be that if it were successful in the Marine Corps, DoD would adopt the program for the other armed services. The industry opposed the Massachusetts law five years ago, but did not lobby against it because the public safety employees' union was adamant about retaining the presumption that heart and lung diseases were job related.⁴⁹ The industry would have no standing to challenge a Marine Corps tobacco ban in court. Yet tobacco industry lobbyists have substantial resources devoted to influencing Congress. Future defense appropriations legislation is susceptible to amendments which would override the authority of the Commandant, the Secretary

⁴⁹Dennis M. Dyer, then Regional Vice President of the Tobacco Institute, quoted in Gold, p. 20.

of the Navy, or even the Secretary of Defense, depending upon what level of support this measure receives.

The tobacco industry has been very aggressive in its efforts to counter any smoking restrictions by forming "smokers' rights" groups on the local level. Philip Morris and R.J. Reynolds, the two largest cigarette manufacturers, have sought to identify smokers and organize them to oppose tobacco controls. The companies then encourage them to become politically active by starting petitions, writing letters, making phone calls, and attending planning sessions where implementation is being discussed. When industry watch dogs find out about a proposed measure to curb smoking, they immediately notify their local supporters. The local groups then set about the task of pressuring the decision makers.⁵⁰ This smokers' rights movement is a significant public opinion force which policy makers must anticipate when weighing a decision to establish a tobacco use ban. It seems that such an effort would have little or no impact on either the Marine Corps image or recruiting effort.

CONCLUSION

When one balances the arguments for and against a ban on tobacco use in the Marine Corps, the weight drives the scales heavily in its favor. Implementation would not be without initial criticism from within the Corps and from tobacco

⁵⁰Bruce Samuels and Stanton A. Glantz, "The Politics of Local Tobacco Control," Journal of the American Medical Association, 16 October 1991, p. 2110.

industry advocates. There would be potential morale problems in places where Marines worked near civilians who smoked, albeit in designated smoking areas. Similar tension may arise for Marines serving in joint service or Navy commands where dual standards apply. Yet these are problems that can be easily overcome with the brand of strong, positive leadership to which Marines have become accustomed.

The Marine Corps program could provide a data base for DoD-wide application after the system has adapted to change. Health care statistics may require a longer period for study, but start-up costs to recruiting efforts could be measured. The Marine Corps already compiles disciplinary statistics, which would be readily available for analysis. Reenlistment and retention rates, before and after implementation, would also prove useful to other service chiefs who see merit, but prefer a wait-and-see approach. These measures of impact all militate in favor of having the Marine Corps take the lead. Negative consequences, if any, would have a minor impact, since the Corps is the smallest of the armed services. For the same reason, it would be easier to make adjustments to compensate for any problems encountered. The ready availability of successful leadership principles and leaders ensures those adjustments can be made with minimal disruption.

The Marine Corps can eliminate tobacco use. It is the right thing to do at the right time in history. The potential benefits are many and enormous. Ensuring the personal health

and combat effectiveness of Marines should be the primary goals as Marine Corps leaders plan to meet the challenges of the future. Tobacco use not only destroys personal health and combat effectiveness, it also creates expenses the Corps and the taxpayer can no longer afford to bear.

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