SECRETARY OF THE AIR FORCE
WASHINGTON

3 December 2004

Mr. Donald M. Horstman
Director, Investigations of Senior Officials
Office of the Inspector General
Department of Defense
400 Army Navy Drive
Arlington, Virginia 22202-4704

Dear Mr. Horstman:

I appreciate the opportunity to respond to the tentative conclusions set out in your letter of 16 November 2004 and the professionalism of you and your staff in conducting this review. However, I must disagree with your conclusion regarding misusing public office for private gain and your conclusion that transmitting this e-mail via an Air Force-issued Blackberry violated the Joint Ethics Regulation.

As for the other issues addressed in your letter, I sincerely appreciate your determination that there were no reasonable grounds to believe that I violated Federal criminal law. I also appreciate your finding that I did not improperly withhold government records, in this instance e-mails, from a congressional committee.

Please find attached a detailed analysis of your tentative findings. I would ask that these detailed comments be incorporated into your report to supplement my earlier statement. Also attached is an e-mail referenced in the accompanying comments. Lastly, I've included some minor corrections we were able to make to the transcript, recognizing I was working without the benefit of an audiotape of my earlier interview.

As a final matter, I request the opportunity to supplement my response to your preliminary findings once I am provided with the remainder of your report related to the e-mail exchange at issue. I understand that you continue to examine whether this e-mail exchange influenced the assessment of the Boeing KC-767 lease proposal by the Office of Management and Budget. While I remain personally convinced the e-mail did not, I would appreciate the opportunity to address your analysis if your investigators find otherwise. Thank you for your consideration of this last request.

SECAF Comments on Tentative Findings of DoD IG Re: May 9, 2003 E-mail

Concerning your two adverse preliminary findings, I understand full well that public office is a public trust and may not be used for anyone's private gain. I also understand that as a public official I must be careful not to give the appearance of government sanction or endorsement where it is not appropriate to do so. I believe, however, that your interpretation of the regulatory provisions governing employment recommendations and character references is in error.

E-mail to [redacted] Was Inherently Personal

There is no chance that [redacted] or any other reasonable person with an understanding of the facts and circumstances surrounding this exchange, would have viewed my e-mail as anything other than a personal exchange. Character and job references are inherently personal in nature, and as such the Joint Ethics Regulation (JER) expressly permits them.

I have known [redacted] for over 20 years. We have worked together, socialized together, and we are close friends. Whatever value [redacted] placed in my vouching for [redacted] character was based on that friendship and [redacted] view of me as an individual, not on any title or position I now hold. There is absolutely no chance, considering the surrounding facts and circumstances, that [redacted] could have reasonably construed my e-mail to be an official Air Force endorsement of [redacted].

I also do not believe Ms Cleveland asked for my assistance because I am the Secretary of the Air Force, or that she wanted or expected me to make a recommendation that would imply Air Force endorsement of her [redacted]. She asked for my help because we are long-time personal friends of over 25 years and she knew well that I am a retired executive of Northrop-Grumman, where her [redacted] was seeking employment.

Providing a reference such as the one I provided for [redacted] is always an inherently personal action, and I believe the Joint Ethics Regulation reflects that basic understanding. I am told that in any personal recommendation or reference the Regulation permits using one's official title, and that what the Regulation does is prescribe *how* that is done so there is no confusion by the reader about personal versus official roles. In the case of paper correspondence, where one is dealing with official stationary and letterheads, and official-looking signature blocks, there could be some risk of the document being misconstrued as an agency communication. Where in written correspondence you are trying to avoid it being inadvertently perceived as official, one often must do the opposite with e-mail--make it clear that a particular e-mail is some sort of official action. That is because most people view e-mail as more closely analogous to a telephone call, spoken communication, or a handwritten personal note than official written correspondence.

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The real issue, then, is whether a reasonable person, with knowledge of the facts and circumstances surrounding this exchange, would view this as an official e-mail conveying an official Department of the Air Force position. There is ample evidence on the face of the e-mail and in the facts surrounding my relationships with the persons involved, that makes it clear to anyone viewing it that it is in fact a personal transmission.

JER Does Not Elevate Form over Substance

In contrast, the analysis reflected in your letter seems to rest on a factual determination that the e-mail *on its face* implied official Air Force sanction or endorsement of the contents, and therefore the e-mail was improper per se. Your analysis, and by extension both tentative conclusions, thus rest on a finding that my e-mail conveyed official Air Force imprimatur, regardless of the purely personal nature of the exchange. This conclusion is expressly based upon the default setting that was on my Blackberry, "Dr. James G. Roche, Secretary of the Air Force" and because the e-mail came from a ".mil" address. Particularly, on page 4 of your letter, it states,

> ... we concluded that the use of a Government Blackberry with a sending address from the Air Force at the Pentagon and with a default signature [banner or element] is equivalent to the letter format addressed [proscribed] in the JER. That is, the *email as formatted conveyed an element of Air Force sanction* that would not be present had you made the recommendation on plan (sic) paper and signed it without using your Air Force title. (emphasis added)

That factual interpretation simply cannot be true, whether the e-mail is analyzed from a subjective or an objective perspective. If analyzed subjectively, that e-mail was initially sent to a personal, long-time friend who would never have been misled by the format of the e-mail into believing I was acting officially as the Secretary of the Air Force. It was abundantly clear to [redacted] that this was an e-mail about the [redacted] of another personal friend (Ms Cleveland), a friend and her [redacted] who had clearly never worked for me in a governmental capacity, all related to a job application for a position completely outside of the federal government.

An objective observer with knowledge of the relevant facts would reach the same conclusion--that it is in fact a personal transmission. First, it is obviously addressed to a friend outside of government. In addition, please note the informal tone of my e-mail to [redacted]. I included a personal wish that he "Be Well", commented on my nomination to be Secretary of the Army, and sent my "Best to [redacted] I also used colloquial speech I would be unlikely to use if I intended this to be an "official" communication to someone inside or outside the government. For example, I said, "I've let Rummy con me one more time." Clearly, personal salutations, best wishes, and first name "signatures" permeate this personal and unofficial exchange.

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Next, and this relates to the discussion in the JER of recommendation letters mentioned in your analysis, the character reference I e-mailed does not reflect an official recommendation and certainly none based upon my Air Force position. I made no attempt to associate [redacted] or his reputation with the Air Force. The e-mail clearly identifies the nature of my personal relationship to Ms Cleveland and her [redacted] as one predating my Air Force tenure. My intent was to transmit to [redacted] a qualified personal character reference based on my personal knowledge of [redacted] and that too is evident on the face of the e-mail. Quite simply, the e-mail was obviously intended to be personal … and private.

So, I disagree with the tentative conclusions of your letter and want to point out the profound and perhaps unforeseen implications that arise from them.

Illusion of a Bright Line Test

I believe that in basing your conclusions on how the default was set on my Blackberry or that a ".mil" server processed the e-mail, you are reading provisions into the Regulation that are simply not there and that are inconsistent with sound and well-reasoned provisions permitting limited personal use. If there is a conclusion that these two elements alone, a Pentagon sending address on the e-mail and a pre-loaded printed identification, are enough to convey an element of official Air Force sanction to the note, then we have a government-wide scandal on our hands and have just created a virtually unworkable government ethics standard which will bedevil the Department of Defense for years to come.

You note in your investigation that the .mil "from" address on my e-mail to [redacted] was an indication that the e-mail was official. All e-mail originating from a government system has some indication that it comes from an official e-mail address. Yet the JER authorizes the use of such government computers and other government communications devices for limited personal purposes. Your conclusion is inconsistent with the criteria for personal use of such government systems. As I understand it, those criteria are that such use does not adversely affect the performance of duties, is of reasonable duration and frequency, serves a legitimate public interest such as allowing an employee to remain at his desk or not use personal computers or PDAs, does not reflect adversely on the government (e.g. pornography, commercial solicitation), and does not overburden the communications system. Your conclusion thus flatly contradicts existing policy and regulation. The e-mail "from" address is a marginal, if not de minimis, indicator of its official nature; otherwise, limited personal use of e-mails with the official "from" address would not be authorized in the JER.

Within the Air Force, we have a policy of not allowing any personal computers in the workplace, but we do authorize limited personal use of government systems in accordance with the JER. If I or any other DoD employee used a Blackberry or office computer to check on a car at the repair shop or notify a spouse of when he or she would be leaving work, or communicate with a friend, those e-mails would come from a ".mil" address. Surely we would not view those as "official" communications. To be fair, one

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must examine any limited personal use under the JER in light of all of the facts and circumstances surrounding an exchange. In this instance, it is just such surrounding facts and circumstances that make the personal nature of the communication clear.

But if, as your draft opinion says, it is the Pentagon sending address *in conjunction with* some other element that creates the violation, as you now identify in my e-mail of May 9, 2003, then almost any other combination of elements creates the risk of similar violations by government employees. E-mails might well have footers, not visible to the sender, similar to the one on my e-mail to [redacted], like the disclaimer I have seen on many of our government attorneys' e-mails. Or, if the person mentions he is still on active duty, the same conclusions could be drawn. And even more problematic, a ".mil" address in conjunction with a DoD senior leader's well-recognized name, such as Donald Rumsfeld, might be interpreted to convey the same "official" sanction, even if the subject was a personal opinion about the State Department. We could even reach the point where a ".mil" origin e-mail address with some discussion of Air Force business-related matters, even in an otherwise purely personal exchange, potentially converts the entire e-mail into an "official" one. So, while you seem to have created a bright line test that the automated inclusion of my signature element combined with a "pentagon.af.mil" sending address transforms the e-mail into an official one, without a reasonable consideration of its context, tone and content, the test is far from being clear ... or reasonable.

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And other difficulties will follow as surely as the technological changes that brought about this discussion. Surfacing next could be the issue of whether there may be any authorized personal use of Pentagon telephones, now that caller identification can identify certain originating numbers as official government telephones. The same for telefax machines. Based on your preliminary findings, one could conclude that a verbal character reference over an identifiable government phone line or a recommendation on plain bond but transmitted from a government fax was also impermissible. This would therefore seem to be a slippery slope for us to traverse. It will be practically impossible to define an objective standard that our people can follow. If the analysis applied in your letter is correct, then virtually all DoD employees are misusing Government resources on a daily basis.

The Joint Ethics Regulation

The JER authorizes the use of official e-mail and communication devices for limited personal purposes for good policy reasons. Government employees are busy, hard working and we desire that they be productive. Government employees need to be able to deal with both official and personal matters as efficiently as possible, the latter to minimize distractions from workplace duties. In some cases, the most efficient way to deal with a personal matter, such as a request for a job reference, is to send an e-mail on a government system or use a government telephone--brief, limited uses authorized by the JER. We could have an inflexible rule that all such personal use of government equipment is forbidden, but we have instead taken the more farsighted approach that

limited personal use benefits the government by keeping government employees at work and focused on the agency's mission.

Related to your letter's analogy to a "letter of recommendation", our General Counsel's office tells me that the provision of the Joint Ethics Regulation governing recommendations discusses various types of "stationery" and signatures and clearly contemplates traditional hard copy letters. I understand that there is simply no convention specified for electronic recommendations. I am further informed that this section of the Regulation dates from at least 1993, when e-mail was almost unknown, and please note that the Blackberry was not introduced into the Air Force until 2001, so it is not reasonable to conclude that the Regulation now expressly prohibits electronic references or sending them from a ".mil" address. And even if the analogy could be made, the logic is far too tenuous to hold our governmental employees to such an ambiguous standard. Guidance must be clear and unambiguous before we find people in violation of the rule. Be assured, if there were any specific guidance on how to transmit an electronic recommendation, I would certainly have attempted to follow it. The JER simply does not address this issue.

Additionally, you conclude that my signature element makes the e-mail in question appear to be "official." On most correspondence, the Secretary of the Air Force's so-called signature block is my full signature hand-written at the bottom of the page--there is nothing, no typed signature block below my signature. However, in the case of this e-mail, you can see that I simply wrote my informal personal e-mail signature "Jim" immediately after the period at the end of the last sentence, and not centered over a signature block. The computer-generated identification element at the bottom of the e-mail was an automated action done after I hit "send." Many of us have loaded an electronic "business card" as an e-mail banner on our office computers. As an example, I've attached an e-mail from Mr. Joseph E. Schmitz, the Inspector General, who uses this convention. I bring this example up not to call attention to this particular convention or to ask for an investigation into how others might use the pre-loaded information in purely personal e-mails, but to demonstrate that there is a widespread acceptance of this practice by most in society who do not read into the inclusion of such "business card" data or identification banner any official sanction. This technique is not intended to characterize every outgoing e-mail as "official", it is simply a tool for effective communication.

And there is another element of e-mail communications that your report should consider. E-mails can arrive unsolicited from individuals or organizations that have obtained the e-mail address from business cards, written correspondence, recipients of past e-mails, or simply by guessing at the appropriate address convention. A government employee should be able to respond to those infrequent e-mails without having to reconfigure their computer system or Blackberry.

Some government employees may even use ".mil" e-mail addresses as their primary e-mail address to allow daytime contact on purely personal matters, akin to giving acquaintances both one's office telephone number along with one's home telephone and cellular numbers. Many provide office e-mail addresses innocently

enough, say for club or school contacts, when an Internet retailer asks for a daytime telephone or e-mail address, or to family members to facilitate communications without having to inconvenience a receptionist who answers office telephones. As long as those communications are reasonable in duration and frequency, do not excessively burden the communications system, and do not adversely affect the performance of official duties, they are clearly authorized by the JER.

We cannot now risk categorizing as "official" the e-mail exchanges that result from inbound messages simply because the original message was knowingly sent to a government ".mil" address, to a known government employee, working in a government office, or because the employee's response might have a ".mil" originating address. The Air Force permits the limited use of government e-mail and telephones in part because we don't want private systems in the workplace. In limiting private computers and PDAs while authorizing the limited personal use of government systems, we must recognize that an employee cannot control all inbound e-mail, that it is logical they respond to many such contacts, and that we should not elevate form over substance to invent official sanction where none could reasonably be perceived.

Collateral Consequences

The issues raised here can affect literally hundreds of thousands of Air Force members, military and civilian. Of greater significance, a precedent you set here in examining my actions can alter the limited personal use rules for the entire workforce within DoD, if not across the Federal government. Therefore, I would appreciate it if you could first staff a recommendation for OSD to develop departmental guidelines, or prompt the development of government-wide guidelines, regarding:

- official versus unofficial e-mail;
- use of business cards with official telephone numbers and e-mail addresses;
- use of informal or "logo" stationery and notepads;
- character or job recommendations and references in the electronic domain; and
- informal communications by executive-level, easily recognizable employees

Finally, your conclusion that my e-mail to [redacted] was official because of the ".mil" address raises profound policy and possibly legal issues far beyond the scope of this inquiry. These include whether clearly personal and authorized e-mails would need to be retained as official records, whether they might be subject to the Freedom of Information Act, and whether the National Archives and Records Administration should be brought into this discussion. This may even provoke a reexamination of whether ".mil" addresses should be used for any private purpose or communication.

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Conclusion

So, while I personally disagree with your investigators' analysis of the Joint Ethics Regulation as applied to the facts in this case, I recognize that the e-mail exchange is being evaluated within a regulatory framework that does not fully anticipate or

comprehensively address this fact pattern, and thus is a matter on which reasonable minds may presently differ.

Despite that, I remain sincere in my belief that this was a permissible, limited personal use of government communications systems to transmit a matter that could not have in any way been reasonably interpreted by its intended recipient, or anyone inadvertently receiving it, as an "official" communication, judged in light of the surrounding facts and circumstances. If we find otherwise in this case, we are going to establish a government-wide standard that hamstrings and exposes to risk not only senior government officials, but practically every member of government in possession of a government cellular telephone, personal computer, or personal digital assistant.

Accordingly, I ask that you take a second look at the policy underpinnings of the limited personal use authorization and all of the facts and circumstances of my qualified character reference for [redacted] to my friend [redacted], and modify your findings accordingly. You should not find that I violated the Joint Ethics Regulation unless you believe that I truly intended to imply Air Force endorsement in this matter or that [redacted], or a reasonable person aware of all the facts and circumstances, could have construed the e-mail in that vein. In summary, I believe the Joint Ethics Regulation and other regulatory guidance permit all of our members and employees to make appropriate personal use of Government communications systems in the very manner in which I used mine. The communication I sent to [redacted] was of a type expressly permitted by the Joint Ethics Regulation, it was personal in nature, and [redacted] would not have viewed it otherwise.

I ask that my comments in this response be incorporated into your report to augment my sworn statement. I also request that the corrections listed in the attached errata sheet be made to the transcript of my sworn interview.

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Roche James Dr SAF/OS

From: Schmitz, Joseph E., OIG DoD [redacted]@dodig.osd.mil]
Sent: Thursday, April 22, 2004 9:51 AM
To: Roche James Dr SAF/OS
Cc: [redacted]., OIG DoD
Subject: Remarks at Air Force Academy

Sensitivity: Private

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Jim: For your information, you can read my remarks delivered at the Air Force Academy this past Monday, April 19th, by clicking http://www.dodig.osd.mil/IGInformation/Speeches/Index.htm. If you would like a personal back-brief, please let me know. /Joe/

> Joseph E. Schmitz
> Inspector General
> Department of Defense
> 400 Army Navy Drive
> Arlington, VA 22202-4704
> Direct: (703) 604-8300
> Fax: (703) 604-8310
>