

Supporting Affiliated Organizations

A new perspective

by Robert D. Hogue

The term Non-Federal Entity (NFE) applies to any organization that is not part of the Federal Government. The topic of interactions with NFEs comes up often in the context of the U.S. military. Types of NFEs include the for-profit organizations that do business with the military, as well as the non-profit organizations that seek to affiliate themselves with military interests. This article will focus on the non-profit variety of NFEs.

NFEs have a long history of close interaction with the military. In the early 20th century, as the United States gained in world prominence and military strength, the public's interest in military affairs also increased. Many military-themed NFEs were chartered during that time. Their missions ranged from providing aid to injured veterans and surviving family members of those killed in combat, to promoting the morale and welfare of military service members.

As the military has evolved over the years, so too have the NFEs that surround the military. Increased Federal funding for the military has improved the basic equipping of service members, and the United States established the Department of Veterans Affairs in its modern form after World War I. While the military is less reliant on NFEs to provide basic operational functions, NFEs nonetheless play an important role in maintaining *esprit de corps*, preserving military history, and fostering meaningful discussions on the current state of the military and how it can improve.

Although NFEs provide unquestionable benefit to the military, military ser-

vice members must always preserve a sense of clear separation from NFEs. A bedrock principle of government ethics is that public service is a public trust. In order to ensure that every citizen of the United States has complete confidence in the integrity of the Federal Government, each Federal employee (including military service members)

is obligated to respect and adhere to a set of fundamental ethical principles. One of those principles is that Federal employees will act impartially and not give preferential treatment to any private organization or individual.¹

There has been, and always will be, a balance that the Marine Corps must strike between creating too much dis-

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Some affiliated organizations support robust awards programs to recognize Marines for professional excellence. (Photo by Abby Wilson.)

tance from NFEs, which would sacrifice the morale and public relations benefits these organizations can offer, and getting too close to NFEs, which would run afoul of the code of ethics and erode the public's trust in the impartiality of government. To manage this inherent tension, the Government has adopted various statutes and regulations which address commonly occurring interactions with NFEs. After many years of dealing with those authorities, and attempting to apply them sensibly at the agency level, it has become clear to me that it is time for a meaningful review of what these rules are meant to accomplish and whether they in fact are meeting those goals.

The DOD Joint Ethics Regulations forbid military servicemembers from explicitly or implicitly endorsing any NFE, but they do permit service members to provide NFEs with impartial and limited logistical support. Limited logistical support often comes in the form of service members providing speeches which promote the Service's interests to receptive audiences at NFE events. In general, the Federal Government is required to give all similarly situated groups and individuals an equal level of support. This is a common sense rule that is reflected in the case law of the U.S. Supreme Court, applicable Federal statutes, and in the ethics regulations promulgated by the Office of Government Ethics (OGE), the DOD, and the individual Services. In 1985, the Supreme Court decided a case called *Cornelius v. NAACP Legal Defense and Educational Fund*, which involved the Federal Government drawing distinctions and giving different treatment to different groups of non-profit organizations.² In that case, the issue was whether the Federal Government could legally exclude certain charitable organizations from participating in the annual Combined Federal Campaign fundraiser. The Supreme Court upheld the Federal Government's right to define which organizations had "similar status," and to interact with those organizations differently than other organizations, as long as the Government could reasonably explain the common goals and methods of the organizations it chose to support.

In practice under this stricture, Federal agencies have chosen to interpret the phrase "similarly situated" very broadly. They tend to consider all non-profit organizations qualifying under § 501(c)(3) of the Internal Revenue Code (codified at Title 26, U.S. Code) as similarly situated with one another. This leads Federal agencies, and military Services in particular, to be overly restrictive in their support for any individual 501(c)(3) organization because they do not want to incur an obligation to provide similar support to every other 501(c)(3) organization; they are simply not resourced for that level of engagement. If the pool of similarly situated organizations is the universe of organizations qualifying for tax exempt status under 26 USC § 501 (c)(3), the potential drain on Service resources and time would simply be too great. The one-size-fits-all approach to interacting with all 501 (c)(3) organizations restrains the military's willingness to open the door to providing support, and in the process prevents the Services generally, and service members in particular, from reaping the benefits that accrue from providing a venue in which service members can share experiences. For this reason, it has become difficult for the Services to work with organizations that are formed by and for the benefit of service members.

I propose a new approach, which would acknowledge that NFEs come in several different forms. In deciding how the Marine Corps should interact with any individual NFE, it is necessary to differentiate one NFE's mission and purpose from the next. Many NFEs provide direct, tangible services to the Marine Corps, individual Marines, and their families in meaningful ways. Some groups provide professional military education (PME) support (i.e., logistical support in furtherance of a battlefield study or providing Marines with historical battlefield experts to lead PME discussions on-site).³ Some groups regularly produce scholarly publications, encouraging innovation, service reflection, and critical thought with regard to major issues of interest to the Service.⁴ Some also organize robust awards programs to recognize Marines

who distinguish themselves in their respective MOSs. The organizations that focus on individual Marines and their families fill their ranks with former Marines and service members, retired DOD officials, and ordinary citizens who value a particular mission of the organization. These groups are organizations with stated missions to benefit the welfare and development of current service members and their families.

It is time to adopt a new perspective on what it means to be "similarly situated." The Services should be allowed to partner with qualified 501(c)(3) organizations whose charters include a defined mission to support the professional development of service members or care for their families. This distinct set of NFEs are similarly situated with one another and deserve special consideration apart from the whole body of 501(c)(3) organizations. Merely being an "alumni association" of former military service members does not make an NFE "similar" to other NFEs that provide tangible benefit to the current military. Appropriate regulatory guidelines need to be promulgated to ensure that the Services' resources are not drained by supporting their alumni associations, and also to ensure that the Services remain engaged with organizations reflecting the broad spectrum of interests and citizens that our Congress has deemed worthy of a tax exemption.

I hasten to add that there are dangers in over-opening the door to supporting "affiliated organizations." One danger is that the Services provide so much support to their affiliated groups that they are increasingly distanced from the very public they are sworn to defend, and whose support is so necessary. Caution should be taken to ensure that the Services remain engaged with ordinary Americans who have no ties to the military in order to maintain and foster better relationships between the Armed Forces and American citizenry at large. This interaction is already permitted by the ethics rules and DOD policy regarding public outreach and support. Notwithstanding these concerns, there is an enhanced public interest in working with affiliated organizations whose mission is to contribute to professional-



Some affiliated organizations provide professional military education (PME) support in furtherance of battlefield studies. (Photo by Abby Wilson.)

izing the Services or to provide direct, tangible support to Service families. As in so many things the Government endeavors to do, it will be important to find an appropriate balance.

To this end, any enhanced authority for the DOD to work with these similarly affiliated organizations requires assurances that organizations that are mission-oriented in this manner meet certain thresholds. Although not an exhaustive list, I submit that the following are the hallmarks of organizations most appropriately situated for enhanced DOD support:

- Appropriate organizational member ratios (for example, to promote connection to the citizenry, an affiliated organization be composed of 70 percent active duty and/or retired servicemember to 30 percent civilian/non-Service affiliated members)
- Regular professional and scholarly publications designed to contribute to the profession of arms, foster innovation, spur debate, and enhance discourse on current, proposed, or

former DOD programs and activities

- Financials and overhead requirements that best ensure that funds contributed to these charitable organizations are in fact used to accomplish the organization's stated mission; and, a meaningful connection to professional development of the Service, the individual service member/Marine, or a substantive connection to the service member's family (e.g., scholarships for a Marine's eligible family members, financial assistance to those families demonstrably in need, etc.)

In some of these cases, the statutory and regulatory framework for the DOD to interact with and support some of these initiatives already exists. (For instance, 10 USC § 2601a covers direct acceptance of gifts by service members and their families.) These are merely suggestions; there should be a public process, like a public solicitation for rulemaking, permitting the inclusion of ideas from ordinary citizens.

As an example of an ability to provide enhanced support to specific NFEs, the

Services already have special authority, under 10 USC § 2558, to support the annual convention of National Military Associations at their national conventions, under certain specified conditions. In addition to otherwise applicable limited logistical support, additional available services includes: limited air and ground transportation; communications support; medical assistance; administrative support; and security support. This article in effect advocates an expansion of that authority which better reflects the reality of the current posture between the DOD and these "affiliated organizations" whose missions are to provide meaningful services to service members and their families.

In sum, I advocate for a more precise understanding of which groups are the most "similarly situated" with regard to permissible DOD logistical support. For the organizations with true missions to professionalize the Service and provide meaningful assistance to service members and their families, with certain threshold requirements, the DoD and the individual Services should have greater authority to interact with the specific subset of 501(c)(3) organizations due to their legitimate focus on the overall mission of the U.S. Armed Forces and their families.

Notes

1. President of the United States, Executive Order 1267, (Washington, DC: 12 April 1989 (as modified by Executive Order 12731).
2. See 473 U.S. 788 (Washington, DC: 1985)
3. This information is available at <https://www.marinecorpsuniversityfoundation.org> and <https://www.mca-marines.org>
4. This information is available at <https://www.mca-marines.org>, and <http://www.flymcaa.org>.

