Apolologies have received a good deal of attention lately, both from the standpoint of their effect on private civil litigation and their place in criminal and international law. These are welcome contributions, but they overlook another area in which apologies can play a valuable role: mistakes government makes when dealing with individuals. I have recently had occasion to consider this on behalf of a client – Army Chaplain James J. Yee – who was vilified (and held in solitary confinement for 76 days) in a national security case that crumbled before trial. Whether or not federal law currently provides some other remedy for him, it remains to be seen whether – all charges against him having been dismissed, and nonjudicial punishment for adultery and downloading pornography having been overturned on appeal – the Army, the Department of Defense, or the Commander in Chief will apologize.

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4 Official apologies directed to ethnic and other groups have also been the subject of recent study, see, e.g., Melissa Nobles, Official Apologies and their Effects on Political Membership in Democracies (paper presented at American Political Science Ass’n meeting, Philadelphia, Aug. 2003), web.mit.edu/polisci/research/mnobles/official_apologies_in_democracies.pdf, but typically involve heads of state or national governments, rather than agencies within a government. I believe such cases involve issues that are different in kind from individualized apologies, although, at least where domestic group injustice is concerned, the same memorialization machinery as that suggested here may be equally apt.
Apologies to vindicated individuals are not unheard of. Dr. Wen Ho Lee, a Los Alamos National Laboratory physicist who was the subject of a lengthy federal indictment, received an apology in open court from a district judge before whom he pleaded to one count of mishandling nuclear secrets in 2000. Four of my clients have received apologies from responsible federal officials. The country itself eventually apologized for the Japanese-Americans “relocation” in World War II. We have also tried to correct unfairness to individuals in other situations where we conclude that an error has been made.

Despite these exceptions, we obviously do not have a culture of public administration that encourages apologies when government errs. One reason for this – aside from the natural reluctance of those in authority to admit an error – may be the absence of a procedure for publishing apologies. The four my clients received were in the form of private letters. Judge Parker’s apology to Dr. Wen Ho Lee exists in court records, was memorialized in a report generated by Senator Arlen Specter, and was reported in the media. What is needed is a way to reach the public directly rather than filtered through news media that may not reproduce the official text, and to do so without the vagaries of competition among newsworthy events for space in a limited “news hole.”

I propose the creation of a new section in the Federal Register: Apologies. The Federal Register is probably one of the driest publications ever printed, but it is official and it reaches a broad audience – especially now that it is available in electronic format. An Apologies section would demonstrate the government’s sincerity on the rare occasions it does apologize. Such a section could be established by simple order of the Director of the Federal Register. That official enjoys the power to publish (in addition to executive orders, proclamations, other presidential documents, and documents required to be published by law) any other document that “is the official action of the
agency concerned”¹⁵ and whose publication he considers “would be in the public interest.”¹⁶ Congress has prohibited the publication of “comments or news items of any character,”¹⁷ but there is no reason to read that clause as covering – and thus excluding – official apologies.

What would be published? Apologies, of course, unless the recipient affirmatively requests nonpublication in the interest of privacy. To the extent that publication is a way of achieving justice for citizens and accountability for officials and agencies, the section could also include notices briefly describing other settings in which an agency or official, rather than having offered an apology, has been determined to have committed some arbitrary or capricious act. Examples include cases in which a court or agency awards fees under the Equal Access to Justice Act because the government’s position was not “substantially justified,”¹⁸ a criminal defendant is acquitted, or a court refers a Freedom of Information Act case to the Office of Special Counsel to determine whether a document has been withheld arbitrarily or capriciously.¹⁹

Perhaps once there is an Apologies section in the Federal Register, federal officials will issue more apologies. Of course there is always the chance that the need to publish apologies in the Federal Register may make federal agencies even less disposed to apologize than they have been in the past, since issuance would presumably require publication of unpleasant or unflattering facts. But we live in hope. ²⁰

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¹⁵ 1 C.F.R. § 5.4(c) (2004).
¹⁶ 1 C.F.R. § 5.3 (2004); see generally 1 C.F.R. § 5.1(a) (2004); 44 U.S.C. § 1505(a) (2000).