



MILITARY RELIGIOUS FREEDOM
f o u n d a t i o n

February 24, 2020

The Honorable Mark T. Esper
Secretary of Defense
1000 Defense Pentagon
Washington DC 20310.

Dear Secretary Esper,

Let me ask you something extremely important, Mr. Secretary.

Does the Air Force Judge Advocate General (JAG) Corps uphold the letter and spirit of the Constitution of the United States?

More specifically, does the Air Force Court of Criminal Appeals (AFCCA) comprehend the Establishment Clause of the First Amendment?

The answer to both questions, sadly, is clearly "NO."

The Military Religious Freedom Foundation (MRFF) has just received complaints from 16 conscientious United States citizens – all active or former military JAGs who care about equal treatment under the law – about the AFCCA's recent hearing of an Air Force service member's criminal appeal at the fundamentalist Christian Liberty University School of Law in Lynchburg, Virginia. As an added disgrace, Liberty University Law School students were encouraged by the AFCCA to not only submit amicus "Friend of the Court" briefs but were also allowed to ARGUE them before the Court in this criminal appeal proceeding! See, <http://www.liberty.edu/news/index.cfm?PID=18495&MID=372029>

Eleven of our 16 MRFF clients are either current or former USAF JAGs. Nine of them are practitioners of the Christian faith and the rest follow minority faith traditions or non-faith traditions.

The University is described by Wikipedia as having "a conservative Christian orientation" and as a "bastion of the Christian right" in American politics. . . ." See, https://en.wikipedia.org/wiki/Liberty_University.

Let's talk about Liberty University. Its "Mission Statement" begins as follows:

"Liberty University is a Christian academic community in the tradition of evangelical institutions of higher education. As such, Liberty continues the philosophy of education which first gave rise to the university, and which is summarized in the following propositions.

"God, the infinite source of all things, has shown us truth through scripture, nature, history, and above all, in Christ.

"Persons are spiritual, rational, moral, social, and physical, created in the image of God. They are, therefore, able to know and to value themselves and other persons, the universe, and God."

Is Liberty University, a private institution, allowed to organize itself around these stated principles? Of course it is. Religious freedom is part of what has made our nation a beacon of freedom in the world.

But too often "religious freedom" is used not as a shield to protect our rights as citizens to worship, or not, free from government interference – but instead as a sword, to cravenly discriminate against others who disagree with how fundamentalist religious extremists see the world. And while good ideas don't require force and indoctrination, bad ones do.

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Liberty University's Faculty Handbook makes it clear that the university discriminates against non-Christians and the LGBTQ community. Specifically, in the Handbook's section on "Ethical Responsibilities of Faculty," it asserts that Liberty University faculty members will "be a model of biblical lifestyle," and "uphold the sanctity of permanent marriage between a natural-born man and a natural-born woman as biblically ordained in scripture."

Liberty University Law School describes itself as having a "Christian worldview" and teaches "that the Western legal tradition is firmly established upon a foundation of faith." And they are free to push this view on their students as they see fit. They have that right. Nobody is forced to attend Liberty University.

But the United States government, of which the AFCCA is a part, should have only a Constitutional worldview and a legal tradition that is firmly established upon a foundation of law, not the Christian faith. In hearing a formal and official United States armed forces military justice appeal at Liberty University, the AFCCA has either forgotten this truth, or is actively and willfully ignoring it.

I should not have to remind anyone within the DoD that Air Force Instruction (AFI) 1-1, ¶ 2-12, states:

Leaders at all levels must balance constitutional protections for their own free exercise of religion, including individual expressions of religious beliefs, and the constitutional prohibition against governmental establishment of religion. They must ensure their words and actions cannot reasonably be construed to be officially endorsing or disapproving of, or extending preferential treatment for any faith, belief, or absence of belief. (emphasis added)

The AFCCA is a Federal Court, established by Congress in 10 U.S. Code § 866. Air Force military appellate judges are all active duty or active reserve Judge Advocates (military lawyers) who must be admitted to the Bar of some State or Territory. What confidence can the public have in the fairness and impartiality of military justice in the Air Force when AFCCA judges cannot even follow the basic Air Force doctrinal manual, AFI 1-1? The answer is simply, "none!" The judges who heard this appeal were from AFCCA Panel 2, all of whom are senior Colonel [0-6] active duty judges. And it is inconceivable that the Chief Air Force Appellate Military Judge, Colonel John Johnson, did not know of and approve of this unconstitutional exercise in the case of *United States v. Hernandez*. To hold oral argument in a United States military justice case in a bastion of odious discrimination such as Liberty University sends a message that the Air Force continues its decades long malfeasance by unconstitutionally elevating the Christian faith over all others faith and non-faith traditions.

Please see the following statement from MRFF Board Member, John Compere, in direct response to this present matter at Liberty University:

"Our secular military and its secular military justice system have no business conducting secular military justice at an exclusive sectarian institution with an extreme sectarian reputation. It implies an endorsement of the sectarian institution & its sectarian education which clearly violates the United States Constitution and US Armed Forces regulations."

Brigadier General John Compere, Judge Advocate General's Corps, US Army (Retired)
Former Chief Judge, US Army Court of Military Review & US Army Legal Services Agency
Board Member, Military Religious Freedom Foundation

A former military JAG who presently practices still in U.S. military criminal justice matters said the following to us:

"I am a former military Judge Advocate with over 25 years experience. A good portion of my civilian practice still involves military cases. I was both shocked and outraged to learn the Air Force Court of Criminal Appeals — a governmental entity — conducted an official appellate hearing in an actual criminal appeal at Liberty University's Law School last week, under the guise of Operation Outreach. Liberty's Law School is not just a law school affiliated with a sectarian university, such as Notre Dame. Rather, it is an avowedly religious institution, which as a private university is its right. Aside from the overt violation of

the Establishment Clause, what message does that court send to both the general public and the law students in attendance? A U.S. military court is composed of senior, presumably experienced Judge Advocates, whose oaths of office both as a lawyer and as a commissioned officer mandate that they “support and defend the Constitution,” which includes the First Amendment. Whether whoever is responsible for this fiasco is ignorant of basic constitutional law, or has an unconstitutional agenda, it is an abomination to our profession. As an American, as a lawyer, as a commissioned officer, and, yes, as a Christian, I am simply repulsed.

Here is a telling statement from a former very senior Air Force JAG:

"It is important to the Air Force that not only the actual occurrence of religious discrimination and domination be avoided and repudiated, but also that the appearance of religious preference be avoided. We must follow the letter and spirit of the Constitution's Establishment Clause and avoid even the appearance of religious endorsement. The Air Force Court of Criminal Appeal's holding its hearing at Liberty University Law School failed miserably in that regard, If Liberty University would like to renounce its advocacy of a one world view of religious liberty and disavow its repudiation of other religious or non-religious views, then the Federal Government could support its law school. Until then, our government and Constitution cannot support Liberty University sponsorship of federal hearings, such as the hearing by Air Force Court of Criminal Appeals. Certainly, there was another non-religious/secular law school somewhere in the United States that would have been willing to host this hearing, where the appearance of Christian domination would not have been raised."

Another current MRFF client in this matter who is a former Navy JAG and who currently maintains a vibrant practice in the U.S. military justice arena, put it this way:

“We start getting into serious trouble when “government officials elevate their private religious views over the Constitution and laws of the United States. I don’t know why this continues to be such a problem for the Air Force in particular, other than senior leadership that doesn’t care. [Air Force Chief of Staff] General Goldfein could put a stop to this kind of thing if he cared to. It shouldn’t take much mental bandwidth or basic human empathy to observe that not every airman is a Christian. But the Constitution, the law, our policies and regulations, they all provide quite clearly that everyone should be treated equally. And there are plenty of schools, plenty of them, that are inclusive and understand that we are all equal under the law. If AFCCA wants to take a road trip, there are far more appropriate destinations. And I’m saying all this as a man who believes in Christ. I guess the disconnect is that I find my Savior in His words and teachings in the Bible I try my best to follow every day. I’ve never really understood where the Falwells and Grahams and Bakkers find theirs. [Liberty University] is no place for the United States Air Force or any other government organization to conduct any official business, let alone military criminal justice business.”

Mr. Secretary, MRFF demands that you implement the following 3 actions immediately:

- (1) the relevant AFCCA Rules must be swiftly amended to disallow any form of connection, now and in the future, with institutions that teach and practice invidious discrimination, like Liberty University.**
- (2) the U.S. Air Force should officially and expeditiously apologize for the repugnant message of fundamentalist Christian triumphalism and exceptionalism it sent to ALL American service members and their families when it allowed this abhorrent travesty to take place at Liberty University.**
- (3) Any DoD/USAF personnel who played a direct, or even a meaningfully indirect, role in this sordid matter of unconstitutional outrage cum fundamentalist Christian supremacy should be aggressively investigated and visibly punished.**

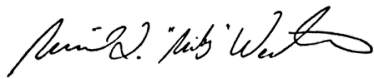
Mr. Secretary, just for a moment please, imagine yourself as a military courts martial defendant who may happen to be Hindu, Wiccan, atheist, agnostic, Jewish, Muslim or anything but a fundamentalist "Christian" and your Air Force criminal courts martial appeal is ensuing at that citadel of fundamentalist Christian exclusivity, Liberty University Law School. How might that make you feel do you think, sir? While we know Liberty University doesn't care, it most assuredly seems the U.S. Air Force doesn't either.

It's hardly just the "optics" here that stink, sir, it's the foundational constitutional LAW and DoD regulatory provisions that are being rapaciously violated!

We at MRFF, and our 16 current and former military JAG clients on this instant matter find what happened herein to be wholly intolerable! Further, our scores of thousands of MRFF active duty, reserve, national guard and veteran U.S. armed forces clients as well as hundreds of paid and volunteer MRFF staff and our myriad MRFF supporters, nationally and worldwide, find this matter at hand to be boundlessly intolerable.

And if you believe in the inclusive spirit of our Constitution, Secretary Esper, it should be likewise intolerable for you.

Sincerely,



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Founder and President
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CC:

Barbara M. Barrett, Air Force Secretary
General David L. Goldfein, Air Force Chief of Staff
Lt. General Jeffrey A. Rockwell, The Air Force Judge Advocate General