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Not For Motion Practice or Pleadings

20 September 2017

Via Email Only

Marguerite C. Garrison
Deputy Inspector General
for Administrative Investigations
Room 15D27, West Tower
4800 Mark Center Drive
Alexandria, VA 22350

RE: *Amended* MRFF Complaint, Your Case # 20170404-042380¹
Memorandum of Law

Dear Ms. Garrison:

As legal counsel to the MRFF, please accept this *Memorandum of Law* as a post-script to our letter of 17 September 2017 on this matter. Specifically, we would ask that this memorandum be provided to the Legal Advisor to the Investigator(s) herein. Our reasons for this are to clarify MRFF's legal position that Chaplain (Captain) Hernandez's *conduct* in writing and publishing the article at issue herein is *not excused* by his "reserve" status and pretextual disclaimer; and to ensure that your Legal Advisor understands our legal position.

As reported in the *Stars and Stripes*, yesterday:²

Air Force Reserve spokesman Lt. Col. Chad Gibson said Hernandez is expressing his own views, not those of the Air Force, and his freedom to express his own faith is an essential protection in the military.³

I do not know if Lt. Col. Gibson is a lawyer, much less a judge advocate, but he – like Chaplain

¹ The undersigned has documentation with this case number as well as Case # 20170404-043280.

² Available at:
<https://www.stripes.com/air-force-chaplain-comments-raise-debate-on-religious-freedom-vs-personal-faith-1.488492#.WcL9btEzXSe>

³ *Id.*

(Captain) Hernandez – has a grossly erroneous view of one’s *legal* status as a commissioned officer, whether serving on active duty or in the active reserves. Being commissioned as an officer of the United States as you know involves bestowing a status, an honored one for sure, which the law recognizes. That status does not depend upon what clothes or uniform one may be wearing and does not change when one takes off their uniform. But, with that status and recognition, comes some restrictions, *i.e.*, there are the proverbial “strings attached.”

In *Parker v. Levy*,⁴ the Supreme Court of the United States reiterated three important (and relevant) principles. *First*, “This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.”⁵ That “society” by definition includes *Reserve* commissioned officers. *Second*, “[The UCMJ] and the various versions of the Articles of War which have preceded it, regulate aspects of the *conduct* of members of the military which in the civilian sphere are left unregulated.”⁶ It is primarily this aspect that neither Lt. Col. Gibson and Chaplain (Capt) Hernandez apparently do not understand. *Third*,

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. ***The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.***⁷ [Emphasis added].

This is the fatal *legal* flaw in both Lt. Col. Gibson’s and Chaplain Hernandez’s respective positions. *Parker* quoted with approval from *United States v. Gray*,⁸ a decision by the highest court in the military justice system, *viz.*: “Servicemen, like civilians, are entitled to the constitutional right of free speech. The right of free speech, however, is not absolute in either the civilian or military community [citations omitted].”⁹

The Supreme Court’s next significant First Amendment decision *vis-a-vis* the military, was *Goldman v. Weinberger*,¹⁰ the “yarmulka” case. There the Court reiterated the principles enumerated in *Parker*:

Our review of ***military regulations*** challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or

⁴ 417 U.S. 733 (1974).

⁵ *Id.* at 743.

⁶ *Id.* at 749 [emphasis added].

⁷ *Id.* at 758.

⁸ 42 C.M.R. 255 (CMA 1970).

⁹ *Id.* at 258.

¹⁰ 475 U.S. 503 (1986).

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regulations designed for civilian society. ***The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment***; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.¹¹ [Emphasis added].

The Court went on to state:

In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.¹²

Or, as the Supreme Court has held in another First Amendment context:

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.¹³

Nor is this something that the military (and particularly, the USAF) has ignored, as this law review article points out: “it is well established that the government has greater latitude in restricting military members speech than would be permissible in the civilian sector.”¹⁴

Good order and discipline has been the cornerstone of all effective militaries for centuries. As such,

The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.¹⁵

Looking at the applicable “military regulations” *Parker* mentions, one must begin with DoDI 1300.17 (2014), which provides:

4. **POLICY.** It is DoD policy that:
 - a. The DoD places a high value on the rights of members of the members of the Military Services to observe the tenets of their respective religions *or to observe no religion at all.*

¹¹ *Id.* at 507.

¹² *Id.*

¹³ *Virginia v. Black*, 538 U.S. 343, 358 (2003).

¹⁴ Fitzkee & Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. Law Rev. 1, 31 (2007)[citing *Parker v. Levy*, *supra*].

¹⁵ *Bolden v. Roy*, 476 U.S. 693, 699 (1986).

* * *

- c. DoD has a compelling government interest in mission accomplishment, unit cohesion, good order, discipline, health, safety, on both the individual and unit levels. ... [emphasis added].

“Observing the tenets” of ones religion has nothing to do with Chaplain (Capt) Hernandez’s public advocacy while clearly *identifying himself* as an Air Force Reserve Chaplain! This was perhaps best explained by an Army Judge advocate in a relevant legal article:

Although the freedom to believe is absolute, the freedom to act in accordance with one’s belief, like the right to free speech, is not absolute and *may be subject to government restriction*. [citation omitted; emphasis added].¹⁶

Thus, the core question here is, are there any government, *legal* restrictions on Chaplain (Capt) Hernandez’s First Amendment rights he (and Lt. Col. Gibson) claim are at issue here?

DoDI 1332.30, *Separation of Regular and Reserve Commissioned Officers* (2017), implicitly recognizes several *legal restrictions* applicable in Enclosure 2:

REASONS FOR SEPARATION

1. **SUBSTANDARD PERFORMANCE OF DUTY.** A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary concerned, when he or she is found to be substandard in any of the following:
 - a. Performance of duty.
 - b. Efficiency.
 - c. Leadership.
 - d. Response to training, in that performance of duties in the officer’s assigned specialty is unsatisfactory.
 - e. Attitude or character. . . .

All respectfully apply to Chaplain Hernandez.

Air Force Instruction [AFI] 51-903, *Dissident and Protest Activities* (2015), is quite specific:

4. Prohibited Activities. Military personnel must reject participation in organizations that advocate or espouse supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal causes; *attempt to create illegal discrimination based on* race, color, gender, *religion*, national origin, or ethnic group; advocate the

¹⁶ Schauss, *Putting Fire & Brimstone on Ice: The Restriction of Chaplain Speech During Religious Worship Services*, Army Lawyer, 17 (February 2013).

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use of force or violence; or otherwise engage in the effort to deprive individuals of their civil rights. [Emphasis added].

Chaplain (Capt) Hernandez's publication flies in the face of this AFI because he is openly encouraging other military commissioned officers (and specifically military Chaplains) to subordinate their commissioning oaths to *his* purported biblical interpretations. But that position directly conflicts with DoDI 1300.17's position quoted above that members of the military are free to observe *no religion* as well as their own – not Chaplain Hernandez's religion – to include Muslims and Buddhists which he expressly singles out in his article.

Next, AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, which applies to all officer and enlisted members not serving on active duty with the Regular Air Force, states that a reserve officer may be discharge when:

2.34. Substandard Performance of Duty. Discharge an officer who, as compared to other commissioned officers of the same grade and experience, is found to be substandard in any of the following respects or similar circumstances.

2.34.1. Failure to show *acceptable qualities of leadership* required of an officer of the same grade.

2.34.3. Failure to *properly discharge the assigned duties equal* to the officer's experience.

2.34.6. *Apathy or defective attitude during which the officer is unable or unwilling to expend effort.*

All respectfully apply to Chaplain Hernandez.

In this respect, in a similar First Amendment, but non-military context, the Supreme Court has concluded:

Congress was deprived of all legislative power over mere [religious] opinion, but was left free to reach actions which were in violation of . . . good order.¹⁷

Reynolds concluded:

Can a man excuse his practices to the contrary [of the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in

¹⁷ *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

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name under such circumstances.¹⁸ [Emphasis added].

That is precisely what Chaplain (Capt) Hernandez publicly professed in the article he published at issue here, *viz.*, he wants “*to make [his] professed doctrines of religious belief superior to the law of the land.*” In other words, superior to the Constitution, his commissioning oath, and military law and regulations.

Finally, to ensure that there is no excuse to accept Chaplain Hernandez’s and Lt. Col. Gibson’s flawed opinions that what Chaplain Hernandez does or writes for public consumption while not on active duty or in a “pay or points” status as a Reservist, consider the case of an Army Reservist, likewise a commissioned officer, *McClellan v. United States*, 119 Fed.Cl. 494 (2015), who while in a non-duty status, was disciplined for his “speech.” Among other things, that officer told his superior the following:

... while I am in citizen status, as I am now, you can mind your own business on how I choose to address anyone. If you don't like it, you can write your congressman and request the law be changed.¹⁹

That court agreed with the Army, to wit: “correctly determined that plaintiff engaged in misconduct.”²⁰

DoDI 1325.06, *Handling Dissident and Protest Activities Among Members of the Armed Forces* (2012), provides at Enclosure 3, the relevant guidance here:

Publication of such matters by military personnel off-post, on their own time, and with their own money and equipment is not prohibited; ***however, if such a publication*** contains language the utterance of which is punishable under Federal law or otherwise ***violates this Instruction or other DoD issuances, those involved in printing, publishing, or distributing it may be disciplined or face appropriate administrative action for such infractions.*** [Emphasis added].

Chaplain Hernandez falls within this Instruction.

Consent to Release

MRFF, by and through its undersigned counsel, agrees and consents to your office’s release of this document for any purpose deemed appropriate to your investigation.

You and your staff are authorized to communicate with me via email regarding this matter.

¹⁸ *Id.* at 166-67.

¹⁹ 119 Fed.Cl. at 518.

²⁰ *Id.*

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Respectfully submitted,

/s/ Donald G. Rehkopf, Jr.

DONALD G. REHKOPF, JR.

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