



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

Thursday, March 21, 2019

United States Commission on Civil Rights  
1331 Pennsylvania Ave., NW, Suite 1150  
Washington, DC 20425

Honorable Commissioners,

As a well-known, prominent guardian of civil rights in the Federal government, especially in the United States military, we respectfully ask that you urgently consider our objections to the Department of the Air Force's recently published Opinion of The Judge Advocate General (AFJAGAF), legalizing religious evangelizing and proselyting at change of command and promotion ceremonies in violation of the First Amendment's Establishment Clause. An AFJAGAF opinion is definitive, controlling guidance to United States Air Force (USAF) commanders. It is "controlling legal guidance" that must be obeyed by USAF commanders, unless overruled by the Air Force General Counsel's Office, which has elected to not issue contrary guidance in this case.

Over the years, we have made repeated complaints with the Department of Defense and the Department of the Air Force on religious matters in violation of the Establishment Clause. Due to our complaints being routinely minimized and rejected by DOD and USAF, we now seek your review. We feel we have exhausted administrative review at DOD and USAF levels, and therefore, seek your intercession. We would greatly appreciate it if you convened a hearing to review this matter. We would happily testify before the Commission, and we are certain DOD and USAF officials would feel compelled to accept your invitation to similarly testify and attempt to justify their violation of the Establishment Clause.

The attached Opinion of The Judge Advocate General of the Air Force (OPJAGAF) reaches an extremely ominous and utterly unconstitutional conclusion; to wit, that United States Air Force (USAF) commanders may now publicly endorse the specific name of their personal gods or deities at their official USAF Change of Command ceremonies and promotion ceremonies. (See attachment 1 to read the OPJAGAF.) This OPJAGAF now serves as the controlling legal authority, permitting violations of the Establishment Clause by all Air Force members at change of command ceremonies and promotion ceremonies.

As you know, the First Amendment of the United States Constitution contains the Establishment Clause and the Free Exercise Clause. In Parker v. Levy, 417 U.S. 733 (1974) (See attachment 2), the United States Supreme Court absolutely and quite conclusively defined the limits of First Amendment freedoms for military members. As such the Supreme Court's opinion serves as incontrovertible, controlling law regarding when free exercise of religion in the military is constrained by the Establishment Clause of the First Amendment. The Court concluded that First Amendment freedoms (such as the religious Free Exercise Clause) are restricted when such speech begins to degrade morale, good order and discipline in the Armed Forces. The Court limited the First Amendment freedoms of military members to the higher necessity of defending the Nation by maintaining morale, good order and discipline of members of the Armed Forces, who are charged with defending the survival of the nation and thus, the survival of the Constitutional freedoms for its civilian citizens. Indeed, one of the most conservative Chief Justices in the history of the United States Supreme Court, Chief Justice William Rehnquist, authored that seminal opinion himself.

Heretofore, the USAF has always concluded that speeches given at change of command and promotion ceremonies are, as a matter of law, official "state speech" which may not endorse particular religious affiliations or lack thereof. Such state speech would predictably have a deleteriously corrosive effect on the morale, good order, discipline, and unit cohesion of Airmen in attendance, who are not affiliated with the Commanders' personally expressed religious beliefs and affiliation. Accordingly, the previous opinions of The Air Force Judge Advocate General were consistent with Parker v. Levy.

The Air Force correctly applied Parker v. Levy when it published Air Force Instruction 1-1. In paragraphs 2.11 and 2.12 of the Instruction, the Air Force prohibited Air Force commanders from endorsing a religious belief or affiliation in a supreme being (e.g., Jehovah, Allah, Jesus, God) under circumstances where such testimony would degrade good order and discipline. The paragraphs states:

**2.11. Free Exercise of Religion and Religious Accommodation.** Every Airman is free to practice the religion of their choice or subscribe to no religious belief at all. You should confidently practice your own beliefs while respecting others whose viewpoints differ from your own. Every Airman also has the right to individual expressions of sincerely held beliefs, to include conscience, moral principles or religious beliefs, **unless those expressions would have an adverse impact on military readiness, unit cohesion, good order, discipline, health and safety, or mission accomplishment** (emphasis added).

**2.12. Balance of Free Exercise of Religion and Establishment Clause.** 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 OPJAGAF concludes that change of command ceremonies are “*official ceremonies*” and thus AFI 1-1 applies, but follow-on promotion ceremonies where the incoming commander is promoted to a higher grade are “*unofficial ceremonies*”, provided that there is at least a ten-minute break between the change of command and promotion ceremonies, to allow those attendees who were directed to attend the change of command ceremony to leave before the promotion ceremony begins.

Paradoxically, the OPJAGAF concludes that the significance of the classification between an official change of command ceremony and an unofficial promotion ceremony is as follows: that in the official change of command ceremony, the incoming commander may thank the deity of his or her choice, while in the unofficial promotion ceremony, the incoming commander may do the same but also add much more in an effort to proselytize the audience to adopt his or her religious preference. The opinion’s attempted factual distinction between official and unofficial ceremonies and its legal conclusions regarding both are seriously flawed as a matter of fact and of law. Please consider the following:

Change of Command Ceremonies: We agree that a change of commander ceremony is an “official ceremony.” As such the Establishment Clause and AFI 1-1 apply. However, the OPJAGAF concludes that, in the absence of any contrary evidence proving that thanking a particular deity degrades morale, good order and discipline (e.g., complaints from attending Airmen), the “thank you” remark is deemed (as a conclusion of fact) to be perceived by the audience as a personal statement, and not the official opinion of the Air Force. The OPJAGAF then concludes, the religious statement is not forbidden by the Establishment Clause or AFI 1-1. Therefore, the opinion concludes an incoming commander may thank God, Jesus, Allah, even Beelzebub (quoting the OPJAGAF) in his remarks in an official change of command ceremony.

The OPJAGAF concludes (again in the absence of evidence) that no non-Christian Airmen in the audience would feel uncomfortable to hear the incoming commander, whom he or she has never met, thank Jesus for rewarding him or her with success. In a similar fashion, the opinion assumes that Christian Airmen would not feel uncomfortable upon hearing the incoming commander thank Allah or “Beelzebub” for his or her success. It goes without saying that atheist Airmen would feel discomfort at hearing either version.

The greater weight of evidence would hold that Airmen who do not share the incoming commander's religious affiliation, will question the impartiality of a commander who went out of his way at his change of command ceremony to state his loyalty and affection for a deity not shared by those Airmen who hold affiliation with another deity or with no deity. The result is predictable. Those Airmen begin to doubt the new commander's impartiality in evaluating their contributions to the unit compared to the contributions of Airmen who share the commander's particular religious affiliation. Unit morale, discipline and good order are degraded on day #1 for of the new commander appointment when the commander makes such a declaration in his change of command remarks. Consistent with this evidence, Parker v. Levy holds that such remarks, therefore, are not protected by the Constitution and should be forbidden under the Establishment Clause. Accordingly, personal thank you's to deities have no place in official change of command ceremonies.

The fact that the incoming commander's subordinates who hear the new commander's religious remarks may reasonably believe that the remarks are his personal opinion and not the Air Force's official position is irrelevant in determining whether the remarks violate the Establishment Clause or exceed the commander's First Amendment right to religious free exercise. The incoming commander, who makes a statement of religious preference at an official ceremony, is a uniformed government official, and for that reason alone, his remarks constitute state speech in violation of the Establishment Clause. Also, under Parker v. Levy standard, because the incoming commander's religious "thank you" statement causes at least some of his subordinates, who have different religious affiliations, to doubt the commander's impartiality in evaluating their duty performance should the new commander learns of their contrary religious affiliations, the new commander's "thank you" to a particular religious deity exceeds his First Amendment right to free expression according to the Parker v. Levy standard.

Furthermore, we must ask why an incoming commander would feel compelled to publicly thank his deity of choice at his change of command ceremony. The greater weight of the evidence demonstrates that the reason for thanking the deity is not merely to express gratitude, but rather its primary purpose is a less-than-subtle form of evangelizing or proselytizing, which is without question prohibited by the Establishment Clause and AFI 1-1. The new commander is aware that his audience at his change of command ceremony consists principally of his subordinates, a diverse group with different religious affiliations or no religious affiliation, whom he has never met and over whom he now has rating authority. The commander reasonably knows that members of the audience, upon hearing his "thank you" to his deity, will predictably conclude that the new commander is engaged in a form of evangelizing and proselytizing. Why else would the incoming commander feel compelled to, for example, thank Jesus publicly in front of an audience whom he has never met? The incoming commander is certainly aware that he could thank Jesus privately or at a religious service. He could, for example, just get down on his knees in prayer at home and thank

Jesus or the deity of his choice. The incoming commander cannot reasonably believe that Jesus or the deity of his choice only hears his “thank you” if delivered in public to his new subordinates. Therefore, the purpose in thanking Jesus or the deity of his choice in his remarks at this official ceremony is not merely to thank Jesus or the deity of his choice. Instead, its greater purpose is to proselytize to his new subordinates the wisdom of converting to his or her religious beliefs and encourage their adoption of his or her deity.

The new commander likely believes that Jesus or the deity of his or her choice wants him to state his thank you in public to his new subordinates because Jesus or the deity of his or her choice wants him to publicly testify in an effort to recruit new believers, which purpose violates the Establishment Clause. Many Christian Protestant officers believe that the Great Commission requires that they use ceremonies such as these to evangelize or proselytize. To suggest that the incoming commander’s public “thank you” to Jesus or any other deity at this official ceremony is merely a thank you and nothing more flies in the face of common sense and the greater weight of evidence.

Accordingly, thanking the deity of your choice at an official promotion ceremony violates the Establishment Clause and AFI 1-1 and exceeds the new commander’s right of free exercise, according to Parker v. Levy.

The OPJAGAF opinion attempts to avoid this obvious truth by stating that “proselytizing,” according to the Fourth Circuit Court of US Appeals, must consist of an express request or order to convert others to the speaker’s religious affiliation. The Fourth Circuit definition ignores the obvious truth that proselytizing can exist without an express order or request to convert to the speaker’s religious faith. If the Air Force adopts this overreaching, fallacious definition of “proselytizing,” then its supervisors and commanders are authorized to evangelize, persuade, and coerce subordinates into converting to their faith, without risking violations of the Establishment Clause, so long as they never articulate a specific request or directive to convert. This cannot be what is authorized as permissible government action consistent with the Establishment Clause’s prohibition. Our Constitution does not permit this kind of government overreach, and we, as a nation, are certainly much better than this!

Promotion Ceremonies Following a Change of Command Ceremony. The opinion concludes that if ten minutes or more are placed between the official change of command ceremony and the incoming commander’s follow-on promotion ceremony, and thus allowing attendees to leave before the promotion ceremony, the promotion ceremony is transformed into an “unofficial ceremony” and the incoming commander is free to state in his remarks all his religious beliefs without limitation. This dichotomy would permit the new commander in his follow-on promotion ceremony remarks to specifically ask, encourage, or even direct that his new subordinates adopt his religious faith and affiliation.

Once again, the author of the opinion failed to consider the greater weight of the evidence which demonstrates that the promotion ceremony is also an “official ceremony.” The evidence demonstrating that follow-on promotion ceremonies are official ceremonies which must comply with the Establishment Clause is as follows:

- First, the change of command ceremony is most often considered a mandatory attendance event. The incoming commander and presiding official sit facing the audience, who are often seated or in standing ranks facing the new commander. For an Airman to leave after the change of command ceremony, even on the pretext to use the restroom during the ten-minute break, and then not return to his or her seat or their place in standing ranks will not go unnoticed by the incoming commander and the presiding official, who often is the commander’s commander. Therefore, the environment of both ceremonies suggests to any reasonable Airman that he or she should stay for both ceremonies, making both in a very incontrovertible practical sense, “mandatory formations” and thus, “official Functions.”

- Second, the incoming commander is always be promoted by state action. An official Air Force promotion board selects him or her. The Air Force then forwards to the President its list of officers who are recommended for promotion. Upon receipt of the Air Force list of officers who are recommended for promotion, the President then nominates officers at his discretion for promotion and forwards his list of officers nominated for promotion to the Senate. The Senate then reviews the President’s list of nominated officers and confirms for promotion officers that it chooses for promotion pursuant to its Constitutional authority under Article 1. To suggest that the promotion ceremony which symbolizes an officer’s promotion in grade to the Air Force community is somehow “unofficial” ignores the obvious fact that his or her promotion is the result of state action on multiple levels. Accordingly, this promotion ceremony serves as confirmation of an undeniable state action and is subject to the restriction of the Establishment Clause and AFI 1-1.

- Third, promotion ceremonies, especially those that take place after a change of command ceremony, occur on federal property, usually (in Air Force cases) in aircraft hangars and officers’ clubs. The Airmen who attend are in uniform, on “official duty” and accordingly paid by the US taxpayers. They are not on personal or administrative leave. The honor guard, narrator, presiding official and the officer to be promoted are likewise each on active duty; they are not on leave; they are on duty and are paid by the taxpayers. According to the federal Purpose Act (31 U.S.C. 1301), attendance at unofficial ceremonies in a non-leave status violates the Act unless Congress somehow authorized the use of federal salaries to attend unofficial events (which it has not). Violations of the Purpose Act trigger the Anti-Deficiency Act (31 U.S.C. 1341), which requires a report of investigation and corrective action be sent to the President. And yet there is no evidence that the Air Force has ever reported promotion ceremonies as violations of the Purpose Act and Anti-Deficiency Act. This is because for purposes of the Purpose Act and Anti-

Deficiency Act, the Air Force argues promotion ceremonies are “official” ceremonies. The result is the Air Force argues out of both sides of its mouth. According to the OPJAGAF logic, the ceremony is official for purposes of using appropriated funds (e.g., federal salaries and equipment) and “unofficial” for purposes of authorizing religious statements by the promotee, which would otherwise violate the Establishment Clause and AFI 1-1. Therefore, to suggest that this promotion ceremony is unofficial (apparently to authorize the promotee’s personal evangelizing and proselytizing of his audience) is factually and legally a fiction, a sham, and a prevarication. The greater weight of the evidence demonstrates that promotion ceremonies are official ceremonies, requiring adherence to the Establishment Clause and AFI 1-1 and forbidding statements of religious affiliation and endorsement.

**Hiding One’s Proselytizing Among Other ‘Thank You’ Comments.** The opinion argues that if, during the official change of command ceremony, the promotee thanks not just “Christ, Allah, or Beelzebub” at his election (see para 3 of the OPJAGAF), but also thanks his family, his fraternal organization and the officers’ club staff for setting up the facility, then his religious statement is clearly a sincere statement of thanks to his deity and not an attempt to proselytize. As we have indicated earlier in this letter, the “thank you” speech to a deity of your choice is not merely and solely an expression of gratitude, but also is a form of evangelizing and proselytizing.

Even more disturbing, this portion of the opinion is nothing more than The Judge Advocate General’s conspiratorial guidance to officers who wish to engage in illegal proselytizing speech, cautioning them to disguise their evangelizing and proselytizing speech as a “thank you” to a deity of your choice and then instructing them to also thank secular sources of help in order to disguise the true proselytizing purpose of their thank you remarks to the deity of their choice. This guidance is a prevarication of the Establishment Clause and a violation of the author’s oath to “support and defend the Constitution.”

**Ceremonial Deism.** The opinion then cites a number of court decisions where, either in the majority or minority opinions, religious speech at public events has been found to not violate the Establishment Clause. Importantly, none of these cases involved religious speech at military ceremonies. The facts, therefore, of these cases are distinguishable. None of these cases discussed the controlling case of Parker v. Levy, because the ceremonies and audiences involved in these cases were not military units or military personnel. Accordingly, the courts in these cases did not examine whether the religious speech had an adverse impact on military morale, good order and discipline, and whether therefore, Parker v. Levy would hold that the speech was not protected under the free expression clause.

The Air Force opinion cites McCreary County v. ACLU, 545 US 844 (2005) among other court decisions, for the proposition that “enlightened or ceremonial deism” is not prohibited

by the Establishment Clause. The McCreary opinion held that a display of the Ten Commandments in front of a Kentucky court house violated the Establishment Clause. The Air Force opinion attempts to drive a truck through the dicta loophole in that case which speculated that mere “enlightened or ceremonial deism” would not violate the Establishment Clause. The Air Force opinion then concludes that for a new commander at his official change of command ceremony to thank “Christ, Allah or Beelzebub” and any other deity for his advancement to his command position is merely lawful “enlightened or ceremonial deism.” To bolster their opinion, the Air Force opinion cites numerous Presidential inauguration speeches where the new President thanks “a Being, Providence, the Almighty, the Author of All Good, the Lord, that Power, the Almighty Being, the Devine Being, the Almighty Ruler of the Universe, God, Almighty Ruler of All Nations, the Devine Hand, Supreme Being, Giver of Good, and Almighty Creator.” While these inaugural speeches may constitute “enlightened or ceremonial deism,” we do not agree that it is not a violation of the Establishment Clause. More importantly, we strongly object that somehow these Presidential speeches serve as authorization for new commanders at official change of command ceremonies or promotion ceremonies to thank in accordance with paragraph 3 of the OPJAGAF “Allah, Brahman, Christ, Ganesh, Yahweh, or Beelzebub,” none of whom are mentioned in the inaugural speeches, and ignore the restrictions of Parker v. Levy, which applies to military commanders. The OPJAGAF opinion accomplishes this unconstitutional chicanery by attempting to label such religious speech by Commanders as merely of “ceremonial deism,” which the author of the OPJAGAF suggests (without legal authority) ought to be an exception to Parker v. Levy.

Equally troubling is the fact that deism is commonly defined as, “belief in the existence of a supreme being, specifically of a creator who does not intervene in the universe.” (See: Merriam Webster Dictionary among other dictionaries.) The term is used chiefly to describe an intellectual movement of the 17th and 18th Centuries that accepted the existence of a creator on the basis of reason but rejected belief in a supernatural deity who interacts with humankind.” The deism concept, therefore, did not include in its pantheon of deities “Allah, Brahman, Christ, Ganesh, Yahweh, or Beelzebub,” and none of these deities are cited as deist entities in the OPJAGAF.

Therefore, the OPJAGAF presents a standard which invites religious speech exceeding “ceremonial deism.” There is no doubt that commanders who wish to drive a truck through the OPJAGAF’s proposed “ceremonial deism” exception to the Establishment Clause and Parker v. Levy will invoke “Jesus Christ” in their remarks, which clearly exceed what deism represents.

Also, given that deism died away 200 years ago, attempting to train commanders on the limits of a deism standard will be an exercise in frustration and predictably invite excesses. Therefore, the OPJAGAF opinion represents construction of extremely poor Air

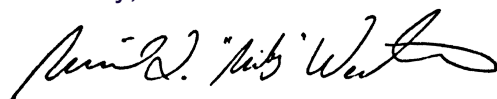
Force policy, even if it did not violate the Establishment Clause, AFI 1-1, and Parker v. Levy (which it does).

Additionally, deism rejects atheism, which holds there is no supreme being or creator of the universe. In other words, atheist Airmen reject deism and other forms of religion which recognize a supreme spiritual being. Accordingly, authorizing speech consisting of “ceremonial deism” violates the Establishment Clause in that it fosters belief in deism and also would degrade good order, discipline, morale, and unit cohesion for atheist, agnostic, and secular humanist Airmen, and as such directly violates Parker v. Levy.

Third, even if religious speech at change of command ceremonies could be limited to “ceremonial deism,” that speech would not satisfy any incoming or out-going commander, and this fact calls into question why the proposed OPJAGAF would need to be published in the first place. For example, no new commander would want to say, “Let’s celebrate that there is a supreme being, who will not intervene in your life, regardless of the depth of your belief and prayers for divine intervention. He just does not care about you or me that much.” Deism can hardly be seen as a cause for public celebration by any new commander, and in fact, it would go directly against the beliefs of those commanders who are likely to inject their personal religious beliefs in a particular deity (e.g., in “Christ” and in fulfillment of the Great Commission) into their public speech at official ceremonies, such as change of command and promotion ceremonies. So why does it need to be authorized except to invite unauthorized excessive unconstitutional religious speech? Authorizing “ceremonial deism” is *clever by half* and can only be seen as a nefarious attempt to ignore the Establishment Clause, AFI 1-1, and Parker v. Levy.

Please convene a hearing on this matter.

Sincerely,



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Attachments:

1. Opinion of The Judge Advocate General of the Air Force (OPJAGAF), 2018-52, 19 December 2018
2. Parker v. Levy, 417 U.S. 733 (1974)

CC: Office of the Secretary of Defense (OSD)

Office of the Secretary of Defense/General Counsel (OSD/GC)

Secretary of the Air Force (SECAF)

Secretary of the Air Force/General Counsel (SAF/GC)

Air Force/Judge Advocate (AF/JA)