

20 May 2015

Via U.S. Mail & Facsimile at (703) 693-9297

General Mark A. Welsh III
Chief of Staff, United States Air Force
1670 Air Force Pentagon
Washington, DC 20330-1670

Re: Major General Craig S. Olson, USAF

Dear General Welsh:

We are writing in response to a misguided letter from the Military Religious Freedom Foundation (MRFF) calling for the court-martial of Major General Craig S. Olson after his remarks at a National Day of Prayer event.¹ On behalf of the Chaplain Alliance for Religious Liberty,² we welcome this opportunity to reiterate that military members do not forfeit their religious freedom by virtue of their service. And despite the various claims from MRFF, Maj. Gen. Olson's remarks do not run afoul of the Constitution or Supreme Court case law and are permitted by relevant guidance from the Department of Defense (DoD) and the Air Force, as addressed below.

FACTUAL BACKGROUND

Maj. Gen. Olson spoke at a National Day of Prayer event in which he gave credit to God for his career achievements. "In all those experiences and many more like them, I found myself admitting I couldn't do [everything] and handing it over to God in prayer," he said, later asking the audience to pray for military leaders and service members who are deployed. These heartfelt and humble remarks clearly spoken in Maj. Gen. Olson's personal capacity drew the ire of MRFF, which demanded that he be "aggressively and very visibly brought to justice for his unforgivable crimes and transgressions."

LEGAL ANALYSIS

¹ Letter, MRFF to Gen. Mark A. Welsh III, May 13, 2015.

² The Chaplain Alliance for Religious Liberty is a non-profit group working to preserve religious freedom for military members and chaplains.

I. The Establishment Clause does not require any government department to purge religious speech.

In its demand letter, MRFF devoted less than one sentence to its usual drumbeat of perceived Establishment Clause violations wherever religious speech is present. MRFF's argument is based on the so-called "separation of church and state," which it interprets to mean that anything remotely religious must be purged from the military. However, as noted in an annual publication by the Judge Advocate General's (JAG) School, the phrase "[separation of church and state] per se do[es] not appear in the Constitution."³ Further, federal courts have recognized that "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state"⁴ (emphasis added). In fact, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."⁵

II. Air Force policies accommodate religious expression of this nature.

At your direction, the Air Force recently clarified its policies governing religious expression: "Expression of sincerely held beliefs (conscience, moral principles, or religious beliefs) shall not be prohibited unless the expression would have a real, *not hypothetical*, adverse impact on military readiness, unit cohesion, good order and discipline, health and safety, and mission accomplishment"⁶ (emphasis added). MRFF's complaints about Maj. Gen. Olson's speech are hypothetical at best. His conduct poses no danger to military readiness or discipline, especially given the personal nature of his remarks and the civilian setting in which they were made. Finally, guidance from the JAG School publication referenced above is on point and captures the accommodation Air Force policies must provide in this context: "Attendance at National Prayer Breakfast activities in uniform is neither prohibited nor encouraged (left to attendee's discretion)."⁷

III. Article VI, Clause 3 of the Constitution and *Parker v. Levy* do not prohibit—or even apply to—the conduct in question.

MRFF's mention of Article VI, Clause 3 and *Parker v. Levy* (417 U.S. 733) are red herrings. Clause 3 of Article VI provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The plain meaning of this religious test ban is clear. There are no judicial decisions

³ *The Military Commander and the Law* (2014 edition), p. 249, available at <http://www.afjag.af.mil/shared/media/document/AFD-140925-013.pdf>.

⁴ *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005).

⁵ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

⁶ Air Force Instruction 1-1, para. 2.11.3 (amended Nov. 2014).

⁷ *The Military Commander and the Law* (2014 edition), p. 250, available at <http://www.afjag.af.mil/shared/media/document/AFD-140925-013.pdf>.

involving this clause, underscoring its clarity. It is equally clear that Maj. Gen. Olson's speech does not involve this Article or Clause.

In *Parker v. Levy*, an Army physician was court-martialed for making disparaging statements about the United States' involvement in Vietnam. The Supreme Court found that the military may impose certain restrictions to prevent speech derailing military objectives and disrupting military war efforts. Maj. Gen. Olson's speech did not address military objectives. And, rather than disrupting war efforts, he asked the audience to pray for wisdom for military leaders as they developed strategies for military efforts abroad.

IV. Maj. Gen. Olson's appearance at the National Day of Prayer event is permitted by DoD guidance.

Military members may appear at events such as the one at issue. MRFF alleges violations of the Joint Ethics Regulation (JER) without providing specifics or supporting analysis, but DoD guidance for the JER is clear. Attendance at events sponsored by Non-Federal Entities "is generally allowed so long as it is clear that personnel are attending in their personal capacities and acting exclusively outside the scope of their official positions."⁸ Maj. Gen. Olson made it clear he was appearing in his personal capacity⁹ and his actions were unmistakably outside the scope of his official position as Program Executive Officer for C3I and Networks at Hanscom Air Force Base.

MRFF also alleges violations of DoD Instruction (DoDI) 5410.19. However, this Instruction clearly states that it "[d]oes not apply to voluntary participation in community and civic activities by DoD personnel when they participate in a personal capacity in an off-duty status."¹⁰ No further discussion on this point is warranted.

V. The Supreme Court has repeatedly ruled that speech cannot be restricted merely because it might offend someone.

In essence, MRFF seeks to muzzle Maj. Gen. Olson because it is offended by his expression of his Christian faith. When people confront speech they find offensive, the First Amendment provides a simple solution: They can avert their eyes.¹¹

Even where the Establishment Clause is involved, it does not provide a heckler's veto to those who find offense. Some residents of Greece, New York objected to prayers before the town's monthly board meetings saying that "the prayers gave

⁸ "Relations with Non-Federal Entities," *Ethics Counselor's Deskbook*, Part III, para. B (citing JER 3-300.a.), available at http://www.dod.mil/dodgc/defense_ethics/resource_library/deskbook/nfe_relations.pdf.

⁹ YouTube video of Maj. Gen. Olson's speech on May 7, 2015, at 4:56 ("I'm just a Christian who happens to be in the Air Force."), available at <https://www.youtube.com/watch?v=UNbaMXzaPQg>.

¹⁰ DoDI 5410.19, *Public Affairs Community Relations Policy Implementation* (13 November 2001), para. 2.4, available at <http://www.dtic.mil/whs/directives/corres/pdf/541019p.pdf>.

¹¹ See *Cohen v. California*, 403 U.S. 15, 21-22 (1971).

them offense and made them feel excluded and disrespected.”¹² But as the Supreme Court noted, their feelings did not mean the town violated the Establishment Clause:

Offense . . . does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views . . .”¹³

MRFF may be offended by Maj. Gen. Olson’s expression of his faith and it is entitled to those feelings. But it is crystal clear that mere offense does not a constitutional injury make; it is part of living in a pluralistic society and the marketplace of ideas.

CONCLUSION

The Air Force is a diverse organization that strives to value pluralism and tolerance. This must include tolerance for service members who express their religious faith appropriately and non-coercively, just as Maj. Gen. Olson did here. We urge you to continue to allow all service members to freely live out their faith. In so doing, you will fulfill the best of our nation’s history of religious accommodation. You will also faithfully implement revised Air Force policies governing religious expression.

In closing, MRFF claims Maj. Gen. Olson violated the Commissioned Officer’s Oath. In your many years of service, you have undoubtedly presided over countless commissioning and promotion ceremonies. Just as often you have administered this oath of office and are familiar with its conclusion: **“So help me God.”** When he gave credit to God for his professional accomplishments, Maj. Gen. Olson upheld this oath in his own way.

Thank you in advance for your time and consideration. If you wish to discuss this matter further, please do not hesitate to contact us using the information below.

Sincerely,



Chaplain (Col.) Ron Crews, USA (Ret.)
Executive Director

CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY

¹² *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014).

¹³ *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014).

Cc:

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