



MEMORANDUM

TO: Jay Alan Sekulow
FROM: Robert W. Ash
RE: USAF Interim Religious Guidelines
DATE: October 20, 2005

COMMENTS OF THE ACLJ ON THE USAF INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE

The revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force (Guidelines) were not promulgated in a vacuum and must be understood in the context in which they were promulgated—instances of perceived and actual religious bias at the United States Air Force Academy. While it is doubtless important to protect minority views and religious beliefs from harassment and coercion by members of the majority religion, such protection must not be accomplished at the expense of the free exercise rights of the majority. Hence, these Guidelines should not be read as a general restriction on the free exercise rights of all United States Air Force personnel. Rather, the Guidelines must be read in their remedial context—primarily as a means to address the problems which occasioned their creation and to prevent similar problems from recurring in the future.

Below, the American Center for Law and Justice (ACLJ) has provided comments, where appropriate, on points discussed in the Guidelines. The ACLJ comments raise questions and issues of concern as well as offer constructive suggestions, where appropriate, of ways to improve the Guidelines. Moreover, the ACLJ makes these comments in full recognition of the unique nature and needs of military society.

FROM AF/DP

TO: ALL SAF/DCSs, MAJCOM/CVs, DRUs and FOAs

SUBJ: INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE (REVISED)

Ref: Chief's sight picture; Airmen, Spiritual Strength and Core Values (28 June 2005) SAF Message; Respecting the Beliefs of All Airmen (MSG DTG 241334Z May 05)

1. Purpose: Recently, the acting SECAF and CSAF expressed their views on free exercise of religion in the military context (see references). Subsequently, they approved and have directed the following interim guidelines be followed by all Air Force members and civilian employees. This message contains those guidelines, to be promulgated by commanders and civilian leaders, and tasks the Air Education and Training Command to submit a plan for incorporating guidelines in all venues of formal training and education for officers, enlisted and civilian personnel where our core values and professional standards are addressed. It also tasks the United States Air Force Academy to submit a long range plan for incorporating this guidance in their training program.

2. GUIDING PRINCIPLES:

A. We are sworn to support and defend the Constitution of the United States. In taking this oath we pledge our personal compliance with the Constitution's protections for free exercise of religion and prohibitions against governmental establishment of religion.

Comment: No concerns.

B. We will accommodate free exercise of religion and other personal beliefs, as well as freedom of expression, except as must be limited by military necessity.¹ We will not officially endorse or establish religion either one specific religion, or the idea of religion over non-religion.

Comment: The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As noted in Locke v. Davey, 540 U.S. 712 (2004), the Establishment Clause and the Free

¹ In considering when military necessity may lead to some constraint on individual rights in this context, we consider The Religious Freedom Restoration Act, Title 42, United States Code, Section 2000bb-1, which provides, in part: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Comment: The standard articulated above, commonly referred to as "strict scrutiny," should meet most of the concerns of people of faith. The major challenge will be in educating the decision-makers at all levels of the Air Force about the standard and how to apply it. Until that is done, one might expect widely varying interpretations. Developing examples for leaders at all levels to review should minimize variations within the Air Force.

Exercise Clause are frequently in tension. Yet, the Court has long said that “there is room for play in the joints” between them. *Id.* at 718. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause. Moreover, neutrality in religious matters requires that the state neither favor nor disfavor religion. The First Amendment clearly proscribes favoring religion over non-religion or one religion over others, but it likewise proscribes favoring non-religion over religion. *See, e.g., Sch. Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (noting that the State may “neither favor nor inhibit religion”). Neither Religion Clause obligates the Air Force to exclude ideas or topics about or concerning religion, faith, and God – or the converse. “[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Educ. of Westside Cmty Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

C. Our core values support and are consistent with our constitutional obligations. Our integrity demands that we respect others and that we live up to our oaths. Service before self demands respect for the Constitution, our Air Force, and each other, and an understanding that in the military our service begins with a commitment to our responsibilities, not only our rights. Commitment to a climate in which individuals of diverse beliefs form an effective team is essential to achieving excellence.

Comment: No concerns.

D. Chaplain service programs are the responsibility of commanders. Chaplains function as staff officers when advising commanders in regard to the free exercise of religion, and they implement programs of religious support and pastoral care to help commanders care for the welfare of all their people.

Comment: The chaplain must, nevertheless, be protected from having to participate in any activity which violates his/her conscience or the tenets of his/her faith group. Free exercise includes the right of chaplains to refrain from participating in specific religious activity to the same extent that it does for any other member of the Air Force. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (recognizing that freedom of expression includes the right to refrain from such expression); *Anderson v. Laird*, 466 F.2d 283, 291 (D.C. Cir. 1972) (noting that “freedom from government imposition of religious activity is a core value protected by the Establishment Clause”); AFI 52-101 § 2.1 (2005) (“Chaplains do not perform duties incompatible with their faith group tenets”). As such, a chaplain may not be punished for refusing to participate in an activity that violates his/her conscience or the tenets of his/her faith group, and commanders at all levels must understand this.

E. Supervisors, commanders, and leaders at every level, bear a special responsibility to ensure their words and actions cannot reasonably be construed as either official endorsement or disapproval of the decisions of individuals to hold particular religious beliefs or to hold no religious beliefs.

Comment: Although chaplains are commissioned officers who may not “command,” they nevertheless can be considered “supervisors” or “leaders” of the chapel, chaplains’ assistants, and the chapel staff. No one disputes that chaplains, while serving as “supervisors” or “leaders,” should not express views disapproving of other religious groups or of those who claim no religious affiliation. However, chaplains, by their very nature as members of a specific faith group, cannot avoid, at least implicitly, endorsing and favoring a specific faith group, its beliefs, and its adherents. Hence, to protect chaplains from running afoul of this Guiding Principle, this paragraph must be understood to exempt chaplains, at least with respect to conveying implicit endorsement of their respective faith group.

F. Abuse or disrespect of our wingmen, our fellow Air Force people, including disrespect based on religious beliefs or the absence of religious beliefs, is unacceptable.

Comment: No concerns.

G. We will recognize and value the many heritages, cultures, and beliefs represented among us, and build a team by stressing our common Air Force heritage: the oaths we took; the core values that we embrace; and, the mission that we undertake to protect our nation.

Comment: The word “value” in the first line above connotes the idea of some type of “approval” of the list that follows. No government official, including those in the Air Force, has authority to compel anyone to assent to such a statement, especially as applied to the “beliefs represented among us,” which beliefs doubtless include religious beliefs. Substitution of the word “respect” (already widely used throughout the Guidelines) for “value” should resolve the issue, since it removes the suggestion of approval.

H. At a time when many nations are torn apart by religious strife, we must understand that our ability to stand together as Americans and as airmen those who represent many religions, shoulder-to-shoulder with those who claim no religion is part of our heritage, and our strength.

Comment: The above paragraph strikes a discordant note by singling out “religious strife,” when one of the great strengths and achievements of the United States is religious tolerance and lack of such strife. Perhaps the paragraph could be reworded along the following lines: “One of the enduring strengths and achievements of our Nation and our heritage has been religious tolerance and respect for those who may disagree with us. Such tolerance has allowed those who represent many religions, to stand together, as Americans and as airmen, shoulder-to-shoulder, with those who claim no religion. We in the Air Force must continue to foster such mutual tolerance and respect.”

3. Guidelines. These guidelines address some key areas: religious accommodation; public prayer outside of voluntary worship settings; individual sharing of religious faith in the military context; the chaplain service; email and other communications; and, good order and discipline. They do not provide all the answers. Resolution of particular issues will be fact-specific, require common sense, and will often benefit from the advice of legal counsel, the chaplaincy, and the equal opportunity office.

Comment: No concerns.

A. RELIGIOUS ACCOMMODATION.

(1) It is Air Force policy that requests for accommodation should be approved except when precluded by military necessity. They should normally be approved unless approval would have an adverse impact on military readiness, unit cohesion, standards, or discipline. When requests are precluded by military necessity, commanders and supervisors should seek reasonable alternatives. Commanders and supervisors at all levels should ensure that requests for religious accommodation are dealt with as fairly as practicable throughout their organizations. .

Comment: The major concern here deals with the issue of unit cohesion and how one determines when unit cohesion is adversely affected. Although there is no doubt that unit cohesion is vital in the military, adversely impacting unit cohesion is a very vague standard. At a minimum, these Guidelines must require that the threat to unit cohesion be real and not merely feared as a possibility. Further, these Guidelines must not curtail the granting of an accommodation based on the reaction of the most hypersensitive or hostile among us to religious issues or to religion in general. Hence, the threat to unit cohesion must be real, not illusory, and the commander must studiously avoid reacting to the complaints of those who see an establishment of religion where there is none. See, e.g., Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (noting the existence of those who see religious endorsement, “even though a reasonable person, and any minimally informed person, knows that no endorsement is intended”).

(2) Basic guidance for religious accommodation in many areas, including worship services, holy days, Sabbath observances, dietary requirements, medical issues, and apparel, is included in DOD Directive 1300.17. This guidance is implemented through AF Instructions, including AFI 36-2706, chapter 8; AFI 36-2903, tables 2.6 and 2.9; and AFJI 48-110, paragraph 13. Commanders and supervisors should become thoroughly familiar with these policies, and include them in staff and professional development training. .

Comment: No concerns.

(3) Commanders cannot anticipate every request for accommodation, but, where practicable, avoiding scheduling conflicts with major religious observance days can build unit confidence in leadership and enhance unit effectiveness.

Comment: No concerns.

(4) Above all, commanders must ensure that they create a climate where individuals believe that requests for accommodation are welcomed and will be fairly considered.

Comment: No concerns.

B. PUBLIC PRAYER OUTSIDE OF VOLUNTARY WORSHIP SETTINGS.

(1) Public prayer should not usually be included in official settings such as staff meetings, office meetings, classes, or officially sanctioned activities such as sports events or practice sessions.

Comment: Since most activities involving groups of Service members on a military installation are, in effect, “officially sanctioned activities,” this suggests that prayer should be avoided in virtually all instances. This is too general a proscription, despite the word “usually” in the first line and the Guideline touting “common sense” and “mutual respect” which follows this one. See B.(2) *infra*. What is of most concern is the stress (in the note in the following Guideline, which doubtless applies here also) on avoiding “discomfort” for those who may hear a prayer or some other religious sentiment. Potential discomfort about things one does not like to hear is the price one pays for the rights of free speech and free exercise in a pluralistic society. Generally, if everyone agrees with certain speech or religious sentiments, such speech and religious sentiments need no constitutional protection. Only speech and religious sentiments which are disfavored or disliked need such protection. Hence, one must proceed cautiously when one tries to proscribe speech based on a highly suspect and subjective standard such as the potential “discomfort” of the hearers. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) (citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641-43 (1994)) (“Discrimination against speech because of its message is presumed to be unconstitutional.”).

(2) Common sense—and mutual respect—should always be applied and extraordinary circumstances may drive exceptions.²

Comment: See comment at B.(1) *supra*. Tolerance is not a one-way street. Just as people of a specific faith group need to be sensitive to and tolerant of those ascribing to different faiths or to no religious faith, it is no less required that those of no faith tolerate the expressions and sensitivities of people of faith. This aspect of tolerance needs to be explicitly stated as such. Further, there are instances short of “mass casualties, preparation for imminent combat, and natural disasters” that conceivably could include public prayer outside of worship settings – such as on Memorial Day, at Veterans Day ceremonies, at Fourth of July gatherings, and the like. Providing examples for commanders – in addition to the extraordinary examples cited in the footnote – would prove very helpful to those who must implement and enforce these Guidelines. See, e.g., Sch. Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (noting that the State may “neither favor nor inhibit religion”).

(3) Consistent with long-standing military tradition, a brief non-sectarian prayer may be included in non-routine military ceremonies or events of special importance, such as change-of-

² For example, there may be extraordinary circumstances where the potential benefits for the welfare of the command outweigh the potential of causing discomfort. These circumstances might include mass casualties, preparation for imminent combat, and natural disasters.

command, promotion ceremonies or significant celebrations, where the purpose of the prayer is to add a heightened sense of seriousness or solemnity, not to advance specific religious beliefs. Military chaplains are trained to deal with such events.

Comment: It is essential that a chaplain be permitted to forego participation in such ceremonies without detrimental effect if he/she cannot participate without violating his/her conscience or the tenets of his/her faith group. For example, some Christian denominations believe that one must pray “in Jesus’ name.” To do otherwise would violate the chaplain’s conscience and/or faith as well as his/her free exercise and free speech rights under the First Amendment. See, e.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977) (recognizing that freedom of expression includes the right to refrain from such expression); AFI 52-101 § 2.1 (2005) (“Chaplains do not perform duties incompatible with their faith group tenets”). Such a chaplain should either be allowed to pray as he/she is required by conscience and/or the tenets of his/her faith (i.e., in Jesus’ name) or be permitted to forego altogether participation in the ceremony without any negative effect on his/her career. All commanders need to understand and honor this.

(4) In addition, a moment of silence for personal reflection does not require the same considerations as public prayer and may be appropriate in official settings.

Comment: No concerns.

C. INDIVIDUAL SHARING OF RELIGIOUS FAITH.

(1) In official circumstances, particularly situations where superior/subordinate relationships are involved, individuals need to be sensitive to the potential that personal expressions may appear to be official expressions. This is especially true when subordinates are present as part of their official duties and obligations.

Comment: No concerns.

(2) The more senior the individual, the more likely that personal expressions may be perceived to be official statements. The more senior the leader, the more responsibility he or she has to send the message that we are a team based on trust, respect, and a common mission to defend our nation and that what is expected of all our personnel is to live up to our oaths, embrace our shared Air Force core values, and do our duty.

Comment: No concerns.

(3) Nothing in this guidance should be understood to limit voluntary, peer to peer discussions.

Comment: No concerns.

D. THE CHAPLAIN SERVICE.

(1) Air Force commanders have an obligation to ensure that the people under their authority have opportunity to obtain spiritual care. Chaplains assist commanders in meeting this responsibility.

Comment: This Guideline may be too limited, as written. “Spiritual care,” though not unimportant, seems too narrow. As stated earlier, commanders must provide opportunities for their subordinates to freely exercise their religion. That includes the whole panoply of activities associated with free exercise – including, for example, opportunities to worship according to the dictates of the Airman’s conscience; opportunities to fellowship with adherents of his/her own faith group; opportunities to study the Scriptures of his/her faith group, engage in prayer, receive teaching and inspiration; etc. If this is what was meant by “spiritual care,” then it should be explicitly stated as such. If not, then this Guideline needs to be expanded as suggested.

(2) Chaplains are commissioned to provide ministry to those of their own faiths, to facilitate ministry to those of other faiths, and to provide care for all service members, including those who claim no religious faith. In these various roles, they should respect the rights of others to their own religious beliefs, including the right to hold no beliefs. They must be as sensitive to those who do not welcome offerings of faith, as they are generous in sharing their faith with those who do. In addition, they must remain sensitive to the responsibilities of superior rank, and they should respect professional settings where mandatory participation may make expressions of religious faith inappropriate.

Comment: Chaplains wear (at least) two hats – the hat of an Air Force officer and the hat of a member of the clergy of a specific faith group. Chaplains also answer to two masters, so to speak – to the United States Air Force and to their respective endorsing agency/faith group. When wearing their clergy hat and conducting activities revolving around divine services, chaplains must be free to conduct themselves and their worship services in accordance with the norms and beliefs of their faith group. No chaplain should be compelled to participate in any religious activity that violates his/her conscience or the tenets of his/her faith. See, e.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977) (recognizing that freedom of expression includes the right to refrain from such expression); Anderson v. Laird, 466 F.2d 283, 291 (D.C. Cir. 1972) (noting that “freedom from government imposition of religious activity is a core value protected by the Establishment Clause”); AFI 52-101 § 2.1 (2005) (“Chaplains do not perform duties incompatible with their faith group tenets”). When acting in their clergy capacity, chaplains must be allowed to freely pray in Jesus’ name, to proclaim the principles of their faith as truth, to train interested Airmen in the basics of their faith, to encourage interested Airmen to attend retreats, to invite the participation of civilian ministries to help meet the spiritual needs of Airmen and their families, etc. See, e.g., AFI 52-101 § 3.2.2.1 (2005) (“Chaplains will conduct services that are within the scope of their personal faith tenets and religious convictions.”). For certain groups, sharing their faith with others is a religious command. Officially to proscribe the sharing of a chaplain’s (or other Airman’s) faith may itself run afoul of the Establishment Clause in that federal officials sit in judgment of what constitutes acceptable religious belief and activities and what does not. This is not to say that a religious activity

may not, under some circumstances, upset good order and discipline. When that occurs, of course government officials may intervene, but government officials must be most careful not to limit free exercise merely because some individual or group does not appreciate or want to be bothered by the message shared. Once again, tolerance is a two-way street, and the Air Force must act as vigorously to protect the majority's free exercise rights as it does to protect the rights of those in the minority. It is a given that the majority religious faith in the United States (and, hence, in the Air Force) is the Christian faith. As such, it is the Christian message that will – simply by virtue of the sheer numbers of its adherents – be foremost among the religious sentiments publicly expressed in the Air Force. That does not mean that the Air Force is “favoring” the Christian faith merely because it is so visible, and the Air Force must always remember that its support of an Airman's free exercise rights does not mean that the Air Force is establishing religion. Facilitating the free exercise rights of Christians (and of other religious groups) is an Air Force responsibility and, without more, does not implicate the Establishment Clause. In fact, the Supreme Court has noted that “[w]e are a religious people whose institutions presuppose a Supreme Being. . . . [The Government] sponsor[s] an attitude . . . that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.” Zorach v. Clausen, 343 U.S. 306, 313 (1952). The bottom line seems to be that one should respect and treat others the same that one would like to be respected and treated. Such an attitude solves many problems.

(3) Chaplain service guidance includes AAFP 52-1 and AFI 52-101.

Comment: No concerns.

E. EMAIL AND SIMILAR COMMUNICATIONS.

(1) General rules for the use of government computers apply to religious matters as they do for other matters IAW AFI 33-119, AFI 33-129, AND 33-112.

Comment: Chaplains, as staff officers charged with implementing the commander's religious program, should be free to advertise religious activities of a general or specific denominational character via email to the same extent that other, non-religious activities are permitted to be advertised. For example, a Southern Baptist chaplain should be able to advertise a retreat aimed at Southern Baptist airmen and their families; a Jewish chaplain should be able to advertise High Holy Day service opportunities to Jewish airmen; a Muslim chaplain should be able to advertise events surrounding the observance of Ramadan, and so forth. In each instance, the advertisement need not be inclusive of other faith groups or sensitive to those of no faith, and the chaplain should be able to freely share religious sentiments about the events advertised. Moreover, such advertising does not run afoul of the Establishment Clause. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) (recognizing that Government neutrality is respected, not offended, when evenhanded policies are applied to diverse viewpoints, including religious viewpoints).

(2) Individuals will take these guidelines into account in their official communications. As in other areas of expression, it is important to avoid the reasonable perception that any official e-mail or computer posting implies that the Air Force supports any one religion over other religions or the idea of religion over the choice of no religious affiliation.

Comment: Same response as in E.(1) *supra*.

F. GOOD ORDER AND DISCIPLINE.

Nothing in these guidelines relieves commanders of the responsibility to maintain good order and discipline in their commands.

Comment: However, these Guidelines should not permit commanders to single out people of faith for special detriment, such as an airman sharing his faith or inviting another to attend chapel, especially when complaints are lodged by persons hypersensitive, or possibly hostile, to things religious. Government officials may neither favor nor disfavor religion; they must remain neutral. See, e.g., Sch. Dist. v. Schempp, 374 U.S. 203, 299 (1963) (noting that the State may “neither favor nor inhibit religion”); Bd. of Educ. of Westside Cmty Sch. v. Mergens, 496 U.S. 226, 250 (1990) (“[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”); Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (noting the existence of those who see religious endorsement, “even though a reasonable person, and any minimally informed person, knows that no endorsement is intended”).

4. For air education and training command: request AETC develop training modules for all accession and training venues—officer, enlisted and civilian—where Air Force culture and core values are addressed. AETC should include this requirement in their FY08 POM. Provide a plan, with timeline for development and implementation, to AF/DP not later than 1 November 2005. In developing this training, consideration should be given to feedback received regarding these interim guidelines. Upon approval, this training will replace these interim guidelines.

Comment: No concerns.

5. For the United States Air Force Academy: USAFA will incorporate this guidance in the training modules on religious respect—respecting spiritual values of all people (RSVP)—currently in development. Provide an update on development and implementation of RSVP, with timelines, to AF/DP not later than 1 November.

Comment: The Air Force needs to proceed cautiously in order to avoid establishing an official, acceptable form of religion or religious expression at the Air Force Academy. That, in itself, would compound the very problems these Guidelines are intended to remedy. Were these Guidelines to articulate a description of acceptable religious beliefs or practices, the Academy would run afoul of the Establishment Clause as well as violate the free exercise rights of the cadets, faculty, and staff at the Academy. Emphasizing mutual

respect, understanding, and tolerance and that one should act towards others as one would like others to act towards him/her should help to minimize friction among members of the Cadet Wing and in the faculty/staff at the Academy.

6. Application of these guidelines will require much thought and judgment by commanders and supervisors. They are not intended to provide answers to every situation. We welcome MAJCOM feedback as your commanders gain experience in implementing this guidance.

Comment: No comment.