



Via Email and U.S. Mail

9 November 2016

The Honorable Glenn A. Fine
Inspector General, Department of Defense
4800 Mark Center Drive
Alexandria, VA 22350-1500

RE: Military Religious Freedom Foundation [MRFF], 25 July 2016 Letter

Dear Mr. Fine:

I am writing on behalf of the MRFF which I represent in this matter. Specifically, MRFF would like an answer as to why your office is not investigating the Air Force's Chief of Chaplains, Maj. Gen. Dondi E. Costin, or has not directed an investigation into his overt, in uniform participation in an event organized by a private organization, the *Chaplain Alliance for Religious Liberty* [CARL]. As stated in MRFF's prior letter to you, Maj. Gen. Costin's conduct not only violated AFI 1-1, ¶ 2.12, but also transgressed other DoD regulations and policies, some of which also appear to violate the *Uniform Code of Military Justice* [UCMJ].

AF Policy Directive 1 (15 SEP 16), ¶ 1.1, begins: "Service as an Airman in the United States Air Force is both an honor and a privilege." Paragraph 1.1.1., says: "It is every Airman's duty and obligation to act professionally and meet all Air Force standards at *all times*." [emphasis added]. It does *not* read, "It is every Airman's duty (except the Chief of Chaplains)"

The political event in question here – and make no mistake, a reception honoring a Member of Congress specifically for their position and actions regarding a clearly political cause is a political event – was sponsored by CARL, a private organization which promotes policies of religious discrimination. CARL and its members can promote, espouse, and believe in whatever discriminatory and xenophobic principles it desires – that is not the issue here. Rather, the issue is that an Air Force General Officer who as the Chief of Chaplains, appeared at and took a speaking part in such an event *while in uniform*. That under any reasonable standard, constitutes "words and actions" which can only "be construed to be officially endorsing. . . . [AFI 1-1, ¶ 2.12] the religious viewpoints of CARL.

Equally as prohibited and unauthorized was Maj. Gen. Costin's *speaking* at this political event, in uniform and in his capacity as the AF Chief of Chaplains. AFI 1-1, ¶ 2.12, cautions that "Leaders at all levels . . . must ensure their *words* and *actions* cannot reasonably be construed to be officially endorsing . . . any faith [or] belief" [Emphasis added]. That, however, is exactly what Maj. Gen. Costin did and why the MRFF is complaining.

Just as illegal was his speaking at this political event organized by CARL. AFI 1-1, ¶ 2.13.1, cautions that Airmen “must be careful that [their] personal opinions and activities are not directly, or by implication, represented as those of the Air Force.” How does this *not* appear to represent the Air Force when its Chief of Chaplains appears in uniform and publicly addresses the CARL audience and politicians?

AFI 1-1, ¶ 2.13.2, contains clear prohibitions, *i.e.*, Airmen may not attend “partisan political . . . speeches” when in uniform; and they “may not speak before a partisan political event . . . regardless of whether or not [they] are in uniform.” Being a General Officer does not exempt one from the law and as a General Officer, one should lead by example. Chaplains are commissioned officers and as such are subject to the U.C.M.J., DoD and Service regulations. They are not excused from the standards of conduct expected of *all* officers simply by virtue of their Chaplain’s designation. DoD *policy* holds that the military’s Chaplancies were established to, *inter alia*, “advise and assist commanders in the discharge of their responsibilities to provide for the free exercise of religion *in the context of military service* . . .” DoDD 134.19, ¶ 4.1 [Emphasis added]. There was nothing about Maj. Gen. Costin’s conduct at issue that did anything to “advise and assist” any Air Force commander.

As an Air Force General Officer, Maj. Gen. Costin is a “public servant;” and as such he either forgot or ignored the basic premise – “[p]ublic service is a public trust.” 5 C.F.R. § 2635.101(b)(1). That section contains the *Standards for Ethical Conduct* applicable herein. In that context, his conduct in appearing in uniform at a political event organized by a private organization and publicly speaking at that event must be subject to an investigation as to whether he violated the “public trust.” Section 2635.101(b), goes on to prohibit:

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(10) Employees shall not engage in . . . activities . . . that conflict with official Government duties and responsibilities.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, *religion*, sex, national origin, age, or handicap. [Emphasis added]

(14) Employees shall endeavor to avoid any actions *creating the appearance* that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts. [Emphasis added]

That these prohibitions applied to Maj. Gen. Costin, is answered by § 2635.102(h):

Fine Letter, Page 3.

(h) *Employee* means any officer or employee of an agency, including a special Government employee. ***It includes officers but not enlisted members of the uniformed services.*** [Emphasis added].

By appearing in uniform and speaking at a CARL political event, Maj. Gen. Costin gave CARL “preferential treatment in violation of subparagraph 8, above. His conduct in question conflicted with his “official government duties and responsibilities” to not give the *imprimatur* of his rank and position to a private organization that openly discriminates on the basis of one’s religious beliefs, in violation of subparagraph 10, above. CARL does not employ “equal opportunity” for many American servicemembers based upon their religious (or non-religious) beliefs, and his appearance and actions at this CARL function violated subparagraph 13, above. Finally, his conduct at issue here, clearly created the *appearance* that by virtue of his rank and position as the AF Chief of Chaplains, of violating the above prohibitions.

The law in this area is clear. “Upon his appointment the chaplain . . . is subject to the same discipline and training as that given to other officers and soldiers.” *Ketcoff v. Marsh*, 755 F.2d 223, 226 (2nd Cir. 1985). These are not uncharted legal areas. Maj. Gen. Costin’s actions overtly violated the First Amendment’s *Establishment Clause* and thus, the very core of his oath as a commissioned officer to “support and defend the Constitution of the United States.” As the Supreme Court held years ago in *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971):

The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

But, what Maj. Gen. Costin believes from a religious perspective ignores the context of his actions both by virtue of his rank and position as the AF Chief of Chaplains. Again, the Supreme Court long-ago addressed this precise issue:

Can a man excuse his practices to the contrary 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 name under such circumstances.

Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

In the military, that concept is even more restrictive. What Maj. Gen. Costin fails to appreciate is the long-standing *constitutional* principle that the military is a separate and distinct society. “The military constitutes a specialized community governed by a separate discipline from that of the civilian.” *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); and “This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.” *Parker v. Levy*, 417 U.S. 733, 743 (1974). As such, servicemembers (including Maj. Gen. Costin) do *not* have co-

Fine Letter, Page 4.

extensive First Amendment rights compared to civilians. That is the law and Maj. Gen. Costin is not above the law.

Let me conclude by noting that I served as a commissioned officer in our military for almost 30 years – both on active duty and as an Individual Mobilization Augmentee judge advocate. I am also the product of *five* evangelical German Lutheran ministers in my immediate family, to include my father and four great-Uncles. As such, I know where the “line must be drawn,” as any responsible officer should. This matter is not about “religious freedom” pertaining to Maj. Gen. Costin and the other uniformed Chaplains participating in this event. It is about his *prohibited conduct* at a political, discriminatory private organization event. It is nothing more than flaunting his decision to ignore the law. He may certainly maintain his *personal* religious beliefs, but when his actions and conduct violate the law, good order and discipline are diminished and harmed – especially when it comes from someone with two Stars on their shoulders. Your office respectfully needs to address these issues now and in a transparent manner.

Respectfully yours,

/s/ *Donald G. Rehkopf, Jr.*

DONALD G. REHKOPF, JR.

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