

The US Army War College Quarterly: Parameters

Volume 42
Number 1 *Parameters Spring 2012*

Article 13

3-1-2012

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Recommended Citation

Snider, Don M.. "Commentary & Reply: David Fitzkee's "Religious Speech in the Military: Freedoms and Limitations"." *The US Army War College Quarterly: Parameters* 42, 1 (2012).
<https://press.armywarcollege.edu/parameters/vol42/iss1/13>

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Commentary & Reply

David Fitzkee's "Religious Speech in the Military: Freedoms and Limitations"

DON M. SNIDER

This commentary is in response to David E. Fitzkee's, Major (USA Retired), "Religious Speech in the Military: Freedoms and Limitations," published in the Autumn 2011 issue of Parameters (vol. 41, no. 3).

To place Fitzkee's article in the right context, readers need to be aware of the following. In a letter (1 September 2011) to all USAF Commanders, subject, "Maintaining Government Neutrality Regarding Religion," their Chief of Staff directed:

Chaplain Corps programs, including activities such as religious studies, faith sharing, and prayer meetings, are vital to commanders' support of individual Airman's needs and provide opportunities for the free exercise of religion. Although commanders are responsible for these programs, they must refrain from appearing to officially endorse religion generally or any particular religion. Therefore I expect Chaplains, not commanders, to notify Airmen of Chaplain Corps programs.

While many interpretations of this directive are possible, it seems fair to say that the Chief of Staff of the US Air Force does not trust some of his Commanders to correctly fulfill their responsibilities to "support individual Airman's needs and provide opportunities for the free exercise of religion." So, he has withdrawn autonomy from all of his Commanders to do so, turning it over to their Chaplains. Commanders can notify their subordinates about all sorts of voluntary programs, but now must be silent about any "vital" programs of a religious nature. Whatever few instances caused this, in Army parlance this is akin to putting the whole company in the motor pool on Saturday afternoon for one dead-lined vehicle.

Why this drastic measure that manifests a very significant loss of trust within the higher levels of the uniformed Air Force? We do not know for sure, but Fitzkee (Associate Professor, Department of Law, US Air Force Academy) gives specific insight when he notes that, "failure to understand the rights and limits concerning religious speech can adversely affect the mission . . . in internal investigations into allegations of violations or even lawsuits against the military, both of which entail substantial time, effort, and distraction from the mission."

I interpret this to mean that the Chief of Staff of the Air Force succumbed to years of harassment by self-appointed, watchdog legalists seeking to redefine what the free exercise of religion is to be within entities of the federal

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government. In the process, he was willing to restrict the autonomy of commanders as if they were mere bureaucrats with jobs within a military department rather than Air Force professionals who proudly serve with a personal calling to their military profession.

Contrast, if you will, this episode and Fitzkee's apologia for it to the Army approach to similar issues of command. We follow the doctrine of mission command which provides for the conduct of military operations through decentralized execution based on mission orders. Effective mission accomplishment results from subordinate leaders at all echelons exercising disciplined initiative within the commander's intent. This requires an environment of trust and mutual understanding, a professional institutional culture rather than a highly centralized, micromanaging bureaucratic environment. In such a professional culture, Army soldiers and civilians are able to use the expert knowledge they have accumulated from years of schooling, training, and operations in a unique manner, especially in command.

Although Fitzkee's article provides a wealth of useful detail on the important issues involved, I suggest that the next article in *Parameters* on the vital topic of the leader's role in the moral development of his or her troops, including how to support their free exercise of religion, be authored by an Army commander. Then readers would be better informed on how the Army profession, under mission command, moves "power to the edge" for mission accomplishment by its professionals.

The Author Replies

DAVID E. FITZKEE

Dr. Don Snider's seemingly innocuous proposal—that an Army commander write the next *Parameters* article “on the vital topic of the leader's role in the moral development of his or her forces, including how to support their free exercise of religion”—raises three concerns.

First, there can be danger in correlating a leader's role in subordinates' moral development with a leader's support for subordinates' right to freely exercise their religion. While the latter duty derives directly from the First Amendment's Free Exercise Clause, we must be careful in speaking of a leader's role in the moral development of subordinates. That development must be along the lines of accepted military values, such as duty, integrity, excellence, selflessness, valor, and others. Some leaders have run afoul of the Establishment Clause by attempting, with the best of intentions, to morally develop their subordinates by sharing their personal religious values, which necessarily must be separate from accepted military values, as the government must remain neutral toward religion. This prohibited blending of a leader's religious values with subordinates' moral development is reflected in a recently publicized incident, in which a Lieutenant General, at his first commander's call, provided his life priorities, the first of which was “Always put God first, and stay within His will.”¹ The general, by providing what he referred to as his “moral compass” to subordinates, probably believed that he was contributing to

the moral development of his subordinates. Yet his well-meaning advice alienated some of his subordinates and likely violated the Establishment Clause.

Dr. Snider's criticism of the Air Force Chief of Staff for sending a memorandum to commanders—admonishing them to obey the Establishment Clause's mandate of government neutrality toward religion—implies that the memorandum is an overreaction to a “few instances” of noncompliance. This dramatically misperceives the scope of the problem. The problem is chronicled in detail elsewhere,² and space does not permit rehashing it here. Suffice it to say that the problem is very unlike “one dead-lined vehicle” that can be expeditiously fixed. It is much more akin to a significant and recurring maintenance issue that adversely affects the unit's readiness, except that the damage to the unit cannot be repaired as readily as equipment. The Air Force Chief of Staff ought to be commended, rather than criticized, for addressing with his commanders this important “maintenance issue” in the Air Force. Nor should readers be misled into believing that religious speech issues are limited to only one branch of service³ or that another branch is inherently better suited to deal with them.

Finally, Dr. Snider proposes that a commander write the next article on how to support subordinates' free exercise rights. This, too, presents a danger that the commander, depending on the circumstances, may be perceived as using his or her official position impermissibly to advance religion. Chaplains have special training and expertise in how to minister to servicemembers' free exercise rights. Moreover, because chaplains are outside the chain of command, they are less likely than commanders to be perceived as coercively advancing religion.⁴

This response is unlikely to satisfy those readers who silently cheered as they read Dr. Snider's commentary bemoaning how “legalists” have redefined the free exercise of religion, presumably from what those readers believe it once meant or should mean. Indeed, my response may even be viewed by some as further evidence that Dr. Snider's comments were right on target. Dr. Snider's proposal, however, fails to recognize either the scope of the “maintenance problem” or the Establishment Clause perils his proposal introduces. This failure is evidence of how intelligent, educated, caring, and well-meaning leaders with a “pro-religious free speech” bent can unwittingly create Establishment Clause issues that can adversely affect the organization. This is precisely why a motif of my article was that leaders should seek advice from their judge advocate general where appropriate in this extraordinarily difficult, important, and sensitive area.

NOTES

1. Markeshia Ricks, “Religion in the Service,” *Air Force Times*, March 5, 2012, 22.

2. See, for example, the six chapters comprising the section on “Religious Expression” in James E. Parco and David A. Levy, eds., *Attitudes Aren't Free: Thinking Deeply About Diversity Issues in the US Armed Forces* (Maxwell Air Force Base, AL: Air University Press, 2010), http://aupress.au.af.mil/digital/pdf/book/Parco_Attitudes_Arent_Free.pdf (accessed April 6, 2012).

3. See, for example, *ibid.* and sources cited therein. During my twenty years in the Army—which included time as an infantryman, artillery commander, and JAG—and nearly seventeen years as an Air Force civilian, I became personally aware of religious speech issues in both services. The Air Force certainly has had its share of adverse publicity on this issue, which may be why the Air Force Chief of Staff chose to emphasize the issue with his commanders, while his counterparts in other services may not have.

4. These were likely the reasons why the Air Force Chief of Staff, almost certainly with input from senior chaplains and lawyers, instructed commanders to leave to chaplains the responsibility of notifying airmen of Chaplain Corps programs.