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Major Alan Serrano

AFJAGS Podcast: Episode 51

The First Amendment in the Military with Major Alan Serrano - Part 2

HOST: MAJOR RICK HANRAHAN

GUEST: MAJOR ALAN SERRANO

Maj Serrano discusses the First Amendment including freedom of speech, assembly and religion within the military.

CAPTAIN CHARLIE HEDDEN:

Hey and welcome back to episode 51 of The Air Force Judge Advocate General's School Podcast. This is part two of a two-part interview with Major Alan Serrano about the First Amendment in the military. We'll pick up right where we left off with Major Hanrahan's conversation with Major Serrano. If you missed part one, I highly recommend going back and listening to Episode 50 now to get yourself caught up.

All right, let's get started.

FREEDOM OF ASSOCIATION

MAJOR RICK HANRAHAN:

So moving on to one other area that we wanted to talk about today, which is freedom of association. Freedom of association, which is another element under the First Amendment. And obviously, more recently, Black Lives

Matter has been at the forefront and hate and extremist groups has also been at the forefront on what military members can or cannot do from a freedom of association standpoint while working at the office, so to speak. Or even on their own personal time. Could you speak to this a little bit?

MAJOR ALAN SERRANO:

Yes. So we had a lot of questions that came up over the last year and a half or so that I've been doing the instruction on the First Amendment in the military while here at The JAG School. I had to go back and review a lot of the rules. And a lot of them are really pretty clear-cut. So when it comes to an organization that might be having a protest activity, military members **CAN** go to a protest activity so long as they are not in uniform, not on duty.

So they could wear their shirt, they can wear, they can bring a sign, but they can't generally lead the organization, and they have to be careful about making sure that whatever they're doing is still within compliance of our other rules and the UCMJ. Military members also have to keep in mind, though, that if a protest that they went to was sanctioned, that they could go there because there was no expectation of violence, but violence begins to break out, or other lawlessness starts—they need to leave, because they cannot participate in that type of activity. And so if something starts to go sideways, a military member needs to get out of there, because we know that not only will it be newsworthy if they were apprehended or involved in something inappropriate, they jeopardize and discredit the whole entire service, right? And that's and that's a big concern for a lot of commanders.

But can they participate and express themselves in a protest? They can, so long as they follow those guidelines. Now, other groups, though, that we can't be parts of we have listed out in the DoD Directive as well as AFI 51-508. And those are traditionally three different groups. Those are criminal gangs, hate groups and extremist organizations. All three of those have definitions in the AFI. That explains what we mean by those. The big one in the news recently, I guess most recently, has been extremist organizations. A lot of folks have asked me about this and they asked the commanders about this all the time.

One of the big things that I've commonly heard or read online has been kind of this mischaracterization as to what is the definition of an extremist organization or extremist doctrine. So, I am going to read from the AFI because it's pretty clear in the AFI, "but is not limited to a common belief which might otherwise be politically or socially acceptable, but that espouses the use or threat of force or violence to attain obtain their goals."

So really, I think when we talk about what is an organization that we can't be a part of, particularly for extremist, extremism is characterized by violence.

That's really the line we're drawing. And, you know, the definitions of these are in the AFI. Military members are to reject participation in any of these three types of organizations: criminal gangs, hate groups, or extremist organizations. And they can be punished if they're actively involved or actively participating in such a group.

Now, a lot of people have asked me you know, what is an extremist organization? Like which group is it? Can you give me a list? That's really hard. There are definitely some groups that when you look at the definition, right? Do they espouse or do they threaten to use violence? Yes, you can say for sure, because in their charter, it's in what their leadership says. Yes, this is an organization that is clearly an extremist organization, because at the core of their identity is this threat of violence.

But others are more difficult and a lot of extremist activities online, which is extremely fluid. So I often tell commanders, don't worry about so much the labels that we're using of the organizations worry about the behaviors we're seeing or the behaviors they're advocating for. And that's really how you'll know if this is a group that either has an opinion that we disagree with, but they're not advocating for violence or if they've crossed that line and we can categorize it as extremist activity because they are advocating for or actually using violence to accomplish their goals.

I really think that line is clear. You know, the threat or use of violence is a big one. A common example I give to a lot of folks who are struggling with this, is the Unabomber. People, I think, get wrapped up about what is extremist activity. Is my political ideology or belief considered extremist? And the answer, there is "No." Your ideology or belief, as the AFI says, it's not going to be determined to be extremist belief or ideology. Does the ideology or belief—is that group or that individual advocating to use *violence* to accomplish those goals?

And so the Unabomber is a perfect example because he had certain beliefs about society and technology, which is, you know, neither really here nor there on

the political spectrum, but he had these beliefs. Had Ted Kaczynski actually just had maybe a forum at a university, published a paper, his beliefs, not a problem. He is entitled to those. But he decided the best way to get his message across was to mail bombs to people. Well, there you go, right? There's the violence. And so by having a certain set of beliefs, not an issue. Crossing that threshold to violence or using violence, that's the problem. That's clearly extremism. And that's the way we apply the AFI and its definitions.

FREEDOM OF RELIGION

MAJ HANRAHAN:

Again, thank you for fielding those questions. And I know we're just kind of just dabbling into some of these a little bit with freedom of association, but there's a lot more there. And those were just some of the topics that have come up more recently. The last area that I wanted to talk about briefly was freedom of religion. And I know this is an area that you've spoken about in detail. Could you offer maybe just a quick overview on this, and kind of where we're at today in 2021 and beyond, with maybe some of the HOT-Button issues in freedom of religion.

MAJ SERRANO:

Freedom of religion is another hot topic that people love to ask us about. And JAGs often are asked about, where the limits are for freedom of religion in regards to the First Amendment. And so the military has a duty to ensure that we do not try to establish any official religion and that we don't prohibit or discriminate against inference or faith or non-belief or non-faith and so we kind of strike this really fine line because we're trying to be inclusive of all Airmen, which is what we should be doing.

We go to great lengths to make sure commanders understand this and with that, we're not giving this appearance of an atmosphere where someone's religious beliefs are either going to be favored or held against them. So that's a big thing in the service. There are lots of outside groups that would prefer us to have no religion in the Air Force or the DoD. And a lot of outside groups

who believe we need more religion, right? You can take your pick. The big thing for a lot of military members is to realize that any religious freedom issue or religious establishment issue is generally something that we can resolve by going to our subject matter experts. So we have a very strong relationship here at the JAG school with the chaplain school right across the street.

The Chaplains Corps is [unintelligible] to commanders and military members on religious issues, and JA, your judge advocates are also available for these constitutional law issues. And we often team with them in many of these areas when we have to resolve a religious expression or establishment issue. A very common issue right now that comes up, and people ask about is religious accommodations.

Can a member grow a beard if it's required by their religion? Can they serve in this capacity? And we follow the, what we apply is the Religious Freedom Restoration Act. And we look at, you know, does the military's restriction on certain religious activities—are we going to substantially burden your practice of your faith or are we going to force you to do something that your faith does not allow you to do?

And so when you look at this analysis, it's actually been codified in our uniform Reg., Air Force Instruction, 36-2903 for these religious accommodations for certain head headwear and uniform items that might be brought up by a military member. You'll see that in there we have a pretty good program that we are generally going to accommodate unless the mission prohibits that.

And so, for example, you will often see in the religious accommodation memo that the person receives granting their accommodation, that they can express their religious preference through, let's say, growing a beard if required by their religion. But if they're ever in a situation where the military mission requires them to, don, let's say a gas mask that would be inhibited by a beard, then they're going to have to shave. Once they

are no longer in the condition where they need to don that gas mask, they'll be allowed to grow their facial hair back out.

And so really, this is where we are allowing members to express their religious identities. But just like everything else on the First Amendment, if it conflicts with the ability of the service execute its mission, sometimes our Constitutional rights will take a backseat until the mission is accomplished. And that's a great one that you can see.

The same thing for religious headgear. You know, in the Air Force, we have rules about what you can wear on the flight line. You can't typically you don't wear covers or hats or other garments on your head, because they can fly off or get sucked into an engine. It just represents danger. And so in that situation, the accommodation you're going to see is going to say that if they're not on the flight line, they can wear their religious head garment. But if they're in a location where they can't, they remove it. And then once they're done with their duty in that location, they'll they can re-don the religious garment. And so it's a pretty good balance, in my opinion.

And we've pushed it to the wing level where the wing commander should be ready to accommodate. And if not, it'll go to a much higher review for denials. But that's a way we allow members to express certain religious identities, but also we have to balance that with the Air Force mission.

MAJ HANRAHAN:

And would you say it's safe to say that the courts have upheld restrictions on religious accommodation when needed?

MAJ SERRANO:

Yes. And so kind of this whole idea of the First Amendment in the military, there's often deference to the military when we have these legitimate military

interests: safety of personnel, mission accomplishment, good order and disciplined.

For religious accommodation requests, specifically, one of the cases, the best case that we can look at right now was a Court of Appeals for the Armed Forces, a CAAF case, which was the Sterling case out of the Marine Corps, some disrespectful actions against her superiors. But then she said that she was being targeted because of her religious beliefs and that she should have had some protection from the prosecution due to her religious faith and some of the things that involved religious Bible quotes that she was using. But in that case, the court upheld the military's conviction. And really, because we have a process.

And when you look at religious accommodation issues, we expect everyone to go through the process. They must first ask for an accommodation. Then we have a chaplain do an interview to establish the depth of their conviction, whether this is a legitimate religious request or maybe it's not legitimate, maybe for some other purpose. The chaplain gives a great report on that. The legal office weighs in. And we talked to the commander. The commander weighs in and then it goes up to their senior leadership at the wing level.

And so if we're going to have someone who receives religious accommodation, we usually have to go through all these steps first. And so when it's challenged later, often deference will be given to the command so long as that legitimate military interest was met, that we weren't doing this to target them or be abusive in our authority. And when you look at most of these, we've granted them. And granted them with, you know, like I said earlier, some small modification when the mission really does conflict. And as long as we have that tie to the legitimate military interest then we're generally going to be on good ground.

MAJ HANRAHAN:

So would you say that more recently the trend has been, at least within the military, that we tend to allow

accommodations for military members, for religious reasons when it can be done?

MAJ SERRANO:

Yes, definitely. For the Air Force. I think the other services are also starting to trend that way. Here, you know, being at Maxwell Air Force Base, where we have officer training, so people make it through training wearing, you know, for example, a hijab, no issues, right? Made it through training. Made it through the technical school later on. And so we've seen that, you know, we can balance this.

And I think we do a good job in doing that type of thing. You know, we have a really diverse service and we have people from all walks of life. We have people from all different backgrounds. And this is a pretty low threat, I think, for a lot of commanders because they take a look at the rule. They talk to their subject matter experts and they realize, can we balance this with the mission? And if push comes to shove, is there a way to ensure this person's safety and the mission accomplishment, while trying to respect their beliefs? Yeah, we can do that.

So this one, I think, is we're seeing this trend in a fairly positive direction. And again, if you look at these accommodations, if they do conflict with a true military necessity, or legitimate military interest, well then we have that built in. But then as soon as we can give them back their First Amendment Right, right, for their religious expression of freedom, then we do.

RESOURCES

MAJ HANRAHAN:

Well, Major Serarano thank you for answering that as well. Thank you for coming in today. This has been great. Great primer here. And I know we've only touched on just the surface on a lot of these, these topics, but hopefully listeners get some value out of this.

So I just have two final questions. One is, could you offer any potential resources where listeners can learn more about what we discussed today?

MAJ SERRANO:

Yes. So I would definitely recommend, particularly for our Air Force members, to check out [AFI 51-508](#) and [AFI 36-2903](#) to look at some of the things we talked about. I mentioned the DoD guidance as well earlier. There's a lot of great primers out there, though. You know, just Googling "military speech", "First Amendment in the military" and so you can see kind of these general rules where they fall. And a lot of cases are pretty famous, like the case I mentioned, if you just Google them. You know, I think they even have Wikipedia pages. Which is not for every case, right.? But these cases, because they are Supreme Court rulings, they do have even just a primer on Wikipedia. That's a great place to get interested in, get your information, if you are interested in it.

MAJ HANRAHAN:

Great. And once we get our website fully functioning, we will add some of these resources to this episode.

Last question I have for all guests is any final thoughts you have, final takeaways, or anything you just want to discuss for our listeners to consider on today's discussion?

FINAL THOUGHTS

MAJ SERRANO:

So I think my final takeaway for the First Amendment in the military is just that I know that people have certain views on how the military should function. But generally, you know, from my career, right, being at this point, nine years, it is really imperative that we in the military balance all these issues and that as military members, we do remain apolitical.

I've served through now three different administrations. You know, a lot of things change. But our role, the military's role doesn't really change, right? And are our main focus is always the mission, right.? They tell you that from day one—mission accomplishment.

Why are rules the way they are, why we may have certain restrictions that prevent people from expressing certain things, but really, it's all tied to those legitimate government interests. And for the military, those really make a significant difference, because we operate with so many different teammates through our careers from different backgrounds. But we're all tied together by a singular mission, which is national defense. And so while people can discuss and debate, which I definitely encourage, sometimes it's helpful just to understand where we're starting from, and really that comes to us from the mission.

MAJ HANRAHAN:

Major Serrano, thank you so much. I know I picked up some golden nuggets just in this talk today, and I really appreciate you coming on today and speaking with us.

MAJ SERRANO:

Awesome. Thanks for having me.

TAKEAWAYS

MAJ HANRAHAN:

That concludes our interview with Major Serrano on the First Amendment. Before we jump into my takeaways, I like to quickly reference what the First Amendment says. It states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." It states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or bridging the freedom of speech or of the press or of the right of people peaceably to assemble and to petition the government for a redress of grievances."

In short, the First Amendment protects five fundamental rights, including speech, religion, press, assembly, and the right to petition the government. And in our discussion today, Major Serrano focused on three of the five of these rights, including speech, religion and assembly, within a military context. It's safe to say that these rights are some of the most sacrosanct rights within the democratic free world and what the U.S. military is designed to protect.

A main theme within the interview that Major Serrano stated is that you don't give up your constitutional rights when joining the military, but certain rights may be curtailed. So for my top three takeaways, I'm going to briefly talk about freedom of speech, association and religion.

NUMBER ONE, the freedom of speech. Major Serrano discussed two seminal cases that highlight this point, including [U.S. v. Schenck](#), an early 20th century case that limits First Amendment freedom of speech when it *could* adversely impact the war effort. And a 1974 case, [Parker v. Levy](#) that limits free speech in the military if that speech interferes with the legitimate military interest, such as maintaining good order and discipline or mission accomplishment. Ultimately decision to limit speech cannot be an abuse of authority or arbitrary and capricious.

Another case that Major Serrano mentioned was [Greer v. Spock](#), a 1976 case which basically states that where we stand impacts a right of freedom of speech. And the case held that a military installation is generally not considered along as there is a rational basis for restricting freedom of speech. Commanders should consider two main questions here. First, is there a legitimate government interest in restricting the speech? And two, can the commander restrict the speech in a content neutral way?

Another point to take into consideration when it comes to speech is that the rules can be different for active duty members versus civilian employees working on a military installation, depending on what the context is of that speech.

Further, these rules and limitations on freedom of speech do apply in a social media context. While an Airmen may post their personal opinions online, to some extent, they are curtailed if those views appear to have a federal endorsement. So military members may need to use a disclaimer or hold off or refrain from stating certain things and their use of contemptuous speech about POTUS or Congress.

Moving on to **NUMBER TWO** and **freedom of association**. Major Serrano discussed, for example, how military members **CAN** go to a protest activity so long as not in uniform, not on duty, and they have no reason to expect violence. And military members generally cannot lead the activity. If the protest turns violent, military members then are expected to leave. And this clearly became an issue in the January sixth 2021 demonstration at the Capitol where violence ensued. Further, military members cannot be a part of criminal gangs, hate groups and extremist organizations. And these are further defined under Air Force Instruction 51-508. In short, extremism is defined by violence, which is not allowed.

Moving on to the **LAST** First Amendment right discussed and that of **freedom of religion**. The First Amendment precludes the military from establishing an official religion or discriminating against one's religious beliefs or non-beliefs. In a combination that comes up here, which was discussed by Major Serrano, is that of religious accommodations. In a religious accommodation setting, the military applies the Religious Freedom and Restoration Act along with any applicable Air Force Instructions. Generally the Air Force tries to accommodate where it can. But if the religious accommodation conflicts with the mission, then the mission will generally trump that religious accommodation.

In closing, how these Constitutional rights are curtailed within a military context often come down to analysis of the specific facts and circumstances. And this is where judge advocates can truly make a difference in assisting their command in evaluating the specifics of a case.

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GLOSSARY

- **AFI:** Air Force Instruction
- **AFJAGS:** Air Force Judge Advocate General's School
- **CAAF:** Court of Appeals for the Armed Forces
- **JA:** judge advocates
- **JAG:** judge advocate general
- **POTUS:** President of the United States
- **UCMJ:** Uniform Code of Military Justice