



June 13, 2016

Via Certified Mail RRR and E-mail

Major General John C. Flournoy, Jr.
Commander, 4th Air Force
895 Baucom Ave SE
March ARB, CA 92518

Colonel Raymond A. Kozak
Commander, 349th Air Mobility Wing (Reserve)
521 Waldron St
Travis AFB, CA 94535

Subj: Unlawful Assault, Battery, and Forcible Removal of Oscar Rodriguez, Jr.

Dear Major General Flournoy, Colonel Kozak:

Oscar Rodriguez, Jr. retained First Liberty Institute to represent him in this matter. Please direct all correspondence related to this matter to First Liberty Institute at the contact information provided below.

On behalf of Mr. Rodriguez, we request that you respond to our request for relief by no later than 1000 PST on June 20, 2016. Should you fail to respond or deny our request for relief, we are prepared to pursue all available legal options.

Factual Background

On April 3, 2016, Master Sergeant (hereinafter, “MSgt”) Charles Roberson held his retirement ceremony from the 749th Aircraft Maintenance Squadron (hereinafter, “AMXS”), United States Air Force Reserve, at the Building 185 Auditorium aboard Travis Air Force Base. While planning his retirement ceremony, now-retired MSgt Roberson invited Mr. Rodriguez to participate in his retirement ceremony by offering a brief speech during the flag-folding ceremony portion of the ceremony. Retired MSgt Roberson invited Mr. Rodriguez to participate as a result of observing Mr. Rodriguez do the same at a colleague’s retirement approximately one month prior. Mr. Rodriguez agreed to support retired MSgt Roberson by participating in his retirement.

When Lieutenant Colonel (hereinafter, “Lt Col”) Michael A. Sovitsky, 749th AMXS Commanding Officer, learned that Mr. Rodriguez would be present at retired MSgt Roberson’s retirement, he attempted to prevent Mr. Rodriguez from attending or participating. Specifically, Lt Col Sovitsky did not want Mr. Rodriguez to participate as a speaker because, historically, Mr. Rodriguez’s flag-folding speeches make references to “God.” In other words, Lt Col Sovitsky did not want Mr. Rodriguez to engage in religious speech during the retirement ceremony.

Upon discovering he lacked the authority to prevent Mr. Rodriguez—an invited guest—from attending the retirement ceremony as a guest, Lt Col Sovitsky informed retired MSgt Roberson he did not want Mr. Rodriguez to participate in the retirement ceremony as a speaker. Retired MSgt Roberson insisted that, as the retiring member, he desired that Mr. Rodriguez participate and offer the flag-folding speech. When relaying this information to Mr. Rodriguez, retired MSgt Roberson re-iterated his strong desire that Mr. Rodriguez participate as requested.

In the days leading up to the April 3 retirement ceremony, both retired MSgt Roberson and Mr. Rodriguez attempted to work with members of the 749th AMXS command in order to resolve any issues. Retired MSgt Roberson and Mr. Rodriguez even went so far as to offer to place “warning signs” on the auditorium doors explaining that the word “God” would be uttered during the retirement ceremony.

Retired MSgt Roberson’s retirement ceremony occurred as scheduled, with family, friends, and colleagues in attendance. In accordance with retired MSgt Roberson’s wishes, Mr. Rodriguez attended and sat in a prominent position that permitted him to perform the flag-folding speech at the appointed time. Towards the conclusion of the ceremony, there was a slide show with music and photos depicting various events throughout retired MSgt Roberson’s career. The flag-folding ceremony occurred after the slide show. Two Airmen who volunteered to perform the flag-folding ceremony took their positions. As Mr. Rodriguez stood to assume his position, Technical Sergeant (hereinafter, “TSgt”) Al Hall, a member of the 749th AMXS, approached Mr. Rodriguez and warned him not to perform the flag-folding speech. Desiring to keep his word and honor his colleague, Mr. Rodriguez stood fast and, as he began his flag-folding speech, TSgt Hall, assaulted Mr. Rodriguez by forcibly grabbing him. Moments later, 749th AMXS members Chief Master Sergeant (hereinafter, “CMSgt”) Antonio Cordes, CMSgt Denis Tharpe, and SMSgt Joe Bruno, immediately joined TSgt Hall’s assault and the group (hereinafter collectively referred to as the “four NCOs”) physically dragged Mr. Rodriguez out of the Building 185 Auditorium.

One of two situations occurred. Either Lt Col Sovitsky issued an order to these four NCOs to carry out the assault, battery, and forcible removal against Mr. Rodriguez, or the four NCOs conspired to commit these offenses of their own initiative. But even if the four NCOs acted without Lt Col Sovitsky’s explicit direction, he should have prevented or stopped their acts against Mr. Rodriguez. As the commanding officer, he had the authority to stop them. But he did not. As a result, members of the United States Air Force—an organization whose mission is to uphold the Constitution and defend Americans—intentionally violated the constitutional rights of a private American citizen. Such acts fly in the face of the Air Force’s core values.

Legal Analysis

The First Amendment to the United States Constitution prohibits the government from “abridging the freedom of speech” of private individuals. U.S. Const., amend. I. Federal law likewise prohibits invidious religious discrimination. See 42 U.S.C. § 2000bb. The government also may not suppress or exclude the speech of private individuals for the sole reason that their speech is religious. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). As the Supreme Court explained:

[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Pinette, 515 U.S. at 760. Furthermore, the Court held that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993).

When a private citizen is engaging in private speech, even on government property, including military installations, it is axiomatic that the government may not engage in viewpoint discrimination, in which it unconstitutionally censors or restricts speech based on the speaker’s viewpoint or message. *Rosenberger* 515 U.S. at 828; see also *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (viewpoint discrimination occurs when the government “denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.”). Indeed, “the First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). Yet that is precisely what members of the 749th AMXS did here.

As a retiree, and as retired MSgt Roberson’s invited guest, Mr. Rodriguez had a right to be present, and to participate, in the retirement ceremony. Lt Col Sovitsky is not an installation commander, and therefore has no debarment authority. See 18 U.S.C. § 1382; 32 CFR § 809a.1(a). Thus, any attempt to prevent Mr. Rodriguez from attending the retirement ceremony is without legal basis or authority. But even if Lt Col Sovitsky possessed such debarment authority, he had no legal authority to order Mr. Rodriguez’s assault, battery, and forcible removal because of Mr. Rodriguez’s religious speech. Likewise, even absent any such order, the four NCOs certainly lack any authority to commit assault, battery, and forcibly remove Mr. Rodriguez.

Mr. Rodriguez is the victim of religious discrimination by members of the 749th AMXS, whether due to Lt Col Sovitsky’s order, or due to the four NCOs’ conspiracy.

Under either circumstance, it is clear that members of the 749th AMXS violated Mr. Rodriguez's rights under the First Amendment to the United States Constitution. Military officers and NCOs have no right to assault and drag away a private citizen simply because they do not want him to mention the word "God." The fact that Mr. Rodriguez was going to mention the word "God," at the behest of the retiring service member, is an insufficient basis to silence him, much less commit assault and battery against him, followed by forcibly dragging him away. Ironically, Mr. Rodriguez's speech was also going to state that our nation's flag "stands for the Constitution . . . freedom of religion, freedom of the press, freedom of speech." Yet Lt Col Sovitsky and/or the four NCOs arbitrarily, unreasonably, and discriminatorily denied many of those very freedoms to Mr. Rodriguez.

In addition to depriving Mr. Rodriguez's First Amendment rights of religious free exercise and speech, Lt Col Sovitsky and/or the four NCOs also violated his constitutional rights under the Fourth and Fifth Amendments to the Constitution. Similarly, federal law recognizes causes of action when two or more actors conspire to violate one's constitutional rights, and when one in authority negligently fails to prevent such a conspiracy.

Clearly, Lt Col Sovitsky, and the four NCOs knew their actions were unlawful and violated Mr. Rodriguez's constitutional rights. Officers and NCOs are charged with upholding and defending the Constitution, not violating it. Thus, any time a service member demonstrates such wanton disregard for the Constitution, it is alarming. But that the service member in question is a senior officer holding a position of command authority shocks the conscience. It is the very epitome of service-discrediting conduct.

Grounds for Legal Action Against U.S. Air Force Members

The following bases may exist to take legal action against Lt Col Sovitsky and/or the four NCOs under his command, for their actions against Mr. Rodriguez:

- (1) First Amendment to the U.S. Constitution;
- (2) Fourth Amendment to the U.S. Constitution;
- (3) Fifth Amendment to the U.S. Constitution;
- (4) 42 U.S.C. § 1985 (Conspiracy to interfere with civil rights);
- (5) 42 U.S.C. § 1986 (Action for neglect to prevent conspiracy);
- (6) 42 U.S.C. § 2000bb (Religious Freedom Restoration Act of 1993);
- (7) Liability under the Federal Tort Claims Act (28 U.S.C. Pt. VI Ch. 171 and 28 U.S.C. § 1346(b)).

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Relief Requested

For the reasons provided herein, we demand you take the following actions to remedy the situation:

- (1) A written admission of wrongdoing and unlawful actions by the responsible member(s);
- (2) A written apology to Mr. Rodriguez;
- (3) A written assurance that, henceforth, no member of the 349th Air Mobility Wing will commit assault or battery against Mr. Rodriguez because he is attempting to engage in constitutionally protected conduct;
- (4) Punitive action against those determined to be responsible for violating Mr. Rodriguez's constitutional rights.

As stated above, we require a response by no later than 0900 PDT, June 23, 2016. Should you deny these requests or fail to respond to this letter, we are prepared to pursue all available legal remedies. I am willing to meet in person to discuss this matter, if you desire. I am the point of contact for this matter and may be contacted via e-mail at mberry@firstliberty.org.

Sincerely,



Michael Berry

Senior Counsel & Director of Military Affairs

Copy to:

Chief Master Sergeant Antonio Cordes
749th Aircraft Maintenance Squadron
Travis AFB, CA 95435

Chief Master Sergeant Denis Tharpe
749th Aircraft Maintenance Squadron
Travis AFB, CA 94535

Senior Master Sergeant Joe Bruno
749th Aircraft Maintenance Squadron
Travis AFB, CA 95435

Technical Sergeant Al Hall
749th Aircraft Maintenance Squadron
Travis AFB, CA 95435