

RELIGION

Religious Displays on Military Installations

This is in response to your query whether an installation commander may constitutionally include a nativity scene – also referred to as a crèche – on military property as part of a larger display of both religious and secular items celebrating the winter holidays. In our opinion, based upon the facts presented in this case, such a display does not amount to the unconstitutional establishment or endorsement of religion. Similarly, other religious displays may constitutionally be included as components of holiday displays, as long as the overall display is secular and avoids endorsing or advancing religion.

In this particular case, the overall proposed display can be broken down into three main components: 1) a collection of painted plywood “holiday cards”; 2) a large lighted tree; and 3) a “multi-cultural holiday display.” The entire display is to be arranged on a corner of an intersection on the base’s main thoroughfare. The intersection also marks the entrance to the Base Exchange and Commissary, thereby maximizing the display’s exposure to base motorists.

The holiday cards are part of an annual contest at the base, in which squadrons and “official base agencies” decorate four-by-eight-foot sheets of plywood to be judged by a panel of First Sergeants. Historically, these cards have been secular in nature, including depictions of such things as Santa Claus riding on an aircraft and messages calling for the safe enjoyment of the holidays. The tree, which was brightly lit and topped with a lit five-pointed star last year, is similarly secular.

The multi-cultural display will include a nativity scene, a menorah, a Yule log, and a Kwanzaa display. The nativity scene was present last year and included figures of Joseph, Mary and Jesus, along with a cow, a donkey, and two lambs. Although the nativity scene was three dimensional and contained within an open structure, the scene itself was not markedly larger than the holiday cards. Last year’s menorah was a simple painting of the traditional candelabra on a sheet of plywood roughly the same size as the other holiday cards. The origins and religious significance of nativity scenes and menorahs are generally well known, so we will not recite that history here. The Yule log has pagan origins, but today it is typically associated with Christmas, although not in any particularly religious sense (the tradition involves burning a large, heavy log). Kwanzaa is a week-long Afrocentric celebration “of family, community and culture” that began in 1966. Although Kwanzaa was initially thought of as an alternative to Christmas (the early adherents shunned Christianity), it is now a non-religious celebration honoring African heritage as well as such principles as self-determination, work, responsibility and justice. A seven-branched candelabra, known as a kinaras, is often included in Kwanzaa displays.

The issue is whether the multi-cultural display impermissibly establishes religion in violation of Amendment I of the United States Constitution, which states in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Nativity scenes and Hanukkah menorah displays on public property have been the subject of court challenges, as have displays that include Yule logs and Kwanzaa kinaras. The evolution of

Establishment Clause law has not followed a particularly direct or clear path.¹ The notion of “establishing a religion” has been found to encompass not only the establishment of a government-created church, but also government endorsement of – or preference for – a particular religion or religion in general.² As the Supreme Court has explained, “the fullest realization of true religious liberty requires that government ... effect no favoritism among sects or between religion and nonreligion.”³ The Court has further explained that the Establishment Clause means the government “may not ... promote one religion or religious theory against another or even against the militant opposite.”⁴ Similarly, the Court has found constitutional requirements for the government to respect religious diversity, remain secular, not “affiliate itself with religious beliefs or institutions,” and “avoid discriminating among citizens on the basis of their religious faiths.”⁵

Recognizing the unique attributes of the military, the Supreme Court has, in dicta, favorably pointed to the existence of a military chaplaincy corps despite its potential tension with the prohibition of government endorsement of religion.⁶ Military chaplains serve several roles, including advising commanders, conducting religious observances and providing pastoral care. Military guidance emphasizes the pluralistic religious makeup of the forces. DoD policy is that the chaplaincies “shall serve a religiously diverse population,” and the Air Force requires “awareness of, and sensitivity to, the diverse religious needs of Air Force members.”⁷ The focus on religious diversity dovetails with the Supreme Court’s observation that the United States is comprised of “adherents of religions too numerous to name ... [as well as] those whose beliefs expressly exclude religion.”⁸ Ultimately, the chaplaincies are an extension of the command structure, performing their functions in support of the overall mission. Therefore, to the extent installation chaplains are delegated the authority for holiday displays, they are carrying out the commander’s intent and are subject to both Constitutional and regulatory restrictions relevant to the displays.

In between the general prohibition of endorsing religion and the legitimate governmental recognition of the importance – and widespread practice – of religion, the Supreme Court has endorsed the presence of religious displays that are part of larger, secular displays.⁹ The Court

¹ Justice Thomas has described Establishment Clause jurisprudence as “in shambles” and having “rendered the constitutionality of displays of religious imagery on government property anyone’s guess.” *Utah Highway Patrol Association v. American Atheists, Inc.*, 132 S.Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari).

² See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring in judgment); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

³ *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

⁴ *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

⁵ *Id.* at 610, 612.

⁶ See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 875 (2005); *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). See also *Thompson v. Com. of Ky.*, 712 F.2d 1078, 1080 (citing to “difficulty” presented by government employment of military chaplains); *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (military chaplaincy is constitutional, at least outside of large urban centers). But cf. *Lee v. Weisman*, 505 U.S. 577, 620 (Souter, J., concurring) (citing Letter from J. Madison to E. Livingston (July 10, 1822), in 5 *The Founders’ Constitution* 105 (suggesting public subsidization of military chaplains is unconstitutional)).

⁷ DoDD 1304.19, *Appointment of Chaplains for the Military Departments*, 11 June 2004, para. 4.2; AFPD 52-1, *Chaplain Service*, 2 October 2006, para. 2.

⁸ *Allegheny*, 492 U.S. at 590.

⁹ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984).

has not established any bright-line rules as to what is and what isn't constitutional, and instead asks whether the context of the display has the effect of demonstrating the government's endorsement of a religion or religion in general.¹⁰ The path to resolving the issue starts with an analysis taken from the case of *Lemon v. Kurtzman*.¹¹ Under that analysis, a government practice that touches upon religion is permissible if it: 1) has a secular purpose, 2) "neither advance[s] nor inhibit[s] religion in its principal or primary effect," and 3) does not "foster an excessive entanglement with religion."¹² The prohibition against government "advancement" of religion reaches government "endorsement" of religion.¹³ Endorsement of religion includes: the government "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred";¹⁴ the government "favor[ing] religious belief over disbelief"¹⁵; and the promotion of a particular religion or religion in general.¹⁶

Items such as nativity scenes and menorahs are plainly religious in nature, and they communicate a religious message. The Supreme Court has held that whether or not the display of religious items amounts to an impermissible endorsement of religion depends on the setting – that is, the context of the display taken as a whole.¹⁷ In that sense, the overall display "may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holiday by suggesting that people praise God for the birth of Jesus."¹⁸ Put another way, the "government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine."¹⁹ What the government may do is acknowledge religious holidays without expressing an allegiance to a particular religion or religion in general.²⁰ From a more practical perspective, when the government chooses to have religious items on display, the overall context of the display and the other, secular, items in it must offset the religious message to the point where the entire display cannot be considered an endorsement of religion.²¹

Considering the foregoing, military commanders who wish to include religious items such as nativity scenes and menorahs in displays should be mindful of the following guidance:

¹⁰ *Allegheny*, 492 U.S. at 611.

¹¹ 403 U.S. 602 (1971).

¹² *Id.* at 612-13.

¹³ *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 70 (1985); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion).

¹⁴ *Allegheny*, 492 U.S. at 593 (citing *Wallace v. Jaffree*, 472 U.S. at 70 (1985) (O'Connor, J., concurring in judgment)).

¹⁵ *Allegheny*, 492 U.S. at 593 (citing *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987)).

¹⁶ *Allegheny*, 492 U.S. at 593 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹⁷ *Lynch*, 465 U.S. at 680; *Allegheny*, 492 U.S. at 598.

¹⁸ *Allegheny*, 492 U.S. at 601.

¹⁹ *Id.*

²⁰ *Id.* at 611-12.

²¹ Justice Brennan, who had limited tolerance for religious displays on public property, criticized this approach as a legal principle that "more is better" when it comes to holiday displays. *Allegheny*, 492 U.S. at 644 (Brennan, J., concurring in part and dissenting in part).

1. Displays containing religious items should include secular items of sufficient number and type that the overall display acknowledges religious holidays without expressing an allegiance to a particular religion or religion in general.²²
2. Religious items should not be placed in more distinctive, favorable or significant locations than secular items; for example, a nativity scene should not be erected at the command headquarters building while confining secular displays to some other, less prestigious part of the base.²³
3. Religious items should be of a similar scope and size as, or smaller than, secular items to avoid the appearance that religion is being favored over non-religion.
4. Items such as nativity scenes and menorahs are almost exclusively religious in nature; that is, these items – if displayed alone – would constitute a display endorsing or establishing religion. Other items associated with the religious holidays, but with more ambiguous religious relevance (*e.g.*, Christmas trees, Santa Claus, dreidels, and other items that amount to the secular trappings of the holidays) are typically secular in nature.
5. Explicit exhortations to demonstrate fealty towards a particular religion (or religion in general) should be avoided, such as signs or banners containing messages like, “Glory to God in the Highest” or “Praise the Lord.”²⁴
6. The celebration of public holidays (even those squarely based on religious beliefs), and the depiction of the origins of those holidays via a government-sponsored display, are considered to be a legitimate secular purposes, so long as the overall display does not establish or endorse religion.²⁵

Because the Supreme Court has found that the Establishment Clause “erects a ‘blurred, indistinct, and variable barrier [between the government and religion] depending on all the circumstances,’”²⁶ the above list is general guidance and should not be read to be exhaustive. The constitutionality of particular displays will have to be judged on a case-by-case basis.

Based upon these principles, we conclude that your proposed holiday display, which will contain, *inter alia*, a nativity scene and a menorah, constitutionally incorporates religious and secular items such that the display, taken as a whole, does not impermissibly endorse or advance religion. The relatively small nativity scene is in keeping with the size and scope of the other displays, and the secular items (the cards and the tree) substantially outnumber the two religious items. The inclusion of the Yule log and the Kwanzaa display further serve to highlight the various ways Airmen celebrate the winter holidays, separate and apart from purely religious observances.

²² *Allegheny*, at 611-12.

²³ *Id.*, 492 U.S. 573.

²⁴ *Id.*

²⁵ *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring); *Allegheny*, at 611-12.

²⁶ *Id.* at 679 (1984) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

One additional aspect of the proposal bears mention, and that is the fact the holiday card portion is open to “official base agencies.” We recommend you consider defining the scope of “official base agencies.” Once participation in the display is opened to a particular group of individuals or agencies, the installation may not discriminate among members of the group. For example, if a base permits private organizations to place signs, the base cannot pick and choose which private organizations may place signs. Similarly, if the base permits displays sponsored or donated by off-base entities, the base would generally be unable to refuse displays offered by other off-base entities.²⁷ Thus, bases should carefully describe who is and who isn’t eligible to participate.

Finally, when bases are purchasing holiday displays, we remind them to carefully consider the fiscal rules for funding various components of the displays. For example, AFI 65-601 Volume 1, *Budget Guidance and Procedures*, para. 4.28.2, prohibits the use of appropriated funds for holiday decorations which are “religious in nature.”

OpJAGAF 2013/8 9 April 2013

²⁷ See, e.g., DoD 5500.07-R, *The Joint Ethics Regulation (JER)*, subsection 3-211(a)(5).