ACLJ
American Center
for Law & Justice

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April 30, 2018

VIA OVERNIGHT DELIVERY SERVICE

Rear Admiral Paul D. Pearigen, MC, USN
Commander, Navy Medicine West
4170 Norman Scott Road, Suite 5
San Diego, CA 92136-5521

Dear Admiral Pearigen:

Based on our previous letter to you, you now know that the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States.[1]

We commend you for resisting the demands made by Mr. Rehkopf on behalf of the Military Religious Freedom Foundation (MRFF) in his first demand letter to you. Unfortunately, as you can see, once you are on the MRFF's "radar," you can become a target for continuing rhetorical abuse.

We would once again suggest that the best course of action for someone in your position may be to refer such complaints to the Navy JAG and/or Navy Public Affairs for action in the future.

Nonetheless, we provide the following support for your position *vis-à-vis* the passive presence of a Bible as one of a number of symbols in the POW/MIA display in Okinawa. In addition to a short summary of our Nation's religious history, we include a discussion of the following legal situations: 1) Where government-sponsored displays with religious content are constitutional; 2)

[1]*See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8–1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

[redacted]

Where government-sponsored displays with religious content are unconstitutional; and 3) Rules governing private displays on public property.

I. THE RELIGIOUS HISTORY OF OUR NATION

America's strong religious heritage is reflected in the historic actions of our legislators and other political leaders. For example, in *Marsh v. Chambers*,[2] a case challenging paid legislative chaplains, the Supreme Court noted that in 1789, "three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights."[3] Only the most irrational thinking would lead one to conclude "that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."[4] "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that . . . challenged [in *Marsh*]."[5] The historical record of the early Congress clearly indicates "the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.'"[6]

As the *Marsh* Court aptly noted, chaplain-led prayer opening each day's session in both Houses of Congress "is not . . . an 'establishment' of religion," but rather "a tolerable acknowledgment of beliefs widely held among the people of this country."[7] The same is surely true of displays on military installations which include religious content like the passive, symbolic presence of a Bible among a number of non-religious items.

The *Marsh* Court emphasized that the "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied . . . – *their actions reveal their intent*."[8] In the 2005 case, *McCreary v. ACLU*,[9] Justice Scalia catalogued other examples of the government's positive acknowledgment of religion and religious belief within our nation's history:

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[2] 463 U.S. 783 (1983).
[3] *Id.* at 788.
[4] *Id.* at 790. The Reverend William Linn was elected chaplain of the House of Representatives on May 1, 1789, the day after the inauguration of George Washington as the first President of the United States. He was paid with public funds. *See* ISRAEL DRAZIN & CECIL B. CURREY, FOR GOD AND COUNTRY: THE HISTORY OF THE CONSTITUTIONAL CHALLENGE TO THE ARMY CHAPLAINCY 21 (1995).
[5] *Marsh*, 463 U.S. at 791.
[6] *Id.* at 792.
[7] *Id.*
[8] *Id.* at 790 (emphasis added).
[9] 545 U.S. 844, 886–90 (2005) (Scalia, J., dissenting).

- George Washington added the words "so help me God" to the Presidential Oath prescribed by Art. II, § 1, cl. 8.[10]
- John Marshall opened the Supreme Court with the prayer, "God save the United States and this Honorable Court."[11]
- Congress, the day after it proposed the First Amendment, "requested the President to proclaim 'a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God.'"[12]
- As part of the first Thanksgiving Proclamation, President Washington, on behalf of the American people, devoted November 26, 1789 "'to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be.'"[13]
- "The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: 'Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'"[14]
- President John Adams wrote to the Massachusetts Militia, "we have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[15]
- And even Thomas Jefferson and James Madison, two foundational figures quoted often in opposition to interaction of religion and government, called upon God as the founder of the world and guardian of the nation in their inaugural addresses.[16]

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[10]*See* Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. Rev. 1, 34 (2004).

[11]1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 469 (rev. ed. 1926).

[12]*McCreary*, 545 U.S. at 886 (citing H. R. Jour., 1st Cong., 1st Sess. 123 (1826 ed.); *see also* Sen. Jour., 1st Sess., 88 (1820 ed.)).

[13]*Van Orden v. Perry*, 545 U.S. 677, 687 (2005) (plurality opinion) (quoting 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 64 (1899)), thus beginning a tradition of offering gratitude to God that continues today. *See Wallace v. Jaffree*, 472 U.S. 38, 100-103 (1985) (Rehnquist, J., dissenting)).

[14]*McCreary*, 545 U.S. at 887 (Scalia, J., dissenting).

[15]Letter (Oct. 11, 1798), *reprinted* in 9 WORKS OF JOHN ADAMS 229 (Charles Adams ed. 1971).

[16]President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations." *See also* President James Madison, First Inaugural Address (Mar. 4, 1809), James Madison placed his confidence "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.".

- Congress also promoted religion by sponsoring the publication of the Bible and granting public lands to advance Christianity among the Indians.[17]

Today, despite pressure and attempts to argue the contrary by groups like the MRFF, the prevailing American view is the same as that of our Founders:

> Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of th[e Supreme] Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God."[18]

Therefore, as a nation firmly rooted in religious influence, the recognition of religion in the military is merely another example of our government's providing for religious opportunities so that service members may exercise their religious rights while serving in uniform as well as the government's recognizing the value of religion to good order and discipline, morale, and combat readiness.

II. EVEN *GOVERNMENT-SPONSORED* DISPLAYS WITH RELIGIOUS CONTENT ARE NOT UNCONSTITUTIONAL SO LONG AS THE RELIGIOUS ELEMENTS OF THE DISPLAY ARE PART OF A LARGER EXPRESSION

The Supreme Court of the United States has upheld the constitutionality of *government* displays that include religious components. In *Lynch v. Donnelly*,[19] the Court upheld the constitutionality of a display that included a government-erected crèche because it was a part of a larger holiday display in which there was a variety of secular symbols. The Supreme Court further recognized that Christmas is a National Holiday observed "in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries."[20] As Justice O'Connor explained, "[c]elebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."[21] The same applies to government displays with cultural significance, like POW/MIA displays.

The Court held that the inclusion of the crèche as part of a holiday display did not violate the three-prong Lemon Test. Specifically, under the "primary effect" prong, the Court held that "display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of

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[17] *Religion and the Congress of the Confederation*, LIBRARY OF CONGRESS, http://www.loc.gov/exhibits/religion/rel04.html (last visited Apr. 30, 2018).
[18] *McCreary*, 545 U.S. at 888–89 (Scalia, J., dissenting).
[19] 465 U.S. 668 (1984).
[20] *Id.* at 686.
[21] *Id.* at 691 (O'Connor, J., concurring).

literally hundreds of religious paintings in governmentally supported museums."[22] The same principle applies to the display of a passive Bible in a POW/MIA display. Moreover, the Court recognized that "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[23]

Similarly, the United States Court of Appeals for the Sixth Circuit noted the following about the motto of the State of Ohio, to wit, "With God, All Things Are Possible":

> The motto involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches. Neither does it impose any religious test as a qualification for holding political office, voting in elections, teaching at a university, or exercising any other right or privilege. . . .
>
> "[T]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." The notion that the First Amendment commands "a brooding and pervasive devotion to the secular" . . . is a notion that simply perverts our history.[24]

The above principles apply in equal measure to the passive display of a religious item in a display on military installations (like the passive display of a Bible in a POW/MIA display, especially when it is in the company of numerous secular items as is the case in Okinawa).

The Sixth Circuit further explained that the Establishment Clause is not violated every time government action offends or irritates someone due to its perceived religious connotations:

> [T]he question before us is not whether a reasonable person could be irritated by any or all of this. Much of what government does is irritating to someone. . . . Our level of irritation with a given governmental action is simply not a reliable gauge of the action's constitutionality. The mere fact that something done by the government may offend us philosophically or aesthetically does not mean, ipso facto, that the Constitution is offended.[25]

In examining government-sponsored displays, courts generally hold that so long as the religious elements of the display are part of a larger expression—with Christmas trees, Santa Claus, reindeer, and the like for a holiday display containing a crèche—such that the primary effect of the

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[22] *Id.* at 683.
[23] *Id.* at 674.
[24] *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 299-300 (6th Cir. 2001) (en banc) (internal citations omitted).
[25] *Id.* at 309.

entire display is secular, the display is constitutional.[26] The same principle applies to a POW/MIA display where the religious symbol, a passive Bible, is only one part of a display containing the following, wholly secular items: a place-setting, a candle, a single rose, an upside down glass, and an empty chair. Hence, the primary effect of the entire display is secular and, thus, constitutional.

III. IN SPECIFIC INSTANCES, *GOVERNMENT-SPONSORED* DISPLAYS CONTAINING RELIGIOUS CONTENT MAY BE PROHIBITED ON PUBLIC PROPERTY

It must be admitted that some government-sponsored displays containing religious content may be prohibited. In *County of Allegheny v. ACLU*,[27] the Supreme Court clarified the law regarding holiday displays with religious content, holding that *the context of the display is key*. In *Allegheny*, the Court examined two holiday displays on government property: 1) a crèche bearing a banner that proclaimed "Glory to God in the highest," standing alone on the Grand Staircase of the county courthouse; and 2) a menorah displayed as part of a larger winter holiday exhibit in front of the City-County building, which included a Christmas tree and a sign saluting liberty.[28]

The Court held that the crèche display violated the Establishment Clause, but that the menorah and Christmas tree display did not.[29] In applying Justice O'Connor's endorsement test, the Court *focused on content and context*, examining the physical setting of the displays. "The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context."[30] The appropriate standard for judging the context of the display was what a reasonable observer would think.[31]

Applying this standard to the crèche, the Court determined that it sends an unmistakable religious message.[32] "The crèche stands alone" such that "nothing in the context of the display detracts from the crèche's religious message."[33] The crèche's location on the Grand Staircase, the main and most beautiful part of the building, was also problematic since "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government."[34] The instant matter is easily distinguishable from the crèche issue in *County of Allegheny* since the Bible in no way comes across as the primary symbol in the POW/MIA display, as evidenced by the fact

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[26] *See Salazar v. Buono*, 559 U.S. 700, 715-722 (2010) (plurality opinion) (noting importance of context and purpose of public displays and reiterating that "goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm"); *see also McCreary*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005) (conducting similar purpose and effect analysis of entire display in Ten Commandments cases).
[27] 492 U.S. 573 (1989).
[28] *Id.* at 598.
[29] *Id.* at 600.
[30] *Id.* at 597.
[31] *Id.* at 620.
[32] *Id.* at 598.
[33] *Id.*
[34] *Id.* at 599-600.

that it is but one of a number of passive, non-religious items. The context minimized the impact of the Bible to the display as a whole.

By contrast to the crèche, the Supreme Court held that the menorah was constitutional because the accompanying Christmas tree and the sign saluting liberty neutralized the religious dimension of the menorah display and emphasized its secular dimensions.[35] The Court explained it as follows:

> The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.[36]

Similarly, the mere presence of a Bible in a POW/MIA display coupled with numerous non-religious items does not communicate government endorsement of religion any more than it endorses the brand of China or silverware used in the place-setting, the specific variety of flower chosen for the vase, or anything else in the display.

Thus, *Lynch* and *County of Allegheny* do not support the proposition that governments must exclude religious symbols from general, government-sponsored holiday displays. *Exclusion of a religious symbol is only required by the Establishment Clause if the religious symbol is not part of a larger display containing other secular symbols.* Therefore, *Lynch* and *County of Allegheny* establish that context is the linchpin when evaluating the constitutionality of religious symbols on government property. In other words, religious symbols in government-sponsored holiday displays that might, *standing alone*, raise Establishment Clause concerns, are permissible when presented in the context of a broader display, which includes secular symbols like Christmas trees and Santa with his reindeer in the case of Christmas holiday displays or secular symbols like a place-setting, a candle, a rose, an upside down glass, and an empty chair in a POW/MIA display.

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[35] *Id.* at 616-19.
[36] *Id.* at 617-18.

IV. PRIVATELY-SPONSORED DISPLAYS WITH RELIGIOUS CONTENT ON GOVERNMENT PROPERTY

A. The Establishment Clause does not forbid all private religious displays on government property

If a display were *privately erected* (e.g., by a chapel congregation, a civic organization or a Bible study group[37]), the following principles apply. The government may allow private individuals or groups to display expressive items (including religious ones) on public property. The Supreme Court of the United States has identified three types of public property for First Amendment expressive purposes: the traditional public forum, the open or designated public forum, and the non-public forum.[38] Certain government properties are presumed to be traditional public fora (streets, sidewalks, and parks).[39] As the Supreme Court has stated, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions."[40] While the First Amendment does not require the government to allow privately-owned permanent or temporary displays in public parks,[41] the government must act in a viewpoint-neutral manner if it chooses to do so.

In addition to streets, sidewalks, and parks, other areas that "the state has opened for use by the public as a place for expressive activity" may be considered "open or designated" public fora. Whether the property in question is considered a traditional public forum (*e.g.*, street, sidewalk, park, or plaza) or a designated public forum (*e.g.*, a government building, community center or other state-owned facility), the ability of governing authorities "to limit expressive activities [is] sharply circumscribed."[42] Government officials may not prohibit religious expression from these places on the basis of viewpoint unless they demonstrate a compelling government interest for doing so.[43] As the Court held in *Lamb's Chapel v. Center Moriches Sch. Dist.*, "[t]he principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'"[44] Hence, were a military installation to allow displays with secular symbols but exclude displays with religious symbols (or consign them to some out-of-the-way location), it would unconstitutionally disfavor

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[37]Although chapel congregations or on-base Bible studies (or similar groups) are composed primarily of service members and their families, merely because one wears a uniform does not convert his/her religious expression into government speech. As such, when members of a chapel congregation or other group come together to erect a religiously-themed display on a military installation, they do so as private individuals exercising their First Amendment free speech and free exercise rights. As such, there is no Establishment Clause violation.

[38]*Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983).

[39]*See United States v. Grace*, 461 U.S. 171, 177 (1983).

[40]*Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

[41]*See Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

[42]*Perry Educ. Ass'n*, 460 U.S. at 45.

[43]*Carey v. Brown*, 447 U.S. 455, 461, 464 (1980).

[44]*Lamb's Chapel*, 508 U.S. at 394 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

religion to the benefit of non-religion. That is expressly what the MRFF is advocating by its call to remove the Bible from the POW/MIA display.

The Supreme Court has consistently ruled that the Establishment Clause does not require a state entity to exclude private religious expression from a public forum. It is, in fact,

> *peculiar to say that government "promotes" or "favors" a religious display [or religious item] by giving it the same access to a public forum that all other displays [or secular items] enjoy.* And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.[45]

In one of its most powerful proclamations upholding the rights of private religious speakers in a public forum, the Supreme Court stated:

> The contrary view [i.e., restricting religious expression] . . . exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. . . . It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives . . . than to private prayers. This would be merely bizarre were religious speech simply as protected by the Constitution as other forms of private speech; but *it is outright perverse when one considers that private religious expression receives preferential treatment under the Free Exercise Clause.* It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government.* It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.[46]

Moreover, in *Board of Education v. Mergens*,[47] the Supreme Court noted a key distinction in this regard: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[48] In fact, the Supreme Court has stated that a policy of excluding private religious expression from public places where secular expression is permitted is unconstitutional:

> Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license

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[45] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763-64 (emphasis added).
[46] *Id.* at 766-67 (internal citations omitted) (emphasis added).
[47] 496 U.S. 226 (1990).
[48] *Id.* at 250 (emphasis added). Yet, as noted in Section II above, religious items included as part of a broader secular display do not violate the Constitution.

> government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[49]

In this regard, courts have concluded that "***the reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those who do***. . . ."[50] A jaundiced view of religion is exactly what the MRFF represents.

B. The First Amendment protects the right of citizens, civic groups, and churches to erect religious-themed displays in public areas where private non-religious displays are permitted

The Constitution protects the right of private citizens to engage in religious speech in a public forum. In *Pinette,* the Supreme Court held that a private group could erect an unattended cross in a public park during the holiday season.[51] The Court noted:

> Respondents' religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is 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.[52]

Key factors in the Court's decision were: 1) the public park in question had historically been open to the public for a variety of expressive activities; 2) the group erecting the cross had requested permission through the same application process and on the same terms required of other private groups; and 3) the group planned to accompany the cross with a sign disclaiming any government sponsorship or endorsement.[53]

In addition, the *County of Allegheny* and *Lynch* cases establish that religious displays on government property that is not a public forum may nevertheless be constitutional if they are accompanied by other secular symbols relating to the expression. For example, the holiday display upheld in *Lynch* contained a crèche, as well as a Santa Claus house, reindeer, candy canes, a Christmas tree, carolers, and toys.[54] The display upheld in *County of Allegheny* contained a menorah and a Christmas tree.[55] There is no principled reason why a POW/MIA display primarily composed of secular symbols could not include a Bible to symbolize faith.

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[49] *Id.* at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)).
[50] *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (emphasis added).
[51] *Pinette*, 515 U.S. at 770.
[52] *Id.* at 760 (internal citations omitted).
[53] *Id.* at 763; *id.* at 782 (O'Connor, J., concurring); *id.* at 784 (Souter, J., concurring).
[54] 465 U.S. at 671.
[55] 492 U.S. at 582.

Thus, *Pinette*, *Lynch*, and *County of Allegheny* teach that private citizens may erect religious displays on public property if: 1) the property is a public forum in which the government has permitted a wide variety of expressive conduct (at least where there is a sign informing the public that the display is sponsored by private citizens and the government is not endorsing its message); or 2) the display is accompanied by a variety of secular holiday symbols such that the overall message of the display is not exclusively or primarily religious.

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In the final analysis, the Constitution permits the display of *government-sponsored*, religiously-themed items as long as the religious items are part of a larger grouping of non-religiously-themed items as well. Even privately-erected, stand-alone religious displays on government property are permissible in specific circumstances as laid out in Section IV above. Merely because some persons who encounter explicitly religious items in an otherwise secular display on public property (like a military installation) dislike religion and religious expression does not render such expression unlawful. To adopt Mr. Rehkopf's view of what the Constitution allows would eviscerate religious expression in the military and violate the very Establishment Clause that he claims to be protecting. One cannot single out religious expression for special detriment and claim to be acting consistent with the Constitution of the United States.

CONCLUSION

Regardless of how many different ways the MRFF tries to create a Constitutional crisis where none exists, it is still up to the recipients of their demand letters not to yield to such demands. We again commend you for responding in the way that you did to Mr. Rehkopf's first letter.

As we suggested, it may be best for a higher echelon of the Navy to deal with the MRFF and its attorneys henceforth. This would free you from having to respond again and again to the MRFF's personal attacks on you and would hopefully free other military installations and commanders from such attacks in the future.

Should you or any member of your staff desire further information or assistance concerning this matter, please do not hesitate to contact our office. We stand ready to assist you in any way we can.

Respectfully yours,

Jay Alan Sekulow
Chief Counsel

Robert W. Ash
Senior Counsel

Cc: The Honorable Richard V. Spencer, Secretary of the Navy
Admiral John M. Richardson, Chief of Naval Operations
Vice Admiral James W. Crawford III, Judge Advocate General