



MEMORANDUM

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Prayer and Religion in the Military

For Americans the right to pray is one of the most fundamental rights we possess. This is no more true than for the brave men and women who serve in the United States Armed Forces. The ACLJ is committed to defending the right of our soldiers to engage in religious expression and of chaplains to pray in Jesus' name.

We live in a very litigious society, where almost anyone can sue another for virtually any offense, real or imagined. Department of Defense (DOD) policy makers are not immune from such litigation. In fact, there are growing numbers of persons and advocacy groups in the United States actively seeking to remove from public life—including in the armed services—virtually all symbols and expression of religion and America's religious heritage by advocating a strict "separation of church and state" that is counter-constitutional. Many of these groups are already actively engaged in filing lawsuits against the DOD and its leaders over various concerns about religious expression in the armed services. Still others have threatened lawsuits. Persons and groups have every right to hold and zealously advocate such views, but many of their views on church-state separation go well beyond what the Constitution and US law require. In fact, they endanger the very freedoms the First Amendment was intended to protect. The ACLJ is dedicated to preserving and protecting the rights of the men and women in the armed forces to continue to exercise themselves the freedoms they fight to protect for us.

The Establishment Clause Does not Prohibit Religious Speech by Military Chaplains, or the Accommodation of Religious Beliefs.

The Establishment Clause was not intended to forbid paid, legislative chaplains and their daily, public prayers. *Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983). The Marsh Court concluded that 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.” *Id.* at 792. Additionally, the First Congress—the same Congress that drafted the First Amendment—established the tradition of clergy-led prayer at presidential inaugurations (which, in truth, constitute military change-of-command ceremonies, where the nation’s new commander in chief assumes office from his predecessor). *See Newdow v. Bush*, 355 F. Supp. 2d 265, 270 n.5, 286–87 (D.D.C. 2005).

The Establishment Clause does not prohibit government accommodation of religious beliefs. Within the sphere of military society, the Department of Defense has chosen to strongly support free exercise of religion by the men and women in uniform. In DOD Instruction 1300.17, *Accommodation of Religious Practices within the Military Services*, DOD lays out its policy on free exercise:

The U.S. Constitution proscribes Congress from enacting any law prohibiting the free exercise of religion. The Department of Defense places a high value on the rights of members of the Military Services to observe the tenets of their respective religions. It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline

DOD Instruction 1300.17, *Accommodation of Religious Practices Within the Military Services*, 2009, para. 4. It is clear from the Constitution and from the precedent of the Supreme Court that such a policy is not prohibited by the Establishment clause; it is, in fact, preferred by the Free Exercise Clause.

In the area of religious expression, the Supreme Court has held that “private religious expression receives *preferential* treatment under the Free Exercise Clause” (emphasis in original). *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 767 (1995). In fact, “discrimination against speech because of its message is presumed to be unconstitutional.” *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828

(1995). Of special note, the Supreme Court has “not excluded from free-speech protections religious proselytizing . . . or even acts of worship” *Capitol Square*, 515 U.S. at 760. Further, “the [government’s] power to restrict speech . . . is not without limits. The restriction must not discriminate against speech on the basis of viewpoint . . . and the restriction must be ‘reasonable in light of the purpose served by the forum.’” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (internal citations omitted). These views are fully in line with the well-established principle that “there 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.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). The *Mergens* Court aptly noted that it is not a difficult concept to understand that the government “does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis.” *Id.*

The Rights and Limits of Religious Expression by Individuals and Chaplains in the Military

When discussing an individual service member’s right to free exercise of religion, a key principle to keep in mind concerns the uniqueness of the military in American society. “‘It is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise’ . . . and this Court has recognized the limits of its own competence in advancing this core national interest.” *Loving v. United States*, 517 U.S. 748, 778 (1996) (Justice Thomas, concurring), *quoting United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). “Both Congress and this Court have found that the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale.” *Brown v. Glines*, 444 U.S. 348, 360 (1980). In the United States Code, Congress expressly notes that the military is a “specialized society” that “is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.” 10 U.S.C. § 654 (a)(8)(A) & (B) (2006).

Military Personnel do Retain First Amendment Rights

Although, the military is a unique forum where unique issues of unit discipline and cohesion arise, when discussing an individual service member’s right to free exercise of religion, it must be clearly understood that “free exercise of religion” means what it says—free exercise. Free exercise may not legitimately be limited to what some government official or civilian advocacy group or attorney may think it *should* mean—or is willing to tolerate. *See e.g., Thomas*

v. Review Bd. of the Indiana Emp't Sec. Div., 450 U.S. 707, 714 (1981). Further, the right to free exercise of religion applies to all members of the armed services—including general or flag officers, commanders, and chaplains—because the First Amendment guarantees the right to free exercise to every American, irrespective of that person's station in life.

Subject to the demands of military service¹ and the need to maintain good order and discipline,² free exercise of religion for service members includes, but is not necessarily limited to, the following: the right to believe or not believe; the right to engage in corporate or individual worship; the right to study religious texts, both individually and with others; the right to fellowship with members of the same faith; the right to discuss and share basic truths of one's faith, both with fellow adherents of that faith and with non-adherents as well; the right to teach one's faith as truth; the right to observe religious holidays, feasts, ceremonies, and so forth; the right to attend religious retreats and conferences; the right to invite others to participate in a religious activity associated with one's faith, such as a Bible study, a bar mitzvah, or a holiday celebration (like a Seder meal or a Christmas party or an Iftar celebration); the right to pass on one's faith to one's own children and other children placed for that purpose in one's care (such as in Sabbath school, Sunday school, catechism classes, or youth groups like Young Life or Club Beyond); and the right to participate in activities sponsored by local religious groups or parachurch groups (like the Knights of Columbus, the B'nai B'rith, the Navigators, or the Officers' Christian Fellowship).

For certain groups and individuals, sharing their faith with others is a religious command. To officially proscribe the sharing of a chaplain's (or other service member's) faith may itself run afoul of the establishment clause in that government officials sit in judgment of what constitutes acceptable religious belief and activities and what does not. This is not to say that a religious activity might not, under some circumstances, upset good order and discipline, just as a secular activity may do so. When that occurs *in either case*, of course, commanders may intervene, but commanders must be careful not to limit free exercise merely because some individual or group does not appreciate or want to be bothered by the message shared. *Lee v. Weisman*, 505 U.S. 577, 597 (1992). Persons can be offended by both religious and secular sentiments. *Id.* Tolerance must be a two-way street. Just as adherents of the majority religious faith must understand and respect the rights of those of minority faiths, or no faith, so too must those of minority faiths and of no faith understand and respect the rights of those professing the majority faith.

No Proselytizing Prayers or Disparaging Other Faiths in a Coerced Attendance Situation

Chaplains are in a unique situation and while they enjoy the right to free exercise of their religion, they should be careful to recognize a few principles that require them to respect other religions when speaking at events with mandatory attendance. Chaplains should not proselytize, even during a prayer, or disparage other faiths in a situation where there is any compulsory attendance. *Marsh v. Chambers*, 463 U.S. at 794–95. Praying “in Jesus name” should not, however, be considered proselytization if the chaplain’s belief requires him to pray in that manner.

Teaching the strictures and beliefs of one’s own faith, even when they contradict beliefs of another faith group, does not constitute disparaging the other faith, *provided that* such teaching occurs in a place where people freely gather on their own accord to receive such teaching. For example, a Christian chaplain’s affirmative teaching to Christians and/or other interested persons that Jesus is the only way to heaven, a core Christian teaching, does not disparage Islam, despite Islamic teachings about Jesus to the contrary, just as a Muslim chaplain’s affirmative teaching to Muslims and/or other interested persons that Mohammed is the last and greatest prophet of God, a core Islamic teaching not shared by Christians, does not disparage Christianity. Such faith-specific *teaching* is *inappropriate*, however, in settings where service members and their families are otherwise required to be present (i.e., where they are a captive audience).

No Compulsion in Belief or Practice

No official in the US government or armed forces—regardless of rank or station—has the right to compel or pressure any other person (1) to assent to any specific philosophy or religious belief or creed, (2) to participate in a religious worship service (such as forcing someone to attend a chapel worship service—unless that person is on duty, for example, serving as a member of an honor guard or a color guard at a funeral or other ceremony), or (3) to engage in a religious act (even so simple an act as being asked to join hands with others when a short prayer of blessing is said over a Thanksgiving or Christmas meal in the military dining facility). Merely being present at a military ceremony or event where a military chaplain says a solemnizing prayer, however, does not violate the First Amendment, since no person is being compelled or pressured to *assent* to any belief, no person is being asked to *participate* in religious worship, and no person is being asked to *engage* in a religious act.

Likewise, no official in the US Government or armed forces—regardless of rank or station—has the right to compel or pressure a chaplain (or any other person, such as a lay religious leader on a naval vessel or someone else asked to pray) to pray in any particular manner. Instead, the chaplain or other person should be free to follow his conscience and the traditions of his specific faith group and to pray as he deems appropriate in the circumstances. Allowing a person to pray as he desires does not violate the establishment clause, whereas directing how he prays or pressuring him to pray in a certain way does violate the establishment clause. *See Lee v. Weisman*, 505 U.S. at 588–89 (noting that it is inappropriate for a government official to tell a member of the clergy how to pray).

No Forcing of Subordinates to Hear an Unwanted Religious/Philosophic Message as Part of a Captive Audience

No commander or leader may require a subordinate to attend or remain in a meeting or other gathering (i.e., create a captive audience) when the commander or leader intends to use the opportunity to convince those in attendance to adopt or assent to his religious faith or secular philosophy. This should not be understood to preclude a commander or leader from being able to mention his religious faith or upbringing when introducing himself to subordinates for the first time. *See* Center for Army Leadership, *Army Leader Transitions Handbook*, 11, 15, and 19. Such information informs the commander's/leader's subordinates about himself and his standards and is permissible, *provided that* the commander or leader makes clear that he will not judge his subordinates on anything other than that person's duty performance, character, and integrity.

¹ The US armed forces operate 24 hours per day, every day of the year. As such, men and women will be assigned to duties at odd hours and times throughout the year. When those times conflict with regularly scheduled chapel worship times or other religious activities, those on duty will be required to forgo attending such religious activities in order to carry out their military duties. Affected service members may, of course, request an accommodation, but the granting of such an accommodation will ultimately depend on mission requirements. *See*, for example, AFD 52-1, Chaplain Service, attachment 1; AR 600-20, *Army Command Policy*, para. 5-6.a; and SECNAV Instruction 1730.8B, *Accommodation of Religious Practices*, para. 5.

² Good order and discipline are essential components of an effective military unit. William A. Cohen, *Secrets of Special Ops Leadership: Dare the Impossible, Achieve the Extraordinary* (New York: AMACOM, 2005): 98, quoting George Washington as saying, "Nothing is more harmful to the service than the neglect of discipline; for that discipline, more than numbers, gives one army superiority over another." Yet, admittedly, the phrase is somewhat vague. When attempting to maintain good order and discipline, commanders and leaders at all levels must ensure that religious service members are not singled out for special

detriment, especially if those complaining about a religious activity or expression of a religious sentiment are persons especially sensitive—or even hostile—to religion or a religious message. See, for example, *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992), noting the existence of persons who see religious endorsement, “even though a reasonable person, and any minimally informed person, knows that no endorsement is intended.”