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Are soldiers allowed to publicly pray in uniform?

As with all First Amendment expressive rights, time, place, and manner restrictions may apply. For example, it would be inappropriate for a soldier to pray aloud or share his faith with someone else while standing in a formation or when otherwise engaged in one's military duties, such as serving in a busy tactical operations center. Nonetheless, soldiers are generally allowed to express religious sentiments in any circumstance where soldiers would be permitted to discuss non-religious topics like the recent Steelers-Raiders football game, what one did (or planned to do) over the weekend, or why one should prefer a Maserati to a Mustang. That's because soldiers, like all Americans, have the Constitutional right to free speech and free exercise of their faith. The right to pray is one of the most fundamental rights Americans possess. This is no less true 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.

The First Amendment provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." To understand religious freedom in the public square these two clauses must be viewed in tandem. The framers of the Constitution and the Bill of Rights recognized, and the Supreme Court has held, that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the [Government]." *Lee v. Wiseman*, 505 U.S. 577, 589 (1992).

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Unfortunately, some advocates today are so preoccupied with stopping the government from allowing or supporting religious activities for fear that this would constitute “establishing” a religion that they instead encourage the government to prohibit citizens from “freely exercising” their religion, which directly violates the First Amendment.

Protecting Religious Freedom for Members of the Military is not a Violation of the Establishment Clause

The Establishment Clause does not forbid all religious activity undertaken by someone employed by the government or prevent religion in the public square. For instance, in *Marsh v. Chambers*, 463 U.S. 783, 787–88, 92 (1983), the Supreme 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.” 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 also certainly does not prohibit government accommodation of religious beliefs. The Department of Defense has chosen to support the free exercise of religion by the men and women in uniform. Department of Defense Instruction 1300.17, *Accommodation of Religious Practices Within the Military Services* (as amended Jan. 22, 2014). Such a policy is consistent with the First Amendment. In fact, the Supreme Court recognizes the broad protection the Constitution gives to free speech and religious expression.

For instance, the Supreme Court has held that “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). Religious expression must be protected at least to the same level as secular speech since “religious proselytizing . . . or even acts of worship” are “not excluded from free-speech protections.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

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The Supreme Court in *Board of Education v. Mergens* recited 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 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.*

Military Personnel Retain First Amendment Rights

The military is a unique forum where unique issues of unit discipline and cohesion arise. Still, an individual service member retains the right to free exercise of religion. Free exercise is not limited to a small range of beliefs or exercises of which a government official agrees 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

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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, AFPD 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* 98 (2005). Cohen quotes 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.” *Id.* 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.”

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 run afoul of the establishment clause in that, in so doing, 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. Political activity is an example of a secular activity that must also achieve a similar balance. The rights of service members to engage in political activity must be carefully balanced against the importance of protecting citizens from the military being used as a tool of political pressure for certain candidates or causes.³

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³ Service members are prohibited from undertaking some activities in uniform or when on active-duty that they would otherwise be allowed to do. For instance, service members may not engage in "campaigning for a candidate, soliciting contributions, marching in a partisan parade" or distribute political literature while on active duty, attend a partisan political event in uniform, or engage in any other activity that serves as an implicit endorsement of a candidate or party by the military or a branch of the Armed Forces. Service members may still express political opinions privately, have political bumper stickers on their private vehicles, vote, encourage others to vote, donate to a political cause, attend political events when it is clear that they are there in their private capacity with no inference of official military sponsorship. Department of Defense Directive 1344.10, *Political Activities by Members of the Armed Forces*.

When an activity threatens good order or discipline, 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.*

As a result of these principles the law and current Department of Defense regulations make clear several categories of permissible and impermissible conduct.

The following practices are permitted:

- Service members praying privately or at certain ceremonies
- Chaplains praying in certain ceremonies
- Chaplains or service members serving as lay religious leaders praying “in Jesus’ name” or using similar words. Praying according to conscience is not a violation of the establishment clause and praying “in Jesus’ name” is not proselytization.
- Chaplains giving religion-specific teaching, at events where soldiers attend voluntarily.

The following practices are impermissible:

- Chaplains or superior officers proselytizing to soldiers at events the soldiers are required to attend.
- Officials, whether in the government or armed forces, pressuring or compelling any person to (1) assent with any specific philosophy, religious belief, or creed; (2) participate in a religious worship service against their will (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) engage in a religious act. Note that this list does not include being present at a ceremony or event where a military chaplain gives a solemnizing prayer as this does not pressure any attendee to assent to any belief, participate in worship, or engage in any religious act.
- Military superiors directing chaplains or lower ranked officers to pray in a particular manner.
- Forcing subordinates to hear an unwanted religious or philosophic message

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- 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 or 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.