RELIGIOUS RIGHTS AND MILITARY SERVICE[#]

by

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

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The purpose of this chapter is to discuss the rights guaranteed to, and enjoyed by, members of the Armed Forces of the United States under the Constitution and laws of the United States with respect to free exercise of religion and free expression of religious sentiments. The chapter will also provide suggestions and guidance to Department of Defense (DoD) policy-makers concerning how to ensure that such rights are respected and implemented without infringing on the rights of others and without detracting from the good order and discipline needed within the Armed Services.

INTRODUCTION

We live in a very litigious society, where almost anyone can sue another for virtually any offense, real or imagined. 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

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expression of religion and America's religious heritage by advocating strict separation of church and state.[1] Many of these groups are already actively engaged in filing lawsuits against DoD and its leaders over various concerns about religious expression in the Armed Services.[2] Still others have threatened lawsuits.[3] 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 U.S. law require. In fact, they endanger the very freedoms the First Amendment was intended to protect. Indeed, protecting free exercise of religion is particularly important in the Armed Services because it is a key component in developing and strengthening the Warrior Ethos, an indispensible factor in fighting and winning our Nation's wars. This chapter will examine a number of issues of concern regarding free exercise of religion and religious expression in the Armed Services. It also will suggest ways of protecting Service Members' free exercise and expressive rights while maintaining good order and discipline.

GENERAL LEGAL PRINCIPLES

Separation of Church and State

When discussing free exercise of religion and its limits in the U.S. Armed Forces, one quickly encounters arguments citing the phrase, "separation of church and state." Those making such arguments often use that phrase when what they are really referring to is the Establishment Clause in the First Amendment.[4] In truth, the phrase "separation of church and state" is found nowhere in the U.S. Constitution. Instead, that phrase comes from a letter written in 1802 by President Thomas Jefferson to members of a Baptist association in Danbury, Connecticut.[5] Hence, rather than wasting time trying to determine the meaning of a phrase that does not exist in the Constitution, time would be better spent determining what the drafters of the First Amendment meant by "establishment of religion," a phrase that does exist in the Constitution.

One of the methods used by the Supreme Court of the United States for interpreting the meaning and legal reach of the First Amendment is to examine how early Congresses acted in

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[1]Representative among individuals advocating strict church-state separation are the following: Rev. Barry Lynn, see generally Barry W. Lynn, Piety & Politics: The Right-Wing Assault on Religious Freedom (2007) (advocating the importance of the strict-separationist viewpoint and decrying challenges to that philosophy by the "Religious Right"); Michael "Mikey" Weinstein, see generally Michael L. Weinstein & Davin Seay, With God on Our Side: One Man's War Against an Evangelical Coup in America's Military (2006) (detailing Weinstein's legal fight against a perceived Evangelical Christian takeover of the military, generally, and the U.S. Air Force Academy, specifically); Christopher Hitchens, see Christopher Hitchins, "GI Jesus: The real problem with military chaplains," Slate, Oct. 2, 2006, http://www.slate.com/id/2150801/?nav=ais (criticizing the National Defense Authorization Act of 2007 due to "[l]awmakers arguing seriously over how much religious instruction and rhetoric should be permitted in the [military] ranks and how explicitly monotheistic that instruction and rhetoric ought to be"). Representative among groups advocating strict separation of church and state are the following: Americans United for Separation of Church and State, Freedom From Religion Foundation, American Civil Liberties Union, and Military Religious Freedom Foundation.

[2]See, e.g., Chalker v. Gates, No. 08-CV-2467-KHV-JPO (D. Kan. filed Sept. 25, 2008).

[3]See, e.g., Letter from Deborah A. Jeon, Legal Dir., ACLU of Md., to Vice Admiral Jeffrey Fowler, Superintendent, U.S. Naval Acad. (May 2, 2008) (on file with author) (demanding the cessation of the Naval Academy's traditional noon-meal prayer).

[4]U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion . . . .").

[5]Letter from Thomas Jefferson, President of the U.S., to Danbury Baptist Ass'n of Conn. (Jan. 1, 1802), *in* The American Republic: Primary Sources 72, 75 (Bruce Frohnen ed., 2002).

light of the Amendment's express terms. One can begin to understand what the Establishment Clause allows (and disallows) by examining what transpired in the earliest years of our Nation during the period when Congress drafted the First Amendment and after the states ratified it.[6] For example, "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer,"[7] and a "statute providing for the payment of these chaplains was enacted into law on September 22, 1789."[8] Moreover, within days of legislating to pay congressional chaplains from the federal treasury, "final agreement was reached on the language of the Bill of Rights."[9] From these facts, the Supreme Court concluded that, whatever its ultimate meaning and reach, the Establishment Clause was not intended to forbid paid, legislative chaplains and their daily, public prayers.[10] 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."[11] 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).[12] These practices have continued to this very day.

Early national leaders also acted in ways that some today argue expressly violate the Establishment Clause. For example, President Washington issued proclamations of thanksgiving to Almighty God during his presidency,[13] and President Adams called for a national day of fasting and prayer.[14] President Thomas Jefferson—a man often described as a strong defender of strict church-state separation—signed multiple congressional acts to support Christian missionary activity among the Indians.[15] Further, during his presidency, President Jefferson also developed a curriculum for schools in the District of Columbia which used the Bible and a

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[6]Most agree that, at a minimum, the Establishment Clause was intended to prohibit the creation of a national church for the U.S., such as existed in England. Nevertheless, one must keep in mind that the First Amendment did not preclude individual states from adopting a state church or a state religion. See Carl Zollman, American Church Law 2-4 (W. Publ'g Co. 2d ed. 1933) (1917). In fact, Massachusetts was the last state to disestablish its state church, and it did so of its own accord in 1833, more than forty years after the ratification of the First Amendment. Kelly Olds, "Privatizing the Church: Disestablishment in Connecticut and Massachusetts," 102 J. Pol. Econ. 277, 281-82 (1994).

[7]Marsh v. Chambers, 463 U.S. 783, 787-88 (1983).

[8]Id. at 788.

[9]Id. (citation omitted). The First Amendment is part of the Bill of Rights.

[10]Id.; see also id. at 790 ("It can hardly be thought 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 to forbid what they had just declared acceptable.").

[11]Id. at 792.

[12]See Newdow v. Bush, 355 F. Supp. 2d 265, 270 n.5, 286-87 (D.D.C. 2005).

[13]E.g., Catherine Millard, The Rewriting of America's History 61-62 (1991).

[14]Proclamation of President John Adams (Mar. 6, 1799), *in* 1 A Compilation of the Messages and Papers of the Presidents 1789-1897 284-86 (James D. Richardson ed., 1899).

[15]See Daniel L. Dreisbach, Real Threat and Mere Shadow: Religious Liberty and the First Amendment 127 (1987) (noting that the 1803 treaty with the Kaskaskia Indians included federal funds to pay a Catholic missionary priest; noting further treaties made with the Wyandotte and Cherokee tribes involving state-supported missionary activity).

Christian hymnal as the primary texts to teach reading,[16] and he signed the Articles of War which "[e]arnestly recommended to all officers and soldiers, diligently to attend divine services."[17] Once the U.S. Navy was formed, Congress also enacted legislation directing the holding of, and attendance at, divine services aboard U.S. Navy ships.[18] As one honestly examines governmental acts contemporaneous with the adoption of the First Amendment, it is difficult to deny that, in the early days of our Republic, church and state existed relatively comfortably (and closely) together, with contemporaries of the drafters of the First Amendment showing little concern that such acts violated the Establishment Clause. As the Marsh Court aptly recognized, actions of the First Congress are "contemporaneous and weighty evidence" of the Constitution's "true meaning."[19]

More recent court decisions have confirmed that strict separation between church and state is not required by the Constitution. In fact, the Government must often yield what it might otherwise be able to do to ensure that free exercise rights are protected. In Corporation of Presiding Bishop v. Amos,[20] the Supreme Court noted that "'[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'"[21] Furthermore, permissible religious accommodation need not "come packaged with benefits to secular entities."[22] The Supreme Court has also noted that strict separation could lead to absurd results. In Zorach v. Clauson,[23] the Court stated that the First Amendment

> does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. . . . A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."[24]

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[16]John W. Whitehead, The Second American Revolution 100 (1982) (citing 1 J. O. Wilson, Public School of Washington 5 (1897)).

[17]Charles E. Rice, The Supreme Court and Public Prayer: The Need for Restraint 63-64 (1964).

[18]Act of March 2, 1799, ch. XXIV, 1 Stat. 709 (requiring commanders of ships with chaplains on board "to take care[] that divine service be performed twice a day, and the sermon preached on Sundays"); Act of March 23, 1800, ch. XXXIII, 2 Stat. 45 (directing commanders of ships to require the ship's crew "to attend at every performance of the worship of Almighty God").

[19]Marsh, 463 U.S. at 790 (citation omitted); see also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 328 (1936) (noting that understanding "placed upon the Constitution . . . by the men who were contemporary with its formation" is "almost conclusive") (citation omitted).

[20]483 U.S. 327 (1987).

[21]Id. at 335 (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987)).

[22]Id. at 338.

[23]343 U.S. 306 (1952).

[24]Id. at 312-13; see also id. at 314 (noting "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence").

Rather than a bright line rule, the so-called "wall" separating church and state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship,"[25] and the location of the line separating church and state must be determined on a case-by-case basis.[26] Hence, *strict* church-state separation has never been required in the United States and is not required now.

The United States as a Nation of Laws

The United States is a nation governed by the rule of law. We are also a nation with a robust, yet diverse, religious heritage. That religious heritage is reflected throughout our society—including within the Armed Forces of the United States. In Zorach, the Supreme Court of the United States noted that "[w]e are a religious people whose institutions presuppose a Supreme Being."[27] The Zorach Court continued with that theme: "[The Government] sponsor[s] an attitude . . . that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[28] Elsewhere, the Supreme Court has held that "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the [Government]."[29] As noted in Locke v. Davey,[30] the Establishment Clause and the Free Exercise Clause are frequently in tension.[31] Yet, the Court has long said that "'there is room for play in the joints'" between them.[32] In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause. Moreover, neutrality in religious matters requires that the state neither favor nor disfavor religion. The First Amendment clearly proscribes favoring religion over non-religion or one religion over others, but it likewise proscribes favoring non-religion over religion.[33] In Rosenberger v. Rector and Visitors of University of Virginia,[34] the Court noted that Government neutrality is respected, not offended, when even-handed policies are applied to diverse viewpoints, including religious viewpoints.[35]

In the area of religious expression, the Supreme Court has held that "private religious expression receives *preferential* treatment under the Free Exercise Clause."[36] In fact, "[d]iscrimination against speech because of its message is presumed to be unconstitutional."[37] Of special note, the Supreme Court has "not excluded from free-speech protections religious proselytizing . . . or even acts of worship . . . ."[38] Further, "[t]he [Government's] power to

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[25]Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
[26]Id.
[27]Zorach, 343 U.S. at 313.
[28]Id.
[29]Lee v. Weisman, 505 U.S. 577, 589 (1992).
[30]540 U.S. 712 (2004).
[31]Id. at 718.
[32]Id. (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)).
[33]See, e.g., Abington Sch. Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (noting that the State may "neither favor nor inhibit religion").
[34]515 U.S. 819 (1995).
[35]Id. at 839.
[36]Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (emphasis in original).
[37]Rosenberger, 515 U.S. at 828 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-43 (1994)).
[38]Pinette, 515 U.S. at 760 (citations omitted).

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.'"[39] 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."[40] 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."[41]

The Military in American Society

Another key legal 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 . . . ."[42] "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."[43] In 10 U.S.C. § 654, Congress expressly noted in its findings 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."[44]

Within that specialized military society, the Department of Defense has chosen to strongly support free exercise of religion by the men and women in uniform, and that DoD position deserves due deference from the courts.[45] In Department of Defense Instruction Number 1300.17, 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.[46]

The Military Services concur in the DoD policy. In Air Force Policy Directive 52-1, the Air Force acknowledges free exercise of religion as "a basic principle of our nation" and then declares that "[t]he Air Force places a high value on the rights of its members to observe the

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[39]Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001) (internal citations omitted).
[40]Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).
[41]Id.
[42]Loving v. United States, 517 U.S. 748, 778 (1996) (Thomas, J., concurring) (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).
[43]Brown v. Glines, 444 U.S. 348, 360 (1980).
[44]10 U.S.C. § 654 (a)(8)(A) & (B) (2006).
[45]Id.
[46]Dep't of Defense, Department of Defense Instruction 1300.17: Accommodation of Religious Practices Within the Military Services para. 4 (2009).

tenets of their respective religions. In addition, spiritual health is fundamental to the well being of Air Force personnel . . . and *essential for operational success*."[47] The Air Force defines "Religious Accommodation" as follows:

> Allowing for an individual or group religious practice. It is Air Force policy that we will accommodate free exercise of religion and other personal beliefs, as well as freedom of expression, except as must be limited by compelling military necessity (with such limitations being imposed in the least restrictive manner feasible). Commanders should ensure that requests for religious accommodation are welcomed and dealt with as fairly and as consistently as practicable throughout their commands. They should be approved unless approval would have a real, *not hypothetical*, adverse impact on military readiness, unit cohesion, standards, or discipline. . . .[48]

Similarly, the Department of the Navy (DON) is fully committed to accommodating the religious practices of Sailors and Marines: "The DON recognizes that religion can be as integral to a person's identity as one's race or sex. The DON promotes a culture of diversity, tolerance, and excellence by making every effort to accommodate religious practices absent a compelling operational reason to the contrary."[49] "DON policy is to accommodate the doctrinal or traditional observances of the religious faith practiced by individual members when these doctrines or observances will not have an adverse impact on military readiness, individual or unit readiness, unit cohesion, health, safety, discipline, or mission accomplishment."[50]

In Army Regulation 600-20, the Army recognizes the importance of an individual's spiritual state for "providing powerful support for values, morals, strength of character, and endurance in difficult and dangerous circumstances."[51] Like its sister Services, the Army "places a high value on the rights of its Soldiers to observe tenets of their respective religious faiths. The Army will approve requests for accommodation of religious practices unless accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, discipline, safety, and/or health."[52]

Though not part of DoD, as a uniformed service, the U.S. Coast Guard also supports the free exercise rights of its personnel: "[I]t is Coast Guard policy that commanding officers shall provide for the free exercise of religion by all personnel of their commands."[53]

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[47]Dep't of the Air Force, Air Force Policy Directive 52-1: Chaplain Service intro. (2006) (emphasis added).
[48]Id. attachment 1 (emphasis added).
[49]Sec'y of the Navy, Secretary of the Navy Instruction 1730.8B: Accommodation of Religious Practices para. 1 (2008).
[50]Id. at para. 5.
[51]Dep't of the Army, Army Regulation 600-20: Army Command Policy para. 3-3.b.(4) (2009).
[52]Id. at para. 5-6.a.
[53]Commandant of the Coast Guard, Dep't of Homeland Security, Commandant Instruction M1730.4B: Religious Ministries Within the Coast Guard para. 5.a (1994).

The remainder of this chapter will focus on the following areas: (1) The importance of the free exercise of religion to developing and strengthening the Warrior Ethos; (2) The role and responsibility of military commanders and other leaders in maintaining and protecting the moral and spiritual health of their units, including protecting the free exercise rights of the men and women they lead; (3) The general role of chaplains in assisting commanders in executing the commanders' programs to protect and assist free exercise of religion and of the individual chaplain in meeting the unique needs of service members from the individual chaplain's own faith group while assisting adherents of other faith groups, and of no faith, to obtain the specific help they may be seeking; (4) The rights enjoyed by all members of the armed forces to exercise their faith; (5) Specific examples of permissible religious exercise in the military; (6) Specific examples of impermissible religious conduct in uniform; and (7) Recommendations to policy-makers on how to protect the religious rights of men and women in uniform while maintaining good order and discipline.

MILITARY ROLES, RESPONSIBILITIES, AND RIGHTS

Free Exercise of Religion is Essential for Developing and Strengthening the Warrior Ethos

General George S. Patton aptly noted the following: "[W]ars may be fought with weapons, but they are won by men. It is the *spirit* of the men who follow and the man who leads that gains the victory."[54] Every professional organization has a purpose, its *raison d'être*. To fulfill that purpose, an organization must establish a specific culture to which its individual members subscribe and in which they flourish.[55] The military is the only institution in civilized society whose ultimate purpose is "to kill people and break things."[56] This organizational purpose is unique among professions; not surprisingly, the military has therefore developed a culture that is also unique. This culture, the very "spirit" embodied by military Service Members referred to in General Patton's quotation above, has been dubbed the "Warrior Ethos."

The Warrior Ethos comprises beliefs and attitudes that have been passed down through generations of professional war fighters from time immemorial.[57] These beliefs and attitudes can generally be broken into three disciplines: physical, mental, and moral.[58] Physical prowess has

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[54]Carlo D'Este, Patton: A Genius for War 221 (1996) (citation omitted) (emphasis added); see also John Paul Jones, Personal Journal Entry (1787), *in* 1 Augustus C. Buell, Paul Jones: Founder of the American Navy 286, 287 (1900) ("[M]en mean more than guns in the rating of a ship.").

[55]See Mats Alvesson, Understanding Organizational Culture 1-2 (2002); see also Field Manual 6-22: Army Leadership § 4-46 (Dep't of the Army ed., 2006).

[56]Don Snider, "U.S. Civil-Military Relations and Operations Other Than War," *in* Civil-Military Relations and the Not-Quite Wars of the Present and Future 1, 3 (Vincent Davis ed., 1996) (internal quotation marks omitted).

[57]Christopher Coker, The Warrior Ethos: Military Culture and the War on Terror 141 (2007) (comparing the warrior cultures of the ancient Chinese, Greek, Roman, and Japanese societies); Field Manual 6-22: Army Leadership, supra note 55, §§ 4-47, -51.

[58]See Jamison Yi, "MCMAP and the Marine Warrior Ethos," Mil. Rev., Nov.-Dec. 2004, at 17, 17 (illustrating a "Synergy of Disciplines" via Venn Diagram); see also Air Force Recruiting Serv., Air Force Warrior Facts: Expand Your Training 2 (n.d.) ("It takes a strong *mind*, *body*, and *spirit* to become an Air Force warrior." (emphasis added)); Field Manual 6-22: Army Leadership, supra note 55, §§ 4-47 to -52; H. Michael Gelfand, Sea Change at Annapolis 9 (2006) (listing part of the U.S. Naval Academy's mission as "develop[ing] [midshipmen] morally, mentally, and physically" (citation and internal quotation marks omitted)).

long been a necessary trait of a successful warrior. Whether for a Spartan warrior 2,400 years ago[59] or a current member of the U.S. Armed Services, the rigors of warfare demand that the military professional subscribe to an intense physical regimen.[60] Similarly, professional warriors have cultivated and mastered a specific mental discipline required by the profession of arms. This discipline includes proficiency in one's military specialty[61] as well as a mental toughness that is characterized by "[the ability] to sustain the will to win when the situation looks hopeless and shows no indication of getting better."[62] Lastly, professional war fighters exhibit a certain moral discipline, an "unrelenting and consistent determination to do what is right."[63] War brings difficult choices. Warriors must stand firm, despite temptation to the contrary, in their moral conviction to "*win with honor*."[64]

There are innumerable examples that define the physical, mental, and moral disciplines of the Warrior Ethos; yet, they may be accurately summarized by the following excerpt from the Soldier's Creed: "I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade."[65] Moral discipline is of utmost importance for the professional warrior—and to the Nation. It is critical that one understand the importance of this discipline. Only then can one discern how the conviction to "win with honor" is developed and, finally, how it is maintained.[66]

What differentiates a murderer from a professional warrior? Both take the life of another human being. *Why they kill* differentiates the one from the other. The murderer may kill on a whim or after detailed planning, but usually for his own purposes, while the warrior's killings are constrained by purposes of state and are limited to certain defined instances on the battlefield. What defines the warrior's constraints is *moral discipline*.[67] Without such discipline, that which distinguishes the warrior from the murderer becomes negligible. Moral discipline (1) protects the general population from the warrior's killing and (2) guards the warrior from the psychological damage inherent in being a murderer.[68] Moral discipline is, in essence, the "glue" that holds the Warrior Ethos together and allows the individual warrior to commit otherwise objectionable acts with honor and integrity.

How then is moral discipline developed and maintained? While some may despise or belittle the thought, for many, there is an important, underlying, spiritual aspect to the moral discipline of the Warrior Ethos. This is not to say that a prerequisite for becoming a great warrior is to be religious; there have been, and undoubtedly still are, great professional military

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[59]Humfrey Michell, Sparta 165 (1964).
[60]Yi, supra note 58, at 21 ("Physical discipline consists of armed and unarmed combat techniques combined as part of the USMC Physical Fitness Program . . . [which] develops a Marine's ability . . . [to] overcom[e] physical hardship and obstacles under any climatic condition.").
[61]Id. at 23.
[62]Field Manual 6-22: Army Leadership, supra note 55, § 4-49.
[63]Id. § 4-52.
[64]Id. (emphasis added).
[65]Id. § 4-48.
[66]E.g., id. § 4-53 ("The Warrior Ethos is crucial but also perishable. Consequently, the Army must continually affirm, develop, and sustain it.").
[67]See Shannon E. French, The Code of the Warrior: Exploring Warrior Values Past and Present 1-3 (2005).
[68]Id. at 3-4, 9-10.

men and women who are nonreligious. Nevertheless, it is incontrovertible that many—indeed, most[69]—military Service Members derive their moral beliefs of right and wrong from personal religious beliefs and values.[70] Hence, to successfully develop and maintain the moral discipline of the Warrior Ethos within its organizational structure, the military must provide religious care and encourage religious free exercise amongst its members. To do otherwise places at risk the development of those qualities that define and motivate the Warrior Ethos in the U.S. Armed Forces.

Leaders of military units must understand that, for the vast majority of those serving within their various commands, the moral discipline of the Warrior Ethos is inexorably linked with their religious faith.[71] Thus, to create and maintain an effective fighting force, leaders must make provision for the spiritual well-being of their subordinates.[72] The U.S. military has recently taken great care to rekindle a Warrior Ethos that was, at one time, thought to be endangered.[73] To neglect (or, worse yet, to suppress) the religious aspect of moral discipline would eviscerate the Warrior Ethos and would significantly degrade the military culture necessary for winning on the battlefield.[74]

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[69]David R. Segal & Mady Wechsler Segal, "America's Military Population," Population Bulletin, Dec. 2004, at 25 tbl.5 (reporting the combined percentage of Protestants, Catholics, and "Other Christians" alone at 68% as of 2001; Hindus, Muslims, Buddhists, and Jews were also reported but comprised less than 0.5% each of the total number); see also Barry S. Fagin & James E. Parco, "A Question of Faith: Religious Bias and Coercion Undermine Military Leadership and Trust," Armed Forces J., January 2008, at 40, 42 [hereinafter, Fagin, "A Question of Faith"] (recognizing that "for many, if not most, in the military, religion is part and parcel of their original decision to serve, their loyalty to country and family, and their source of strength in times of great stress").

[70]Field Manual 6-22: Army Leadership, supra note 55, § 4-57 ("Beliefs matter because they help people understand their experiences. Those experiences provide a start point for what to do in everyday situations. Beliefs are convictions people hold as true. Values are deep-seated personal beliefs that shape a person's behavior. Values and beliefs are central to character."); see also id. § 4-59 ("Beliefs derive from upbringing, culture, *religious* backgrounds, and traditions. As a result, different moral beliefs have, and will, continue to be shaped by diverse *religious* and philosophical traditions." (emphasis added)); French, supra note 67, at 3.

[71]See id. § 4-59 ("Beliefs derive from upbringing, culture, *religious* backgrounds, and traditions. As a result, different moral beliefs have, and will, continue to be shaped by diverse *religious* and philosophical traditions." (emphasis added)); see also note 69 (noting that over two-thirds of U.S. Service Members claim religious affiliation).

[72]See Field Manual 6-22: Army Leadership, supra note 55, § 4-58 ("Army leaders should recognize the role beliefs play in preparing Soldiers for battle.").

[73]Coker, supra note 57, at 132-33; Yi, supra note 58, at 17.

[74]Even those otherwise opposed to overt religious expression in the military recognize the importance of religious faith and values to members of the Armed Forces:

> [M]embers of the military live with the fact that they could be asked to surrender their lives at any moment. Those who see combat face life-and-death issues on a regular basis and are forced to grapple with fundamental questions of existence in a way those they protect likely will never face.
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> This means that for many, if not most, in the military, religion is part and parcel of their original decision to serve, their loyalty to country and family, and their source of strength in times of great stress. . . . [I]t's unrealistic to expect the spiritual beliefs of soldiers to vanish once they put on a uniform. . . .

Fagin, "A Question of Faith," supra note 69, at 42.

Role and Responsibility of Military Commanders and Leaders at All Levels in Ensuring Free Exercise Rights

As noted above, life in the military is markedly different from life as a civilian. Good order and discipline are required in the military to ensure that our Armed Forces will be able to carry out their vital duty to defend the United States whenever called upon to do so. Critical to ensuring the readiness of our Armed Forces are the various leaders assigned at all levels of command within each of the Armed Services. The United States military has produced countless military commanders and other leaders who lead by example and model servant leadership for their subordinates. Such leaders take an active interest in their subordinates and their welfare. They demand high standards in training—both of themselves and of the men and women they lead. Further, such leaders give freely of themselves and of their time to mentor their subordinates so that they are properly prepared for the rigors of military life, including, when required, the rigors of combat when life and death decisions demand utmost courage and integrity. Given its level of responsibility, a commander's life is not an easy life. In effect, commanders at every level are responsible for all that their commands do and fail to do; they are responsible for developing and honing the Warrior Ethos in their commands.

Among the many responsibilities that fall on commanders' shoulders is the *responsibility for the moral and spiritual welfare of their subordinates and their family members*.[75] Irrespective of the individual commander's personal religious faith (or lack thereof), he[76] is nonetheless responsible for ensuring that his subordinates' moral and spiritual needs (as well as those of the subordinates' families) are identified and met. Hence, *it is the commander's responsibility to develop the moral/religious program for his command*. It is not (as is often thought) the military chaplain's responsibility, although the chaplain, as a special staff officer, exists, in part, to advise and assist the commander in developing and carrying out the commander's program. Moreover, as with every other command responsibility and command program, the commander is responsible to periodically—and personally—check to ensure that his religious program is being properly executed and is achieving the results intended. Failure to do so constitutes dereliction of duty and is a betrayal of the high trust we place in commanders.

Good commanders are team builders. They lead by example.[77] They model caring, servant leadership. They spend time and share hardships with their subordinates.[78] They are present where the weather is foulest and the training is toughest. They are there at the toughest

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[75]E.g., Chief of Naval Operations, Dep't of the Navy, Operational Naval Instruction 1730.1: Chaplains' Manual § 1301(1) (1973); Dep't of the Air Force, Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force § 3.D.1 (2006); Field Manual 1-05: Religious Support § 1-16 (Dep't of the Army ed., 2003).

[76]The use of "he" and "his" throughout this chapter is simply for convenience and is not intended to demean or denigrate women in uniform or their military service. Women serve with distinction throughout the U.S. Armed Services in virtually every job category, including as commanders and chaplains.

[77]E.g., Army Leader Transitions Handbook 20 (Combined Arms Ctr.–Ctr. for Army Leadership ed., 2008) [hereinafter Handbook] ("You are the role model. . . . Your example speaks for what is acceptable and what is not."). The Handbook is published by the Center for Army Leadership and "contains best practices and proven techniques *from military and civilian sources*." Id. at 1 (emphasis added).

[78]E.g., id. at 14 ("Leave plenty of time for visits to see Soldiers at their duty stations or in training"), 15, 18, 20 ("Meet your troops at ranges, on guard duty and during squad and crew training. Do physical training with different groups regularly.").

times to see that the needs of the men and women in their charge are being adequately met. They are there to ensure that ongoing training meets required standards.[79] They are there to make on-the-spot corrections, where needed, and to give individual and collective praise, where appropriate. They speak to—and with—their subordinates. They listen to what their subordinates have to say, treat them with respect, and answer their questions.[80] Good commanders share the good times—and the bad times—with the men and women they command. By spending time and sharing hardships with their subordinates, good commanders establish mutual trust and confidence.[81] Moreover, American commanders—beginning with General George Washington—have recognized that proper moral and spiritual health is a force multiplier on the battlefield, that it enables and emboldens men and women to perform beyond their perceived, individual limitations to achieve superior, collective results.[82] And successes in wartime begin with training in peacetime. Thus, effectively caring about moral and spiritual health in peacetime contributes to victory and success in wartime—when it really counts.[83]

Role of Military Chaplains in Furthering Free Exercise

Military chaplains are unique members of the United States Armed Forces. By law, they are commissioned officers without command.[84] As such, the chaplain has no command authority, meaning that the chaplain lacks lawful authority "to order a subordinate unit to execute directives or orders."[85] Each chaplain is a member of the clergy of a specific faith group and serves in uniform to represent and propagate the specific teachings of that faith group.[86] Because Christianity, as represented in its myriad forms, is the most widely practiced religion in the

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[79]E.g., id.

[80]E.g., id. at 14, 20 ("Never pass up an opportunity to talk with your Soldiers . . . ."), 25.

[81]E.g., id. at 19, 26.

[82]See Order No. 50 of George Washington to the Continental Army at Valley Forge (May 2, 1778), *in* Revolutionary Orders of General Washington 74, 75 (Henry Whiting ed., 1844) ("While we are duly performing the duty of good soldiers, we certainly ought not to be inattentive to the higher duties of religion. To the distinguished character of a Patriot, it should be our highest glory to add the more distinguished character of a Christian."); see also The Christmas Message and Prayer Sent the Third Army, 1944, *in* Brenton Greene Wallace, Patton & His Third Army app. 7, at 231 (Stackpole Books 2000) (1946) (detailing the prayer sent by General George Patton to the Third Army).

[83]Don M. Snider, Op-Ed., "Intrepidity …. And Character Development Within the Army Profession," Strategic Studies Inst., Jan. 2008, at 2, http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB847.pdf ("'The soldier's heart, the soldier's spirit, the soldier's soul are everything. Unless the soldier's soul sustains him, he cannot be relied on and he will fail himself, his commander, and his country in the end. It is not enough to fight. It is the spirit that wins the victory.'" (quoting General George Marshall)); see also Handbook, supra note 77, at 20 (noting that the commander/leader is "the role model for the ethical and moral climate of the unit" and that the commander's/leader's "example speaks for what is acceptable and what is not" in the unit).

[84]See 10 U.S.C. § 3581 (2006).

[85]Field Manual 1-05: Religious Support, supra note 54, § 3-106.

[86]See, e.g., Dep't of the Navy, United States Navy Regulations: 1990, ch. 8, § 1, art. 0817(2) (1990) ("Chaplains shall be permitted to conduct public worship according to the manner and forms *of the church of which they are members*." (emphasis added)). Legislative chaplains are not so. Legislative chaplains exist, first and foremost, to seek Divine blessings on, and to solemnize the proceedings of, legislators in enacting the statutes that govern us all, not to ensure free exercise of religion by legislators. In the legislative milieu, the chaplain is not hired to represent a specific denomination and, in fact, is not expected to do so. See Andy G. Olree, "James Madison and Legislative Chaplains," 102 Nw. U. L. Rev. 145, 151 (2008).

United States,[87] it is also the religion with the most adherents within the U.S. Armed Forces. Hence, in order to meet the spiritual needs of the U.S. Armed Forces, the majority of U.S. military chaplains represent some denominational variant of the Christian faith. Yet, because beliefs and practices even among Christian groups and denominations differ widely,[88] it is not fully accurate to speak of "Christianity," *per se*, as the largest faith group represented within the U.S. Armed Forces. Instead, one should note the relative sizes of the various Christian denominational groups for purposes of comparison—especially when charging that the military is favoring one faith group over another.[89]

Military chaplains wear multiple hats. They serve, first and foremost, to meet the free exercise needs of the men and women in the U.S. Armed Services.[90] This has been true from the earliest days of our national history and pre-dates the founding of the Republic. Consequently, *military chaplains are selected precisely because they represent specific faith groups and specific theological beliefs*. Each military chaplain is commissioned to meet the free exercise needs of adherents of his specific faith group. As members of the *clergy*, military chaplains are not "fungible" assets. Jewish chaplains are not capable of ministering the rites of the Catholic faith to Catholic Service Members; Methodist chaplains are not capable of ministering the rites of the Islamic faith to Muslim Service Members; Buddhist chaplains are not capable of ministering the rites of the Baptist faith to Baptist Service Members; and so on. Nor may they be compelled to do so.[91]

In their free exercise role, military chaplains also wear a second hat. In addition to assisting adherents of their own faith group, military chaplains exist to support Service Members of other faiths, or no faith, in obtaining the spiritual and/or other assistance that they seek. In that context, military chaplains must be familiar with the beliefs and needs of other faith groups and must do whatever they can to assist the Service Member in contacting a chaplain or civilian clergyman of that Service Member's faith when faith-specific needs require it.[92]

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[87]For information concerning the prevalence of Christianity in the U.S. as a whole, see U.S. Census Bureau, Religious Composition of U.S. Population: 2007 tbl.74 (2008), available at http://www.census.gov/compendia/statab/tables/09s0074.pdf (reporting the combined percentage of Protestants and Catholics in the U.S. at 75.2% as of 2007). For information about the military, see Segal & Segal, supra note 69.

[88]See Religion Facts, Comparison Chart of Christian Denominations' Beliefs, http://www.religionfacts.com/christianity/charts/denominations_beliefs.htm (last visited May 5, 2009).

[89]Whatever else it was understood to mean when drafted and adopted, the Establishment Clause meant that none of the religious groups present at the founding of our Nation would be elevated to become the established, national church of the United States. It is also important to recognize that military commanders have a responsibility to support the free exercise needs of the men and women in uniform. Merely because most of those serving in uniform happen to practice some variant of the Christian faith does not mean that DoD is favoring Christianity over other religious faith groups. As noted above, sheer numbers dictate most chaplains and resources are used to meet the needs of Christian Service Members and their families.

[90]Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985).

[91]See, e.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977) (recognizing that freedom of expression includes the right to refrain from such expression); AFI 52-101 § 2.1 (2005) ("Chaplains do not perform duties that are incompatible with their faith group tenets . . . .").

[92]E.g., Sec'y of the Navy, Secretary of the Navy Instruction 1730.7D: Religious Ministry Within the Department of the Navy para. 5(e)(3) (2008) ("Chaplains care for all Service members, including those who claim no religious faith, [and] facilitate the religious requirements of personnel of all faiths . . . .").

Military chaplains, as commissioned officers in their respective Service, wear a third hat as well. They fulfill a non-faith-specific role. In addition to their faith group responsibilities, military chaplains are special staff officers who assist their respective commanders in developing and carrying out the commanders' moral/religious programs.[93] They are also trained in the areas of counseling and are often relied upon by their commanders to be a non-threatening resource to whom Service Members can turn when they need advice, are in trouble, have emergencies, and so forth.[94]

Because the Government commissions military chaplains due to their membership in specific faith groups (i.e., to meet the free exercise needs of the men and women in uniform) and because it is constitutionally inappropriate for the Government to delve into the details of religious belief and clergy qualification within a specific faith group (i.e., to avoid violating the Establishment Clause by entangling the Government in religious matters), DoD relies on civilian ecclesiastical endorsing agencies to ensure that chaplains seeking to serve in the Armed Forces meet the religious standards required by their respective faith groups.[95] Were a chaplain to lose his denominational endorsement, he would be separated from the military.[96] Hence, *denominational affiliation is the irreducible essence of membership in the chaplaincy of the United States Armed Forces, and as such, military chaplains are intentionally hired, and hence expected, to represent a specific denominational view within the military*. Military chaplains are, in the final analysis, members of the clergy of their specific faith groups who conduct their ministries in uniform.

Finally, neither being paid a salary by the military nor wearing a uniform while performing chaplain duties converts a chaplain's religious message into Government speech which must be squelched to avoid violating the Establishment Clause. As the court in Rigdon v. Perry[97] aptly noted, "[w]hile military chaplains may be employed by the military to perform religious duties, it does not follow that every word they utter bears the imprimatur of official military authority; if anything, the content of their services and counseling bears the imprimatur of the religious ministries to which they belong."[98] From that, the Rigdon court concluded that there was "no need for heavy-handed censorship, and any attempt to impinge on the [chaplain's] constitutional and legal rights [wa]s not acceptable."[99]

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[93]Dep't of Defense, Department of Defense Directive 1304.19: Appointment of Chaplains for the Military Departments para. 4.1 (2004).
[94]Israel Drazin & Cecil B. Currey, For God and Country: The History of a Constitutional Challenge to the Army Chaplaincy 35, 41 (1995).
[95]Id. at 32. DoD can, and does, set neutral criteria that all chaplains—irrespective of faith group—must meet, such as education, health, age, and experience requirements. Dep't of Defense, Department of Defense Instruction 1304.28: Guidance for the Appointment of Chaplains for the Military Departments paras. 6.1 to .4 (2004). However, aside from such neutral criteria, DoD relies on the endorsement by the respective faith group that a chaplain nominee fully meets the religious requirements of his respective faith group.
[96]Drazin & Currey, supra note 94, at 32; Department of Defense Instruction 1304.28: Guidance for the Appointment of Chaplains for the Military Departments, supra note 95, at para. 6.5.
[97]962 F. Supp. 150 (D.D.C. 1997).
[98]Id. at 159.
[99]Id. at 165.

Rights of Individual Service Members to Exercise Their Faith

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.[100] 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 service[101] and the need to maintain good order and discipline,[102] 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, etc.; 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 in youth groups like Young Life or Club Beyond); and the right to participate in activities sponsored by local religious groups or para-church 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

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[100]See, e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

[101]The United States 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 forego 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. E.g., Air Force Policy Directive 52-1: Chaplain Service, supra note 47, at attachment 1; Army Regulation 600-20: Army Command Policy, supra note 51, at para. 5-6.a; Secretary of the Navy Instruction 1730.8B: Accommodation of Religious Practices, supra note 49, at para. 5.

[102]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) (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, e.g., 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").

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.[103] Persons can be offended by both religious and secular sentiments.[104] 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.

EXAMPLES OF PERMISSIBLE RELIGIOUS EXERCISE

Praying by Chaplains at Military Ceremonies and Other Events

Many of the complaints about religious exercise in the military center around prayers proffered by military chaplains at ceremonies or other events where adherents of many different faiths, or persons of no faith, are present.[105] Yet, such prayers have been permitted since the founding of our Nation. Further, the fact that the First Congress established the tradition of clergy-led prayer at presidential inaugurations—in themselves, change of command[106] ceremonies between outgoing and incoming Commanders in Chief—indicates that contemporaries of the First Amendment did not regard such prayers as violating the Establishment Clause. Moreover, in light of the fact that the First Congress commissioned the first chaplain of the Army,[107] and subsequent Congresses appointed the first Navy chaplain and directed that divine worship take place aboard Navy ships,[108] it is inconceivable that those who drafted the First Amendment intended it to prohibit chaplain-led prayers at military ceremonies.

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[103]See Lee, 505 U.S. at 597 (noting that people "may take offense at all manner of religious as well as non-religious messages"); Americans United, 980 F.2d at 1553 (noting the existence of those who see religious endorsement, "even though a reasonable person, and any minimally informed person, knows that no endorsement is intended").

[104]Lee, 505 U.S. at 597 (noting that people "may take offense at all manner of religious as well as non-religious messages").

[105]E.g., Chalker v. Gates, Case No. 08-2467-KHV-JPO (D. Kan. filed Sept. 25, 2008) (where plaintiff complains, *inter alia*, about hearing "sectarian Christian prayers" being delivered at mandatory events). As an aside, one wonders what a "nonsectarian" *Christian* prayer would sound like and whether the plaintiff would have been satisfied had that kind of prayer been offered at the mandatory events. See also Letter from Ezra W. Reese, Counsel to the Military Religious Freedom Found., to Thomas F. Kimble, Acting Inspector General, Dep't of Defense (Dec. 11, 2006) (available at http://www.militaryreligiousfreedom.org/MRFF%20Letters.pdf) (complaining about the promulgation of a Christian video that featured several Pentagon officials extolling, *inter alia*, the virtues of prayer).

[106]Technically, George Washington's inauguration as President under our current Constitution, being the first, was an assumption of command ceremony, not a change of command ceremony, but the principle is exactly the same.

[107]Military Establishment Act of 1791, ch. XXVIII, § 5, 1 Stat. 222.

[108]See Act of March 2, 1799, ch. XXIV, 1 Stat. 709 (requiring commanders of ships with chaplains on board "to take care[] that divine service be performed twice a day, and the sermon preached on Sundays"); Act of March 23, 1800, ch. XXXIII, 2 Stat. 45 (directing commanders of ships to require the ship's crew "to attend at every performance of the worship of Almighty God").

The Marsh Court has aptly recognized that actions of the First Congress are "contemporaneous and weighty evidence" of the Constitution's "true meaning."[109]

Given our long and unbroken history of permitting prayers to solemnize military ceremonies and other events, calling on chaplains to continue such historical practice today merely reflects long-held traditions and constitutes "tolerable acknowledgment[s] of beliefs widely held among the people of this country."[110] Hearing such prayers is also the price one pays for living in a pluralistic society that honors free exercise of religion and free expression of religious sentiments. It is, in fact, a testimony to the religious tolerance that we have been able to achieve in the United States and is something that should be recognized and applauded, not rejected and forbidden.

Some worry that prayers said at military ceremonies will cause discomfort to, or offend, attendees of different faiths, or of no faith. Yet, potential discomfort about things one does not like to hear is, once again, the price one pays for the rights of free speech and free exercise in a pluralistic society. The First Amendment protects speech, including religious speech; it does not—and was never intended to—protect potential hearers against discomfort at what is spoken. Generally, if everyone agrees with what is said, such sentiments need no constitutional protection. Only speech and sentiments which are disfavored or disliked require such protection. In Lee, the Supreme Court explicitly declared that it did "not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."[111] Hence, one must proceed cautiously when one tries to proscribe speech based on highly suspect and subjective standards, such as the potential "discomfort" of the hearers.[112]

The U.S. Navy, for example, has an unbroken tradition of saying a prayer aboard each Navy ship each day.[113] That tradition is consistent with the sanctions of Congress concerning religious activity on board naval ships that were enacted shortly after the adoption of the First Amendment.[114] That, in itself, is strong evidence that such prayers were not considered as violating the Establishment Clause. Similarly, the United States Naval Academy has a 164-year tradition of having a Navy chaplain recite a short prayer before noon meals at the Naval

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[109]Marsh, 463 U.S. at 790 (citation omitted); see also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 328 (1936) (noting that understanding "placed upon the Constitution . . . by the men who were contemporary with its formation" is "almost conclusive" (citation omitted)).

[110]Marsh, 463 U.S. at 792.

[111]Lee, 505 U.S. at 597.

[112]See Rosenberger, 515 U.S. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional." (citing Turner Broad. Sys., 512 U.S. at 641-43)).

[113]See "Chaplain John Maurice Delivers Meaningful Shipboard Prayer on the Eve of the War in Iraq," Mil. Christian (Christian Military Fellowship, Oroville, Cal.), Summer 2003, http://members.iquest.net/~c_m_f/cmfnew56.htm (last visited May 6, 2009); Navy Recruiting Command, Delayed Entry Program, Daily Routine, http://www.cnrc.navy.mil/DEP/daily.htm (last visited May 6, 2009) (including the traditional evening prayer in Navy Recruits' daily schedules); Robert S. Lanham, ENCM (SW/AW), USN, "I Love the Navy," Goat Locker, http://www.goatlocker.org/retire/lovenavy.htm (last visited May 6, 2009) (noting, through poetry, a myriad of naval traditions, including the evening prayer).

[114]Supra note 108 and accompanying text.

Academy.[115] These activities are long-standing traditions in the United States Navy and serve to remind Sailors and Marines of their proud heritage as well as accommodate "beliefs widely held" by the American people.[116]

Praying by Chaplains as Their Faith Tradition Requires or Permits

Some argue that, in order to avoid giving offense, chaplains must—at a minimum—offer only "nonsectarian" prayers when praying at events where adherents of other faiths, and persons of no faith, are present. There are numerous problems with such an argument. One problem is that it is not clear how, or when, an otherwise "sectarian" prayer becomes "nonsectarian"—or who is to judge. As the Tenth Circuit has aptly noted, "all prayers 'advance' a particular faith or belief in one way or another" if for no other reason than "[t]he act of praying to a supreme power assumes the existence of that supreme power."[117] A second problem is that offense at what is being said has never been a valid reason to proscribe such speech. The same is true today. Were our Government or the U.S. Armed Forces ever to adopt the nonsectarian prayer standard, they would then be in violation of the Establishment Clause by preferring one form of prayer (the nonsectarian form) over alternative forms of prayer (the sectarian forms). Such a policy would not only violate the Establishment Clause, but also the free exercise and free speech rights of every chaplain.

The Supreme Court of the United States has held that "[t]he First Amendment's Religion Clauses mean that *religious beliefs and religious expression are too precious to be either proscribed or prescribed by the [Government]*."[118] Lee involved the giving of a "nonsectarian" prayer at a high school graduation ceremony. Much of the criticism about the prayer in Lee centered not only on the fact that school officials selected which clergyman would deliver the prayer but also on the inappropriateness of the school principal's telling the Rabbi that he should render a "nonsectarian" prayer.[119] The Lee Court concluded: "The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, *but the legitimacy of its undertaking that enterprise at all . . . .*"[120] This comment applies with equal force to the oft-expressed desire that military chaplains deliver "nonsectarian" prayers in settings where adherents of other faith groups are present. No one questions the military's good intentions, but, as the Lee Court concluded, adopting such a policy is simply unconstitutional.

Further, any attempt to restrict religious speech (such as a prayer) to avoid causing offense to the hearer is sure to fail. First, the Free Speech Clause of the First Amendment protects free expression from Government interference. And there is no language in the First Amendment that protects a hearer from being offended. In truth, inoffensive speech needs no protection. If everyone were to agree with the sentiment expressed, no one would challenge it, and no protection would be needed. It is *offensive* speech that needs protection. Praying in Jesus' Name is offensive to some, but not to others. Invoking the name of Allah also offends

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[115]Jacqueline L. Salmon, "ACLU Might File Suit to End Lunch Prayer," The Washington Post, June 26, 2008, at B04; see also Charles J. Gibowicz, Mess Night Traditions 115 (2007).
[116]Marsh, 463 U.S. at 792.
[117]Snyder v. Murray City Corp., 159 F.3d 1227, 1234 n.10 (10th Cir. 1998).
[118]Lee, 505 U.S. at 589 (emphasis added).
[119]Id. at 588.
[120]Id. at 588-89 (emphasis added).

some people, but not others. Still others—atheists and agnostics—may be offended by any and all prayer, no matter to what deity it may be directed. Hence, try as one might, one cannot avoid offending someone. Advocating a "Cause-No-Offense" strategy will surely fail. More importantly, it is unconstitutional.

As Justice O'Connor aptly noted in Elk Grove Unified School District v. Newdow,[121] "[g]iven the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the [reasonable observer] test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."[122] Further,

> [t]here is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing . . . simply because a particular viewer of a display [or hearer of a religious sentiment] might feel uncomfortable.
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> *It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [activity] appears*.[123]

Likewise, Service Members are deemed to be "reasonable observers." Consequently, they are deemed to know that chaplains represent different faith groups and traditions and that prayers offered at certain military ceremonies are part of military tradition meant to solemnize the event, *not to endorse the faith or religious sentiments of the chaplain delivering the prayer*. Thus, the Establishment Clause is not violated by an individual chaplain's private choice of words for a prayer to solemnize a military ceremony.

Prayers at presidential inaugurations (which constitute, in fact, change of command ceremonies at the highest level of the Armed Forces) have been delivered by clergymen of many different faiths and have frequently included references to Jesus or the Trinity.[124] Marsh refutes the contention that clergy-led, ceremonial prayer violates the Establishment Clause merely because a particular prayer might reference monotheistic terminology or beliefs. In Marsh, the Court rejected the argument that selection by the Nebraska legislature of a Presbyterian clergyman who chose to pray in the "Judeo-Christian" tradition violated the Establishment Clause. The Court declared: "We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergy man of one denomination advances the beliefs of a particular church."[125] The Court noted that "[t]he content of the prayer is not of concern to judges where, *as here*, there is *no indication that the prayer opportunity has been exploited to proselytize* or advance any one, *or disparage* any other, faith or belief."[126] The same

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[121] 542 U.S. 1 (2004).
[122] Id. at 34-35 (O'Connor, J., concurring).
[123] Pinette, 515 U.S. at 780 (emphasis added); see also Rosenberger, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional.").
[124] See Newdow, 355 F. Supp. 2d at 286-87.
[125] Marsh, 463 U.S. at 793.
[126] Id. at 794-95 (emphasis added).

holds true in the military. Moreover, were the Government to outlaw prayer altogether at military ceremonies and other events, it would demonstrate hostility, not neutrality, towards religion in light of the long history of such prayers in the military and in light of the Supreme Court's recognition that solemnizing, non-proselytizing prayers do not violate the Establishment Clause.

Many of the complaints about prayers in the military revolve around the issue of praying "in Jesus' Name."[127] Not every Christian chaplain feels compelled to pray explicitly in Jesus' Name, but some do. Such differences reflect the religious pluralism not only within American society but also within Western Christianity. Ending a prayer in Jesus' Name (or a similar phrase)—without more—is not proselytizing. To proselytize is defined as "to make or try to make converts."[128] To assert that merely adding the words "in Jesus' Name" to a prayer said in the presence of adherents of different faiths, or persons of no faith, constitutes proselytizing is absurd. Orthodox Christian theology teaches that Jesus *is* God[129]—hence, praying in Jesus' Name is another form of praying in God's Name. There is no principled reason why invoking Jesus by name is any different than invoking the name of Adonai or Allah or Vishnu, something few are suggesting should be forbidden.

Saying a prayer that ends in Jesus' Name clearly identifies the religious faith of the person praying, just as beginning a prayer with the words "In the Name of Allah the Compassionate, the Merciful" identifies the person praying as a Muslim, or invoking the "God of Abraham" before reciting the Shema identifies the person praying as Jewish. None of these prayers—without more—can be remotely construed as constituting proselytizing. Yet, were any of these chaplains to pray in such a manner that the prayer was meant to convince the hearer to adopt the chaplain's specific faith, such a prayer would constitute proselytizing, whether Jesus, the God of Abraham, or Allah were specifically mentioned or not. Hence, fixating on praying explicitly in Jesus' Name, without more, is without merit.

Because chaplains are intentionally brought into the Armed Forces as members of different religious faith groups, the military knows and, indeed, expects that those chaplains will proclaim and practice the tenets of their respective religious faiths in the military.[130] Hence, in such circumstances, as an accommodation to the chaplain's religious obligations, the chaplain must be allowed leeway to pray as his conscience and faith tradition require.[131]

The Constitution prohibits any federal official—including senior civilian leaders, military commanders, and senior chaplains—from directing that a chaplain either pray or refrain from

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[127]E.g., "Efforts Afoot to Protect Military Prayers," WorldNetDaily, Nov. 17, 2005, http://www.worldnetdaily.com/ news/ article.asp?ARTICLE_ID=47432 (describing the backlash following the U.S. Air Force's decision to ban prayers in Jesus's name "in the wake of complaints from non-Christians at the Air Force Academy who believed Christians, both cadets and staff, were being too heavy-handed about their faith on campus").

[128]The New Lexicon Webster's Encyclopedic Dictionary of the English Language 802 (Deluxe ed. 1991).

[129]See John 1:1, 14 ("In the beginning was the Word, and the Word was with God, and the Word was God. . . . The Word became flesh and made His dwelling among us."); 10:30 ("I and the Father are one.").

[130]E.g., Air Force Policy Directive 52-1: Chaplain Service, supra note 47, at para. 3.4.

[131]See Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144-45 (1987) (noting that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause"); Marsh, 463 U.S. at 791-92 (approving legislative prayers from the "Judeo-Christian tradition").

praying in a certain manner, except when required to maintain good order and discipline in the respective Service. *This position comports fully with the Constitution—it avoids Government entanglement with religion, religious beliefs, and religious practices, while upholding the free speech and free exercise rights of military chaplains*.

Chaplains May Prefer Their Own Faith Group in Appropriate Circumstances

Although chaplains exist, in part, to assist commanders in executing their command religious programs for all Service Members in their respective commands, there are nevertheless times when a chaplain may legitimately focus exclusively on his own faith group. The most obvious example is when the chaplain is conducting worship services for adherents of his respective faith and others who are interested in attending such services. Yet, chaplains, as staff officers charged with implementing the commander's religious program, should also be free to advertise religious activities of a specific denominational character via email (and other communications channels) to the same extent that non-religious activities are permitted to be advertised. For example, a Southern Baptist chaplain should be able to advertise a retreat aimed at Southern Baptist Service Members and their families; a Jewish chaplain should be able to advertise High Holy Day service opportunities to Jewish Service Members; a Muslim chaplain should be able to advertise events surrounding the observance of Ramadan, and so forth. In each instance, the advertisement need not be inclusive of other faith groups, or sensitive to those of no faith, and the chaplain should be able to freely share religious sentiments about the events advertised. Moreover, such advertising does not run afoul of the Establishment Clause.[132]

The same is true when a chaplain is teaching the truths of the chaplain's specific faith group to interested Service Members or their family members. Chaplains are selected by faith group to meet the religious needs of adherents of that faith group. Hence, the chaplain need not be inclusive of non-adherents during such times and may be exclusive, without violating the Constitution.

Commanders and Other Leaders May Speak of Religious Matters with Subordinates

Given the hierarchical nature of the military, some argue for the complete prohibition of superiors' discussing their faith with their subordinates or otherwise engaging in religious endorsements in the company of subordinates. Although senior officers and non-commissioned officers must be careful not to impose their religious views on subordinates, an absolute prohibition on all sharing of faith by a superior to a subordinate is patently unconstitutional and an egregious violation of the Free Exercise and Free Speech Clauses.[133] Aside from the difficulty in defining exactly when discussion of religious matters would cross the line from

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[132]See Rosenberger, 515 U.S. at 839 (recognizing that Government neutrality is respected, not offended, when evenhanded policies are applied to diverse viewpoints, including religious viewpoints).

[133]See id. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional." (citing Turner Broad. Sys., 512 U.S. at 641-43)); Pinette, 515 U.S. at 767 (noting that "private religious expression receives preferential treatment under the Free Exercise Clause"); Zorach, 343 U.S. at 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. . . . [The Government] sponsor[s] an attitude . . . that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

protected religious expression to prohibited "proselytizing" and "religious endorsements," however such terms are defined, the First Amendment clearly protects such activity.[134]

Opponents of such interaction simply ignore the fact that it is the *commander* who bears full responsibility for the *moral and spiritual* welfare of his subordinates and their family members.[135] Such persons also fail to take into account that frequent, intimate interaction with one's subordinates is what helps to solidify one's command and create a healthy, effective unit.[136] Hence, speaking on topics of morality and spirituality with subordinates is a necessary part of the commander's job,[137] irrespective of the commander's personal belief system. Further, some of those who complain about such interaction are hypersensitive or hostile to religious matters and may see "proselytizing" or "religious endorsement" where there is none.[138] Individual hypersensitivity to religious discussions and sentiments must not be permitted to interfere with the commander's responsibility to develop and implement an effective program to meet the moral and spiritual needs of the men and women under his command.

An absolute ban on interaction between superiors and subordinates about religious matters, a ban that clearly violates the Constitutional rights of free speech and free exercise, is worse than the putative disease. It denies the commander the access he needs to fulfill his responsibility to develop and implement an effective moral/spiritual program for his command. Surely, the military and civilian chains of command are fully capable of handling isolated incidents of abuse of a superior's position vis-à-vis a subordinate without resorting to a draconian sanction of prohibiting all such interaction between superiors and subordinates. When superiors overstep the bounds of their authority, for whatever reason, the means already exist in the U.S. Armed Forces to appropriately sanction such behavior. Such means run the gamut from verbal or written reprimand to relief for cause, to administrative reduction in rank, to court martial. Recent examples of investigating and/or disciplining senior military officers for misbehavior should suffice to demonstrate that the military services can take care of such problems as they arise, thereby avoiding the need for adopting an absolute policy of forbidding interaction between superiors and subordinates regarding issues of morality and spirituality.[139]

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[134]See Pinette, 515 U.S. at 760-61 (noting that the Free Speech Clause protects, *inter alia*, "religious proselytizing").
[135]Supra note 75.
[136]See Handbook, supra note 77, at 14 ("Open communications early."), 18 ("Spend time . . . talking to Soldiers. . . . Never be too busy to stop and share thoughts and ideas with your subordinates."), 20 (Never pass up an opportunity to talk with your Soldiers . . . ."), 25 ("Spend more time listening and talking to subordinates."), 26 ("As their leader, provide . . . [a]n ear for listening. Listening to your subordinates gives individuals a share in the organization's future.").
[137]See id. at 11 (identifying topics to be addressed with subordinates, including values, ethics, and integrity), 20 ("You are the role model for the ethical and moral climate of the unit. Your example speaks of what is acceptable and what is not.").
[138]See, e.g., Americans United, 980 F.2d at 1553 (noting the existence of those who see religious endorsement, "even though a reasonable person, and any minimally informed person, knows that no endorsement is intended").
[139]E.g., Josh White, "4-Star General Relieved of Duty: Rare Move Follows Allegations of an Extramarital Affair," The Wash. Post, Aug. 10, 2005, at A01; William Fisher, "Jesus Is Not Our Co-Pilot, Academy Insists," AntiWar.com, June 20, 2005, http://www.antiwar.com/ips/fisher.php?articleid=6484 (last visited May 6, 2009); Dave Moniz & Blake Morrison, "General who led Abu Ghraib Prison Guard Unit has been Suspended," USA Today, May 25, 2004, http://www.usatoday.com/news/world/iraq/2004-05-24-abuse-karpinski_x.htm.

Moreover, there is no legitimate reason why commanders cannot mention their educational, professional, and religious backgrounds when introducing themselves to their subordinates. The Army Leader Transitions Handbook, a book for leaders based on the "best practices and proven techniques from military and civilian sources,"[140] declares, for example, that "[t]alking to all your subordinates . . . about what is important to you and what you value as their leader will help establish trust."[141] The Handbook recommends that military leaders discuss the following topics with their subordinates: (1) The leader's background;[142] (2) The leader's expectations and standards;[143] (3) The leader's values;[144] (4) The leader's view of ethics;[145] (5) The leader's objectives for the unit;[146] (6) The leader's thoughts on integrity;[147] (7) The leader's priorities;[148] (8) The leader's standards of discipline;[149] (9) The leader's thoughts on training, education, and safety;[150] (10) The leader's thoughts on leadership;[151] and (11) The leader's thoughts on caring for Soldiers and their families.[152] Sharing such thoughts is essential to informing one's subordinates of what is expected of them from the leader's perspective and what they can expect from the leader in return.[153]

Finally, an obvious example where commanders *must* speak to their subordinates about religious beliefs often occurs aboard ship. On board U.S. Navy ships at sea, "[d]ivine services shall be conducted on Sunday[s] if possible."[154] Because so many Navy ships deploy without a "chaplain attached to the command[,] . . . [s]ervices led by laypersons are encouraged."[155] Regardless of whether a chaplain is embarked, the commanding officer is still responsible for ensuring "[t]he religious preferences and the varying religious needs of individuals [are] recognized, respected, encouraged and ministered to . . . ."[156] Therefore, a commander must ensure that a religious lay leader is capable of adequately fulfilling a role like that of a chaplain so that the free exercise rights of his subordinates are protected. That commander must be free to communicate—in depth—with potential lay leaders to ensure the best quality spiritual care for those under his command.

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[140] Army Leader Transitions Handbook 1 (Combined Arms Ctr.—Ctr. For Army Leadership ed., 2008).
[141] Handbook, supra note 77, at 19.
[142] Id.
[143] Id.
[144] Id. at 11.
[145] Id.
[146] Id.
[147] Id.
[148] Id.
[149] Id.
[150] Id.
[151] Id.
[152] Id.
[153] Id. at 15.
[154] United States Navy Regulations: 1990, supra note 86.
[155] Id. at art. 0817(3).
[156] Id. at art. 0817(2).

All Service Members May Participate in Local Religious Groups and/or Para-Church Groups on Their Free Time

Despite the herculean efforts made by commanders and military chaplains to provide for the free exercise needs of all Service Members and their families, there are times when their efforts fall short of the Service Members' religious needs and desires. As such, when possible, Service Members often avail themselves of religious opportunities in nearby civilian communities and/or participate in para-church groups to meet their spiritual needs. Many religious groups in communities located near military installations offer outreach programs to Service Members and their families, most of whom are far away from their families and friends. Such efforts are to be lauded and encouraged. There are a limited number of chaplains available at any military installation, and it is virtually impossible for them to meet the needs of each denomination or faith group represented by Service Members on that installation. Local and para-church groups help to fill that gap. Such groups may also fill the gap by providing a greater array of religious opportunities throughout the week than can normally be provided by chaplains, thus accommodating the often chaotic schedules that define Service Members' lives. In some instances, without external help, chaplains would simply be unable to meet the spiritual needs of the men and women in uniform that constitute their respective flocks. For example, the Pentagon Chaplain's office comprises three persons whose mission it is to serve the men and women assigned to and working in the Pentagon. Thus, three persons are expected to provide spiritual support to over 24,000 persons,[157] an impossible task. As such, the Pentagon Chaplain must rely on volunteers—often from local religious and para-church groups—to carry out his ministry. DoD and the Armed Services should applaud and encourage the efforts of such groups to minister to the spiritual needs of the men and women in uniform and their families. Working together, they help to ensure that the First Amendment's guarantee of free exercise of religion can be realized by those serving all of us in uniform.

EXAMPLES OF IMPERMISSIBLE RELIGIOUS CONDUCT

No Proselytizing Prayers or Disparaging Other Faiths

Prayers offered by chaplains at military ceremonies and other events are permissible as "a tolerable acknowledgment of beliefs widely held among the people of this country,"[158] even when they are clearly sectarian in nature. Hence, Christian chaplains who believe that they should pray "in Jesus' Name" (or use a similar phrase like "through Jesus Christ our Lord") may do so without violating the Establishment Clause, just as Jewish chaplains may invoke the "God of Abraham, Isaac and Jacob" and Muslim chaplains may invoke "Allah," without violating the Constitution. No chaplain, however, may proselytize while praying at such ceremonies or disparage other faiths.[159]

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[157]The Pentagon, Military, GlobalSecurity.org, http://www.globalsecurity.org/military/facility/pentagon.htm (last visited May 6, 2009).

[158]Marsh, 463 U.S. at 792.

[159]Id. at 794-95. To proselytize is defined as "to make or try to make converts." The New Lexicon Webster's Encyclopedic Dictionary of the English Language 802 (Deluxe ed. 1991). To disparage is defined as "to belittle, deprecate." Id. at 272.

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 *in*appropriate, 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 U.S. 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,[160] (2) to participate in a religious worship service (such as, forcing

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[160]There are a number of suggested alternatives being proffered by well-meaning persons to resolve alleged violations of church-state separation. Yet, some of the proposed cures are fraught with Constitutional infirmities. Among suggested cures, for example, is a proposal to require all commanders to take an oath (called the "Oath of Equal Character"). Fagin, "A Question of Faith," supra note 69, at 43. The Oath of Equal Character reads as follows:

> I am a <[Fill in your belief system (e.g., Christian, Muslim, Jew, atheist, Buddhist, Hindu, Wiccan, nontheist, etc.)]>. I will not use my position to influence individuals or the chain of command to adopt <[Fill in your belief system (e.g., Christianity, Islam, Judaism, atheism, etc.)]>, because I believe that soldiers who are not <[Fill in your belief system (e.g., Christians, Muslims, Jews, atheists, etc.)]> are just as trustworthy, honorable and good as those who are. Their standards are as high as mine. Their integrity is beyond reproach. They will not lie, cheat or steal, and they will not fail when called upon to serve. I trust them completely and without reservation. They can trust me in the same way.

Id. at 43.

The underlying assumptions of the oath appear to suggest that all religious/philosophical belief systems are essentially equivalent and that the adherents of one religious/philosophical system essentially exhibit the same characteristics as adherents of every other religious/philosophical system. Aside from the fact that it is impossible to prove the truthfulness of the underlying assumptions contained in the oath—to wit, about the trustworthiness, dependability, integrity, and the like, of adherents of belief systems other than the oath taker's—and the fact that many could convincingly argue that readily available evidence indicates that such assertions are, in fact, demonstrably untrue, requiring the taking of such an oath would violate a whole host of Constitutional provisions. *First*, it seeks to compel belief in the equivalence of different religions and between religion and non-religion. No Government official may require that. Simply put, things are rarely equivalent, and some things are definitely not equivalent to others. For example, one could legitimately argue that a philosophy or religion that demeaned women would be inferior (and so not equivalent) to one that did not do so. Likewise, a philosophy or religion that preferred one race over another would be inferior (and so not equivalent) to a philosophy or religion that did not do so. *Second*, the undertaking seeks to compel speech with which one may disagree, and freedom of speech includes the right to refrain from expressing ideas with which one disagrees. See Wooley, 430 U.S. at 714 (recognizing that freedom of expression includes the right to refrain from such expression). *Third*, the undertaking seeks to replace the religious/philosophical views held by various commanders—as of right—with a view of religion and its adherents acceptable to the oath's proponents (and, they hope, ultimately the U.S. Government).

Yet, once Government officials put their stamp of approval on a religious belief, they have violated the very Establishment Clause that they were sworn to uphold. The above oath, if required, would violate the Free Exercise, the Free Speech, and the Establishment Clauses of the First Amendment, irrespective of the good

someone to attend a chapel worship service—unless that person is on duty, such as, 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.[161]

Likewise, no official in the U.S. 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.[162]

No Forcing of Subordinates to Hear Unwanted Religious/Philosophic Message as Part of 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

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intentions of those proffering the suggestion. The Supreme Court stated in Lee that "[t]he First Amendment's Religion Clauses mean that *religious beliefs and religious expression are too precious to be either proscribed or prescribed by the [Government]*." 505 U.S. at 589 (emphasis added).

Further, there seems to be a basic nonsequitur in the argument. The authors correctly recognize that "[b]eliefs remain a *right*" and "*freedom of conscience is among the oldest and most precious freedoms enshrined in the history of America's founding*." Id. at 43 (emphasis added). In the very next sentence, they acknowledge, correctly, that members of the Armed Forces take an oath to uphold the Constitution of the United States (including, one presumes, the First Amendment). Id. But then they argue that military leaders who *believe* that adherents of other faiths are less likely to have good character than adherents of the leader's own faith/philosophy should leave the military and seek another career. Id. What happened to the Constitutional "right" of that leader to believe as he does? What happened to that leader's Constitutionally protected "freedom of conscience"? On what legal basis do the authors conclude that those who do not share *their* views on how to resolve potential religious misunderstandings in the military have any less right to remain in the military than those who agree with them? The authors refer to the First Amendment, but that amendment protects the leader's right to believe as he wishes, not as the Government or the authors may prefer. The First Amendment does not stand for what the authors contend. It protects the individual's right to believe against Government coercion or Government-supported orthodoxy, even when the individual's beliefs are strange or offensive.

[161]Merely being present when a prayer is being said does not mean that one is assenting to the sentiments being expressed, that one is actively participating in religious worship, or that one is actively engaging in a religious act. Instead, the Service Member is an observer. People encounter and observe religious ceremonies all the time without their mere presence converting them into participants in the ceremonies. The same is true when present at military ceremonies or formations where a short, solemnizing prayer is said. Solemnizing prayers constitute only a minute part of such ceremonies and, thus, do not convert such gatherings into religious gatherings.

[162]See Lee, 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).

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.[163] 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.

RECOMMENDATIONS

Teach and Foster Tolerance of Differences, Including Religious Differences, During All Phases of a Service Member's Military Career

All of the Armed Services are in the team-building business. Each Service must take men and women from all walks of life and all types of backgrounds and meld them into an effective team. Part and parcel of such a process is educating Service Members about their differences and building understanding, tolerance, and respect for each other despite those differences. Such differences manifest themselves, *inter alia*, through race, ethnicity, creed, gender, and culture. They mirror the American motto: E Pluribus Unum. Each Service Member must learn to tolerate and respect the differences exhibited by his fellows in uniform.

The same is true with respect to religion and chaplains. Religiously, we are a heterogeneous nation, and the military and its chaplains reflect that heterogeneity. Adherents of different faiths approach God differently. That is reflected in many ways, including how they pray. Rather than try to restrict how an individual chaplain prays at certain public events, the chaplain should pray consistent with his conscience and religious tradition. This presents a great opportunity to demonstrate, recognize, and celebrate diversity within the military.

All of the Armed Services have both entry-level schooling for enlisted Service Members and for officers as well as follow-on schooling as officers and enlisted Service Members increase in rank and assume greater responsibilities. Part of the team-building process is noting our differences and encouraging Service Members of all ranks to respect and tolerate those differences. Each member of the military takes an oath to defend the Constitution of the United States against all enemies, foreign and domestic. It should be a relatively simple task to teach enlisted Service Members and officers about the First Amendment's religion clauses and how they play themselves out in the individual Service Member's daily life. Service Members can be taught that commanders are responsible to develop and implement moral and religious programs to meet their free exercise needs; that military chaplains traditionally offer prayers at various military ceremonies (such as, at change of command ceremonies) to solemnize such events; that, due to the heterogeneous nature of religious beliefs in the United States, they are apt to hear prayers said from various religious perspectives; and that such prayers are evidence of the religious tolerance that our country has been able to achieve over time, *not an indication that our Government, DoD, or the Armed Services favor a certain faith group or belief*.

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[163] See supra notes 141-153 and accompanying text.

Reminding the men and women in uniform that chaplains come from differing religious traditions and that their prayers reflect those traditions should be embraced and celebrated, since what we have achieved in the United States differs markedly from many cultures where certain religious groups are often denigrated and marginalized, if not outright persecuted. Because commanders set the tone within their commands, they, too, should receive training at command and staff schools concerning the roles of the chaplains within their commands as well as their responsibilities to ensure that their subordinates and their families may freely exercise their religious faiths. Commanders play the key role in ensuring that a chaplain's free speech and free exercise rights are not violated as well as ensuring that those under their commands understand that allowing a chaplain to pray as he deems appropriate does not constitute Governmental sanction of any particular faith group or religious belief. If this is done evenhandedly by commanders, there should be no reason—real or perceived—to direct how a chaplain should pray. Likewise, there should be no reason for any Service Member to misinterpret or misunderstand why a prayer is being offered or how the respective Armed Service views such prayer. After all, 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."[164] Similarly, reminding the men and women in uniform that their colleagues in uniform also reflect differing religious faiths, including no faith, and that such differences reflect our tolerant society should also be embraced and appreciated.

Tolerance is a two-way street, and military commanders must act as vigorously to protect the majority's free exercise rights as they do to protect the rights of those in the minority. It is a given that the majority religious faith in the United States (and, hence, in the Armed Forces) is the Christian faith, in all its myriad forms. As such, it is the Christian message that will—simply by virtue of the sheer numbers of its adherents—be foremost among the religious sentiments publicly expressed in the military. That does not mean that the military is "favoring" the Christian faith merely because it is so visible, and commanders must always remember that their support of a Service Member's free exercise rights does not mean that the military is establishing religion. Facilitating the free exercise rights of Christians (and of adherents of other faith groups) is a command responsibility and, without more, does not implicate the Establishment Clause.

Because the largest religious faith in the U.S. Armed Forces is some variant of the Christian faith, most complaints are lodged against Christian chaplains and their prayers. Yet, despite opponents' attempts to lump all Christians together in one basket, if one listens closely, one will note that there are a wide variety of messages being shared and proclaimed because not all professing Christians share the same theology, practices, or Biblical interpretation.[165] Hence,

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[164]Mergens, 496 U.S. at 250.

[165]At its most obvious level in the West, one easily notes that Roman Catholics and Protestants share different theological views and practices. There continue to be theological differences separating Roman Catholics from Eastern Orthodox as well. Likewise, there are significant differences in theological beliefs and practices within Protestantism, such as, between liturgical denominations (e,g., Episcopalians, Lutherans) and non-liturgical denominations (e.g., Baptists, Assemblies of God). Then, there are differences between denominations that believe that spiritual gifts (i.e., charismata) are still in use today (e.g., Church of God in Christ (COGIC)) and denominations that believe that such gifts are no longer in use (e.g., Independent Fundamental Churches of America (IFCA)). Further, there are religious groups that do not fall neatly into any category (e.g., Latter-Day Saints (Mormons), Christian Scientists). Even within groups with a common heritage, there can be significant theological differences

to determine whether improper religious favoritism really exists, one must identify the specific Christian denomination that is allegedly being improperly advanced; it is not enough to assert that "Christianity," *per se*, is being favored, as is the habit of some.[166]

In sum, a well-planned and executed program for educating Service Members—at all phases of their careers—about our religious heritage, about chaplains and their roles, about commanders' responsibilities for the moral and spiritual welfare of those they command, and about the First Amendment, will reduce confusion about religious expression in the military and increase appreciation for what we as a Nation, unlike too many others, have been able to achieve in the area of religious tolerance. This relatively easy fix should resolve problems of perceived religious discrimination. Regarding those isolated times when actual religious discrimination occurs, DoD and the uniformed services have ample tools to remedy such violations, and those tools should be used as required.

Trust Military Leaders To Know What Works in Training Effective Teams to Fight Our Nation's Wars

One final topic needs to be addressed: that of training and preparing Service Members to assume the Warrior Ethos described earlier and to carry out their vital mission of national defense. Each military Service is organized, equipped, and staffed to meet recognized military needs. Through long experience, military professionals learn how to train the men and women in uniform to accomplish the missions assigned to them. Because of the uniqueness of military life, what military leaders require for success has no civilian analog. It is, therefore, imperative that military leaders have the freedom to operate and train in ways that meld disparate individuals and units into combat-ready, fighting formations, capable of achieving victory, whenever required. To do this, military commanders need sufficient leeway to apply principles, proven over time, and lessons learned from previous combat to conduct intense, realistic training in peacetime to ensure that our forces are ready to defeat the enemy in wartime. To that end, both the Congress and the courts have recognized that military commanders need flexibility to hone their forces to fighting trim.[167]

(e.g., Evangelical Lutheran Church in America (ELCA) vs. the Lutheran Church-Missouri Synod (LCMS) or the Presbyterian Church (USA) (PCUSA) vs. Presbyterian Church in America (PCA)). In order to accommodate free exercise of religion as much as possible in the military, military chaplains represent many different Christian denominations, based in large part on the relative numbers of adherents of the respective denominations in uniform (i.e., denominations with greater numbers of adherents in uniform are allotted more chaplains than denominations with fewer numbers). See also Religion Facts, Comparison Chart of Christian Denominations' Beliefs, http://www.religionfacts.com/christianity/charts/denominations_beliefs.htm (last visited May 5, 2009).

[166] E.g., Complaint at 3-4, Chalker v. Gates, No. 08-CV-2467-KHV-JPO (D. Kan filed Sept. 25, 2008) (describing the "requirement for [P]laintiff . . . to attend military functions and formations where *sectarian Christian prayers* are delivered" (emphasis added)).

[167] See, e.g., 10 U.S.C. § 164(c) (2006) (delegating substantial authority to military combatant commanders in the performance of their duties); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (acknowledging that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps").

The defense of the Nation is the highest priority of Government,[168] and the Supreme Court has correctly recognized "the limits of its own competence in advancing this core national interest."[169] Many of the complaints raised against DoD in U.S. courts involve Service Members dissatisfied with, and complaining about, something they experienced as part of their training.[170] In such circumstances, the trainee is, in effect, criticizing the training being conducted. This, in itself, constitutes a challenge to the military chain of command, suggests a potential breakdown in good order and discipline within the affected unit, and counsels caution before jumping in to remedy the alleged "violation" of the complaining Service Member's rights. It is wrong (as a matter of policy and common sense) for civilian advocacy groups and civilian attorneys to sue in court to seek to apply civilian standards to military units. Life in the military and life in the civilian world are different, and they need to remain different.

The Armed Forces of the United States have a proven record of success honed over time. Training methods are entrusted to persons in each Service who have proven themselves capable of assuming such heavy responsibilities. Courts and civilian society should defer to their experience and training and should not second-guess their judgment merely because it does not mirror what might be acceptable in civilian society.

In sum, military commanders are entrusted with training our sons and daughters to defend the Nation, as required. Senior military commanders are masters of the profession of arms. They are competent, smart, and dedicated. They are committed to defending the Nation and the Constitution, to the point of laying down their lives on behalf of us all. They deserve our trust in developing and implementing the training regimens that they—in their professional opinions—believe will protect us. When commanders determine that a solemnizing prayer at certain ceremonies is appropriate as a team-building tool, for example, they are acting in accordance with military traditions that pre-date the founding of the Republic, traditions that have been considered important to team-building throughout our history, and consistent with long-held values of the majority of our population—both in civilian society and in uniform. Given the unique nature of the military, such reasoned judgments should be supported, not challenged in court. Nothing in the Constitution requires that Americans shed their religious beliefs and heritage once they don a military uniform, and military commanders have recognized the positive role of religious faith on morale and service consistently over the course of our history.[171] Commanders and leaders at all levels of our Armed Forces are responsible for the

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[168]See Haig v. Agee, 453 U.S. 280, 307 (1981) (noting as "obvious and unarguable" that there is no governmental interest more compelling than security of the nation) (citing Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)).

[169]Loving, 517 U.S. at 778.

[170]See, e.g., Chalker v. Gates, No. 08-CV-2467-KHV-JPO (D. Kan. filed Sept. 25, 2008) (complaining about "sectarian prayers" given at three required formations).

[171]Revolutionary Orders of General Washington, supra note 82, at 74-75 ("The Commander-in-Chief directs that Divine service be performed every Sunday at 11 o'clock, in each Brigade which has a Chaplain. Those Brigades that have none will attend the places of worship nearest them."); "The Prayer at Sumter," Harper's Weekly: A Journal of Civilization, Jan. 26, 1861, *available at* http://www.sonofthesouth.net/leefoundation/major-anderson-ft-sumter_Dir/civil-war-prayer-fort-sumter.htm (describing the dramatic prayer offered by the command chaplain following Major Robert Anderson's raising of the American flag over Fort Sumter just days before the post fell, signaling the start of the Civil War); "Proud to Pay Debt, says Gen. Pershing," N.Y. Times, Dec. 1, 1918, at general sec. ("[General Pershing] paid tribute to the dead and wounded, urged the soldiers to thank God for the victory, and declared that a new vision of duty to God and country had come to all."); James H. O'Neill, "The True Story of the Patton Prayer: The Author of General Patton's Famous Third Army Prayer Reveals the Story of its Origin, Paying

moral and spiritual health of their commands, and they deserve our support and our deferring to their professional judgment when it comes to planning and implementing those training regimens that they believe are necessary to defend the Nation.

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In conclusion, the foregoing examples and recommendations are consistent with our history and fully in accord with the Constitution and laws of the United States. An aggressive education program performed at every level of the Service Member's career should remove any misunderstanding about religious observance and expression in the military and should help each Service Member to understand and appreciate the degree of religious liberty and tolerance that our Nation, unlike many others, has been able to achieve.

Tribute both to the General's Trust in God and to the Power of Faith-filled Prayer," The Review of the News, Oct. 6, 1971, *reprinted in* The New American, Jan. 12, 2004, *available at* http://findarticles.com/p/articles/mi_m0JZS/is_1_20/ai_n25081623?tag=untagged (describing General Patton as a self-proclaimed "firm believer in prayer" as he issued his famous Third Army Prayer to his subordinates); Don M. Snider, supra note 83, at 2 ("'The soldier's heart, the soldier's spirit, the soldier's soul are everything. Unless the soldier's soul sustains him, he cannot be relied on and he will fail himself, his commander, and his country in the end. It is not enough to fight. It is the spirit that wins the victory.'" (quoting General George Marshall)).