



THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

by ROBERT WESTON ASH

AS BOTH A MEMBER OF THE U.S. ARMED FORCES AND A CHRISTIAN, have you ever wondered, “just what exactly are my rights to freely express my faith in Jesus Christ—even while in uniform?” Published in *COMMAND* magazine from December 2009 through April 2011, the six-part *Religious Rights of Those in Uniform* series discussed the rights guaranteed to, and enjoyed by, members of the U.S. Armed Forces under the Constitution and laws of the United States with respect to free exercise of religion and free expression of religious sentiments. The articles examined the importance of religion to establishing and maintaining the Warrior Ethos, applicable legal principles, and the specific rights and responsibilities of military commanders, chaplains, and individuals. Robert Weston Ash is the senior litigation counsel for national security law at the American Center for Law and Justice (ACLJ) in Virginia. He is also an assistant professor of law at Regent University School of Law in Virginia, from where he received his Juris Doctor degree. Robert served twenty-two years active duty in the Army after graduating from West Point.

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THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART I: INTRODUCTION

Editorial Note: This is the first in a series of articles about the religious rights guaranteed to and enjoyed by members of the U.S. Armed Forces under the Constitution and laws of the United States with respect to free exercise of religion and free expression of religious sentiments. This first article introduces the series. Subsequent articles will examine the importance of religion to establishing and maintaining the Warrior Ethos, applicable legal principles, and the specific rights and responsibilities of military commanders, chaplains, and individuals.

THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART I: INTRODUCTION

by ROBERT WESTON ASH

WE LIVE IN A COUNTRY FOUNDED ON BIBLICAL PRINCIPLES. Yet one cannot avoid recognizing that virtually everywhere the public expression of religious sentiments and the public symbols of our biblical heritage are under attack. Recently the Supreme Court of the United States heard arguments to determine whether an unattended cross erected on public property approximately seventy-five years ago to honor fallen service members violates the Establishment Clause of the First Amendment.¹ The original cross was erected in 1934 by the Veterans of Foreign Wars in “Memory of the Dead of All Wars.”² The cross is located in a “remote location” of the 1.6 million acres that make up the Mojave National Preserve in California.³

The closest town is Cima, California, “a town of roughly twenty-one people located within the Preserve,” which is about seven miles from the location of the cross.⁴ The cross is located on the north side of a narrow blacktop road that runs southeast through the Preserve.⁵ Despite its remote location in the Mojave Desert, a resident of Oregon has claimed that he is offended by the presence of the cross and is demanding that it be removed as a violation of the First Amendment’s Establishment Clause.⁶ This complaint is now being seriously considered by the highest court in the land.

This is not an isolated matter. Similar complaints are continually made around the country regarding other religious expression. Such complaints include disputes over the presence of Ten Commandments

monuments on courthouse lawns,⁷ the presence of religious symbols on municipal crests,⁸ the placing of crèches and other religious displays on public property during holidays,⁹ the use by religious groups of otherwise available public buildings,¹⁰ and the saying of prayers at public events.¹¹

One could easily become discouraged, but these situations merely reflect the ongoing spiritual battle for the souls of men and women. Always keep in mind that “greater is He who is in you than he who is in the world.”¹² Remember also that we were once like those who oppose us. We, like they, “were by nature children of wrath”¹³

In these uncertain times, we must stand strong for the Lord, but we also need to pray earnestly that those who oppose us today will someday come to a

[R]emember that you were at that time separate from Christ, excluded from the commonwealth of Israel, and strangers to the covenants of promise, having no hope and without God in the world. But now in Christ Jesus you who formerly were far off have been brought near by the blood of Christ. For He Himself is our peace¹⁴

saving knowledge of Jesus Christ. On that day when we all stand before the Lord, may many who oppose us now rejoice that we did not give up on them, that we earnestly prayed for their salvation, that we shared with them the Bread of Life, and that we spoke to them the truth in love.

The remaining portions of this series will lay out for you the critical importance of religious faith for establishing and maintaining the Warrior Ethos so necessary for fighting and winning our nation's wars. They will also explain your rights and responsibilities under the Constitution and laws of the United States regarding free exercise of religion and the expression of religious sentiments in uniform. Each member of the military chain of command must know both what the law requires and what it allows. In our defense establishment, it is commanders—not chaplains—who are responsible for the spiritual health of their commands and for ensuring that the free exercise

rights of their subordinates are protected. It is also commanders who must ensure that all members of their commands are treated correctly, irrespective of their religious faith or lack thereof. As Christian officers and leaders, that is also our sacred duty, both to believers and non-believers alike. ✠

Robert Weston Ash is an assistant professor of law at Regent University School of Law in Virginia, from which he received his Juris Doctor degree. He is also the senior litigation counsel for national security law at the American Center for Law and Justice (ACLJ). Robert served twenty-two years active duty in the military after graduating from West Point.

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Endnotes

- 1 U.S. Supreme Court, Supreme Court of the United States, October Term 2009: For the Session Beginning October 5, 2009 (2009), available at http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2009.pdf; Brief for the Petitioners at 2, *Salazar v. Buono*, No. 08-472 (U.S. June, 2009).
- 2 Brief for the Petitioners, *supra* note 1.
- 3 *Id.* at 2–3.
- 4 *Id.* at 3.
- 5 *Id.*
- 6 *Id.* at 4.
- 7 E.g., *Van Orden v. Perry*, 545 U.S. 677 (2005).
- 8 E.g., *Webb v. City of Republic, Mo.*, No. 98-3306 (W.D. Mo. Aug. 20, 1999); John Antczak, “ACLU Demands Removal of Cross From Los Angeles County Seal,” *San Diego Union-Trib.*, May 25, 2004, <http://www.signon sandiego.com/news/state/20040525-1848-ca-countyseal-aclu.html>.
- 9 E.g., *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lynch v. Donnelly*, 465 U.S. 668 (1984).
- 10 E.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).
- 11 E.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).
- 12 1 John 4:4 (NASB).
- 13 Ephesians 2:3 (NASB).
- 14 Ephesians 2:12–14 (NASB).



THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART II: WARRIOR ETHOS

Editorial Note: This is the second in a series of articles about the religious rights guaranteed to and enjoyed by members of the U.S. Armed Forces under the Constitution and laws of the United States with respect to free exercise of religion and free expression of religious sentiments. The first article (Command magazine, December 2009) introduced the series. Subsequent articles will examine applicable legal principles, and the specific rights and responsibilities of military commanders, chaplains, and individuals. The extensive footnotes in this series of articles are integral to the author's intent and research, and are therefore included in their entirety.

THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART II: WARRIOR ETHOS

by ROBERT WESTON ASH

GENERAL GEORGE S. PATTON APTLY NOTED: “Wars 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.”¹ 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.² 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.³ These beliefs and attitudes can generally be broken into three disciplines: physical, mental, and moral.⁴ Physical prowess has long been a necessary trait of a successful warrior. Whether for a Spartan warrior 2,400 years ago⁵ or a current member of the U.S. Armed Forces, the rigors of warfare demand that the military professional subscribe to an intense physical regimen.⁶

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 specialty⁷ 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."⁸

Lastly, professional war fighters exhibit a certain moral discipline, an "unrelenting and consistent determination to do what is right."⁹ War brings difficult choices. Warriors must stand firm, despite temptation to the contrary, in their moral conviction to "*win with honor*."¹⁰

The Warrior Ethos 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."¹¹ Moral discipline is of utmost importance for the professional warrior—and to the nation. It is critical to

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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.¹²

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*.¹³ Without such discipline, that which distinguishes the warrior from the murderer appears negligible. Moral discipline also protects the general population from the warrior’s killing and guards the warrior from the psychological damage inherent in being a murderer.¹⁴ Moral discipline is, in essence, the glue that holds the

Warrior Ethos together; it 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. It is incontrovertible that many—indeed, most¹⁵—military service members derive their moral beliefs of right and wrong from personal religious beliefs and values.¹⁶ 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 among its members.

For the vast majority of those serving within the U.S. Armed Forces, the moral discipline of the Warrior Ethos is inexorably linked to their religious faith.¹⁷ Many Christians view military service

as an honorable way to assist civil authorities in discharging their God-given responsibility to counter evil (as in Romans 13). Thus, to create and maintain an effective fighting force, leaders must make provision for the spiritual motivation of their subordinates.¹⁸ 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.¹⁹ ✎

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Endnotes

- 1 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) ("Men mean more than guns in the rating of a ship").
- 2 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).
- 3 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 2, §§ 4-47, -51.
- 4 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 2, §§ 4-47 to -52; H. Michael Gelfand, *Sea Change at Annapolis* 9 (2006) (listing part of the U.S. Naval Academy's mission as "developing midshipmen morally, mentally, and physically" (citation and internal quotation marks omitted)).
- 5 Humfrey Michell, *Sparta* 165 (1964).
- 6 Yi, supra note 4, 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 overcome physical hardship and obstacles under any climatic condition.").
- 7 *Id.* at 23.
- 8 Field Manual 6-22: *Army Leadership*, supra note 2, § 4-49.
- 9 *Id.* § 4-52.

10 Id. (emphasis added).

11 Id. § 4-48.

12 E.g., id. § 4-53 (“The Warrior Ethos is crucial but also perishable. Consequently, the Army must continually affirm, develop, and sustain it.”).

13 See Shannon E. French, *The Code of the Warrior: Exploring Warrior Values Past and Present* 1-3 (2005).

14 Id. at 3-4, 9-10.

15 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”).

16 Field Manual 6-22: Army Leadership, *supra* note 2, § 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 13, at 3.

17 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 15 (noting that over two-thirds of U.S. Service Members claim religious affiliation).

18 See Field Manual 6-22: Army Leadership, *supra* note 2, § 4-58 (“Army leaders should recognize the role beliefs play in preparing Soldiers for battle.”).

19 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:

Members 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.

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. . . . It's unrealistic to expect the spiritual beliefs of soldiers to vanish once they put on a uniform. . . .

Fagin, "A Question of Faith," *supra* note 15, at 42.



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PART III: LEGAL PRINCIPLES

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THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART III: LEGAL PRINCIPLES

by ROBERT WESTON ASH

WE LIVE IN A SOCIETY WHERE MORE AND MORE INDIVIDUALS and groups are attempting to limit public religious exercise and expression. Protecting free exercise of religion is particularly important in the Armed Forces because it is a key component in developing and strengthening the Warrior Ethos, an indispensable factor in fighting and winning our nation's wars. Therefore, we are compelled to examine a number of issues of concern regarding free exercise of religion and religious expression in the Armed Forces.

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.” Yet, that phrase does not come from the U.S. Constitution. It comes from a letter written in 1802 by President Thomas Jefferson to members of a Baptist association in Danbury, Connecticut.¹ Those making separation of church and state arguments often use that phrase when what they are really referring to is the First Amendment’s Establishment Clause: “Congress shall make no law respecting an establishment of religion.”²

Hence, dissecting the phrase “separation of church and state” is a waste of time from a legal standpoint. Time is better spent determining what the drafters of the First Amendment meant by “an establishment of religion,” a phrase that does exist

in the Constitution.

One of the methods used by the U.S. Supreme Court for interpreting the meaning and legal reach of the First Amendment is to examine how early Congresses acted in 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.³ 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.”⁴

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).⁵ 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,⁶ and President Adams called for a national day of fasting and prayer.⁷ During his presidency President Jefferson developed a curriculum for schools in the District of Columbia which used the Bible and a Christian hymnal as the primary texts to teach reading,⁸ and he signed the Articles of War which “earnestly recommended to all officers and soldiers, diligently to attend divine services.”⁹ Moreover, when Congress appointed the first Navy chaplain

it also enacted legislation directing the holding of, and attendance at, divine services aboard U.S. Navy ships.¹⁰

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. Further, 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.

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.” Yet, that phrase does not come from the U.S. Constitution.

In *Corporation of Presiding Bishop v. Amos*,¹¹ the Supreme Court noted that “this 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.”¹² Furthermore, permissible religious accommodation need not “come packaged with benefits to secular entities.”¹³

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,”¹⁴ and the location of the line separating church and state must be determined on a case-by-case basis.¹⁵ 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 U.S. Armed Forces. In *Zorach v. Clausen*, the Supreme Court noted that “we are a religious people whose institutions presuppose a Supreme Being.”¹⁶ The Court has also aptly noted that “the First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the [Government].”¹⁷

The Military in American Society

Another key legal principle to keep in mind concerns the uniqueness of the military in American society. The Department of Defense

has chosen to strongly support free exercise of religion by the men and women in uniform. In DoD 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.¹⁸

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 “the Air Force places a high value on the

rights of its members to observe the tenets of their respective religions. In addition, spiritual health is fundamental to the well being of Air Force personnel . . . and essential for operational success.”¹⁹

Similarly, the Department of the Navy (DON) is fully committed to accommodating the religious practices of Sailors and Marines: “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.”²⁰

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.”²¹ The Army “places

a high value on the rights of its Soldiers to observe tenets of their respective religious faiths.”²²

Though not part of DoD, as a uniformed service, the U.S. Coast Guard also supports the free exercise rights of its personnel: “It is Coast Guard policy that commanding officers shall provide for the free exercise of religion by all personnel of their commands.”²³

In conclusion, the free exercise of religion and free expression of religious sentiments are consistent with our history and fully in accord with the Constitution and laws of the United States. ✎

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Endnotes

- 1 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).
- 2 U.S. Const. amend I (emphasis added).
- 3 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).
- 4 *Marsh v. Chambers*, 463 U.S. 783, 787-88 (1983).
- 5 See *Newdow v. Bush*, 355 F. Supp. 2d 265, 270 n.5, 286-87 (D.D.C. 2005).
- 6 E.g., Catherine Millard, *The Rewriting of America's History* 61-62 (1991).
- 7 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).
- 8 John W. Whitehead, *The Second American Revolution* 100 (1982) (citing 1 J. O. Wilson, *Public School of Washington* 5 (1897)).
- 9 Charles E. Rice, *The Supreme Court and Public Prayer: The Need for Restraint* 63-64 (1964).
- 10 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").

11 483 U.S. 327 (1987).
12 Id. at 335 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987)).
13 Id. at 338.
14 *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).
15 Id.
16 343 U.S. 306, 313 (1952).
17 *Lee v. Weisman*, 505 U.S. 577, 589 (1992).
18 Dep't of Defense, Department of Defense Instruction 1300.17: Accommodation of Religious Practices Within the
Military Services para. 4 (2009).
19 Dep't of the Air Force, Air Force Policy Directive 52-1: Chaplain Service intro. (2006) (emphasis added).
20 Id. at para. 5.
21 Dep't of the Army, Army Regulation 600-20: Army Command Policy para. 3-3.b.(4) (2009).
22 Id. at para. 5-6.a.
23 Commandant of the Coast Guard, Commandant Instruction M1730.4B: Religious Ministries Within the Coast Guard
para. 5.a (1994).



THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART IV: INDIVIDUAL'S ROLES & RIGHTS

Editorial Note: The purpose of this series of articles 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. This fourth article addresses the specific rights of individual military service members. Subsequent articles will address the rights and responsibilities of military commanders and chaplains. The extensive footnotes in this series of articles are integral to the author's intent and research, and are therefore included in their entirety.

THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART IV: INDIVIDUAL MILITARY SERVICE MEMBERS' ROLES, RESPONSIBILITIES, RIGHTS

by **ROBERT WESTON ASH**

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—and not what some attorney says it means or is willing to tolerate. Further, the right to free exercise of religion applies to all members of the Armed Forces—irrespective of their rank or station¹—because the First Amendment guarantees the right to free exercise to every American.

Subject to the demands of military service² and the need to maintain good order and discipline,³ 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 Officers' Christian Fellowship).

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 extended 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 many 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.

Free Exercise Requires Tolerance Among Religious Believers and Between Believers and Non-Believers

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 a Service's team-building process is noting our differences (including religious differences) and encouraging service members of all ranks to respect and tolerate those differences. Service members can and must be taught that commanders are responsible to develop and implement moral and religious programs to meet their free exercise needs; that military chaplains assist commanders in their responsibilities and 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 that our government, DoD, or the Armed Forces favor a certain faith group or belief.

It is not a difficult concept to understand that our government “does not endorse or support ...speech that it merely permits on a nondiscriminatory basis.”⁴ Similarly, our colleagues in uniform reflect differing religious faiths, including no faith, and such differences reflect our tolerant society.

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.

In sum, nothing in the Constitution requires that Americans shed their religious beliefs and heritage once they don a military uniform. ✂

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Endnotes

- 1 One must nonetheless keep in mind that senior officers and NCOs/POs must take special care not to force their religious or philosophical views on their subordinates.
- 2 The United States Armed Forces operate 24 hours per day, every day of the year. As such, service members 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.
- 3 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”).
- 4 *Mergens*, 496 U.S. at 250.



THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART V: COMMANDERS' ROLES & RIGHTS

Editorial Note: This is the fifth in a series of articles about the rights guaranteed to, and enjoyed by, members of the U.S. Armed Forces under the Constitution and laws of the United States with respect to free exercise of religion and free expression of religious sentiments. This article addresses the roles and responsibilities of military commanders.

THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART V: MILITARY COMMANDERS' ROLES, RESPONSIBILITIES, RIGHTS

by ROBERT WESTON ASH

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.¹ Irrespective of a commander's personal religious faith, he² is responsible for ensuring that the moral and spiritual needs of his subordinates and their families are identified and met. Hence, commanders are responsible to develop the moral/religious program for their commands. It is not the chaplain's responsibility, although chaplains advise and assist commanders in developing and carrying out commanders' programs.

Good commanders are team builders. They lead by example.³ They model caring and servant leadership, and they spend time with their subordinates.⁴ They are present where the weather is foulest and the training is toughest to ensure that the needs of the men and women in their charge are being adequately met and that ongoing training meets required standards.⁵ They make on-the-spot corrections, where needed, and give individual and collective praise, where appropriate. They listen to what their subordinates have to say, treat them with respect, and answer their questions.⁶ Good commanders share the good times—and the bad times—with those they command to establish mutual trust and confidence.⁷ Beginning with General George Washington, American commanders have recognized that moral and spiritual health is a force multiplier on the battlefield, and that it enables service members to perform beyond their perceived limitations to

achieve superior, collective results.⁸ Success in wartime begins with training in peacetime. Thus, concern for moral and spiritual health in peacetime contributes to success in wartime—when it really counts.⁹

Commanders and Other Leaders May Speak of Religious Matters with Subordinates

Given the military's hierarchical structure, some argue against superiors' discussing their faith with subordinates or expressing religious sentiments where subordinates are present. Although senior personnel may not impose their religious or philosophical views on subordinates, prohibiting all sharing of faith by a superior to a subordinate is patently unconstitutional and violates the Free Exercise and Free Speech Clauses.¹⁰ Aside from the difficulty in defining exactly when religious discussion would cross the line from protected

religious expression to prohibited “proselytizing” and “religious endorsements,” the First Amendment clearly protects such activity.¹¹ 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 based on the “best practices and proven techniques from military and civilian sources,”¹² declares that “talking to all your subordinates . . . about what is important to you and what you value as their leader will help establish trust.”¹³ The Handbook recommends that military leaders discuss the following topics, among others, with subordinates: (1) the leader’s background,¹⁴ (2) his expectations and standards,¹⁵ (3) his values,¹⁶ (4)

his view of ethics,¹⁷ (5) his thoughts on integrity,¹⁸ (6) his standards of discipline,¹⁹ and (7) his thoughts on leadership.²⁰ Such sharing is essential to informing subordinates of what is expected of them by the leader and what they can expect from the leader in return.²¹

No Compulsion in Belief or Practice

No U.S. official—regardless of rank or station—may compel or pressure any person (1) to assent to any specific philosophy or religious creed, (2) to participate in a religious worship service (such as 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

Beginning with General George Washington, American commanders have recognized that moral and spiritual health is a force multiplier on the battlefield, and that it enables service members to perform beyond their perceived limitations to achieve superior, collective results.⁸

(3) to engage in a religious act (even so simple an act as being asked to join hands with others when a short prayer is said over a holiday meal in a 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.²² Likewise, no U.S. official—regardless of rank or station—may compel or pressure a chaplain (or any other person) to pray in any particular manner. Instead, the person praying should follow his conscience and faith group traditions and pray as he deems appropriate in the circumstances. Allowing a person to pray as he deems appropriate does not violate the Establishment Clause, whereas directing him to pray in a certain way does violate the Establishment Clause.²³

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

No commander or leader may create a captive audience where he intends to use the opportunity to convince those in attendance to assent to his religious faith or secular philosophy. This does not mean that commanders or leaders may not mention their religious faith or upbringing when introducing themselves to subordinates.²⁴ Such information informs the commander's/leader's subordinates about himself and his standards and is permissible, provided that the commander/leader makes clear that he will judge his subordinates solely on that person's duty performance, character, and integrity.

In sum, military commanders are entrusted with training our sons and daughters to defend the nation. Senior military leaders 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 our behalf. 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 an appropriate teambuilding tool, they are acting in accordance with military traditions that pre-date the founding of the Republic, traditions that have been considered important to teambuilding throughout our history, and consistent with long-held values of the majority of our population. Commanders and leaders at all levels of our military are responsible for the moral and spiritual health of their commands. They deserve our support and our deferring to their professional judgment when it comes to planning and implementing specific training regimens that they believe are necessary to defend the nation. ✎

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Endnotes

1 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).

2 The use of "he" and "his" throughout this article is for convenience and not intended to denigrate women or their military service. Women serve with distinction throughout the military in virtually every job category, including as commanders and chaplains.

3 See, 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.").

4 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.").

5 E.g., id.

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

7 E.g., id. at 19, 26.

8 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).

9 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 the spirit that wins the victory." (quoting General George Marshall)).

10 See *Rosenberger v. Rector*, 515 U.S. 819, 828 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.” (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994))); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (noting that “private religious expression receives preferential treatment under the Free Exercise Clause”).

11 See *Pinette*, 515 U.S. at 760-61 (noting Free Speech Clause protects, *inter alia*, “religious proselytizing”).

12 Handbook, *supra* note 3, at 1.

13 *Id.* at 19.

14 *Id.*

15 *Id.*

16 *Id.* at 11.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 15.

22 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.

23 See *Lee v. Weisman*, 505 U.S. 577, 588-89 (1992) (noting that it is inappropriate for a government official to tell a member of the clergy how to pray).

24 See *supra* notes 13-21 and accompanying text.



THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART VI: CHAPLAINS' ROLES & RIGHTS

Editorial Note: The purpose of this series of articles 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. This sixth and final article addresses the roles, responsibilities, and rights of military chaplains.

THE RELIGIOUS RIGHTS OF THOSE IN UNIFORM

PART VI: MILITARY CHAPLAINS' ROLES, RESPONSIBILITIES, RIGHTS

by **ROBERT WESTON ASH**

Military chaplains are unique members of the United States Armed Forces. By law, they are commissioned officers without command.¹ As such, the chaplain has no command authority.² Each chaplain is a member of the clergy of a specific faith group and serves in uniform to represent and propagate the teachings of that faith.³ Because Christianity, as represented in its myriad forms, is the most widely practiced religion in the United States,⁴ it is also the religion with the most adherents within the U.S. military.

Hence, in order to meet the spiritual needs of the military, the majority of chaplains represent some variant of the Christian faith.

Military chaplains wear multiple hats. They serve, first and foremost, to meet the free exercise needs of the men and women in uniform.⁵ This has been true from the earliest days of our history and predates the founding of the Republic. Consequently, military chaplains are selected precisely because they represent specific faith groups and specific theological beliefs. Each chaplain is commissioned to meet the free exercise needs of adherents of his specific faith. As clergymen, 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.⁶

In their free exercise role, chaplains also wear a second hat. In addition to assisting adherents of their own faith, chaplains support service members of other faiths, or no faith, in obtaining the assistance that they seek. Thus, 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.⁷

Chaplains wear a third hat as well. They fulfill a non-faith-specific role. In addition to their religious responsibilities, chaplains are special staff officers who assist their respective commanders in developing and carrying out the commanders’ moral/religious programs.⁸ Chaplains are also trained as counselors and are a non-threatening resource to whom service members can turn when they need advice, are in trouble, have emergencies,

and so forth.⁹

To avoid being unconstitutionally entangled in religious matters, DoD relies on civilian ecclesiastical endorsing¹⁰ agencies to ensure that chaplains seeking to serve in uniform meet the religious standards required by their respective faith groups.¹¹ Were a chaplain to lose his denominational endorsement, he would be separated from the military.¹² Hence, denominational affiliation is the irreducible essence of membership in the military chaplaincy, and as such, military chaplains are intentionally hired, and hence expected, to represent a specific denominational view within the military. Chaplains are simply members of the clergy of specific faith groups who conduct their ministries in uniform.

Finally, neither being paid 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.¹³

Chaplains and Public Prayer

Many of the concerns about religious exercise in the military center around prayers proffered by chaplains at events where adherents of different faiths, or persons of no faith, are present.¹⁴ 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 command¹⁵ 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, since the First Congress commissioned the first Army chaplain,¹⁶ and subsequent Congresses appointed the first Navy chaplain and directed that worship take

place aboard Navy ships,¹⁷ it is inconceivable that those who drafted the First Amendment intended it to prohibit chaplain-led prayers at military ceremonies.

Given our long and unbroken history of permitting prayers to solemnize military events, having chaplains 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.”¹⁸ Hearing such prayers is the price one pays for living in a pluralistic society that honors free exercise of religion and free expression of religious sentiments. It is a testimony to the religious tolerance that we have been able to achieve and is something to be recognized and applauded, not rejected and forbidden.

The U.S. Navy, for example, has an unbroken tradition of saying a prayer aboard each Navy ship each day.¹⁹ 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.²⁰ That is strong evidence that such prayers were not considered as violating the Establishment Clause. Similarly, the U.S. Naval Academy has a 164-year tradition of having a Navy chaplain recite a short prayer before noon meals at the Naval Academy.²¹ These activities are long-standing Naval traditions that remind Sailors and Marines of their proud heritage as well as accommodate “beliefs widely held” by the American people.²²

Chaplains and Faith-Specific Prayers

Some argue that, in order to avoid giving offense, chaplains must offer only “nonsectarian” prayers when praying at events where adherents of other faiths, and persons of no faith, are present. Such arguments are problematic. First, it is not clear

how, or when, an otherwise “sectarian” prayer becomes “nonsectarian”—or who is to judge. After all, “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.”²³ Second, taking offense at what is being said has never been a valid reason to proscribe speech. The same is true today. If U.S. officials ever adopted the nonsectarian prayer standard, they would violate the Establishment Clause by preferring one form of prayer (nonsectarian) over alternative forms of prayer (sectarian). Such a policy would violate the Establishment Clause as well as every chaplain’s free exercise and free speech rights.

Likewise, service members are deemed to be “reasonable observers.” Consequently, they are deemed to know that chaplains represent different faiths and traditions and that prayers offered at military events 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 a chaplain’s private choice of words solemnizing a military event.

If the government outlawed prayer altogether at military events, it would demonstrate hostility, not neutrality, towards religion, given the long history of such prayers in the military and the Supreme Court’s recognition that solemnizing, non-proselytizing prayers do not violate the Establishment Clause.

Many of the complaints about prayers at military events concern the issue of praying “in Jesus’ name.”²⁴ Not every Christian chaplain feels compelled to pray in Jesus’ name, but some do. Such differences reflect 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 “to make or try to make converts.”²⁵ To assert that merely adding the words “in Jesus’ name” to a prayer said in the presence of non-adherents of that faith constitutes proselytizing is absurd. Orthodox Christian theology teaches that Jesus is God²⁶—hence, praying in Jesus’ name is another form of praying in God’s name. Saying a prayer that ends in Jesus’ name 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 construed as proselytizing. Yet, were any chaplain

to pray in a manner meant to convince the hearer to adopt the chaplain’s faith, such a prayer would constitute proselytizing, whether Jesus, the God of Abraham, or Allah were specifically mentioned or not. Hence, fixating on praying in Jesus’ name, without more, is groundless.

Because chaplains are intentionally brought into the military as members of different religious faiths, the military knows and expects those chaplains to proclaim and practice the tenets of their respective religious faiths in the military.²⁷ Hence, in such circumstances, to accommodate the chaplain’s religious obligations, the chaplain must be allowed leeway to pray as his conscience and faith tradition require.²⁸

Because chaplains are intentionally brought into the military as members of different religious faiths, the military knows and expects those chaplains to proclaim and practice the tenets of their respective religious faiths in the military.²⁷

When Chaplains May Prefer Their Own Faith

Although chaplains assist commanders in executing command religious programs for all service members in their commands, there are times when a chaplain may focus exclusively on his own faith group. The most obvious example is when the chaplain is conducting worship services for adherents of his faith and others interested in attending such services. Yet, chaplains should also be free to advertise religious activities of a specific faith via email (and other communications channels) to the same extent that non-religious activities may be advertised. For example, a Baptist chaplain should be able to advertise a retreat aimed at 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 faiths, or sensitive to those of no faith, and the chaplain should be able to freely share religious sentiments about the events advertised. Such advertising does not run afoul of the Establishment Clause.²⁹

Chaplains may also favor their faith when teaching the truths of their faith to interested service members or their family members. Chaplains are selected to meet the religious needs of adherents of their faith. Hence, the chaplain need not be inclusive of non-adherents during such times, without violating the Constitution.

What is Prohibited to Chaplains

Prayers offered by chaplains at military events are permissible as “a tolerable acknowledgment of beliefs widely held among the people of this country,”³⁰ even when they are faith-specific. No

chaplain, however, may proselytize while praying at such events or disparage other faiths.³¹

Teaching the strictures and beliefs of one's faith, even when they contradict beliefs of another faith, does not constitute disparaging the other faith, provided that such teaching occurs 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 concerning Mohammed's prophetic office, a key Islamic teaching not shared by Christians, does not disparage Christianity. Such faith-specific teaching is inappropriate, however, where service members and their families are otherwise required to be present (i.e., where they

are a captive audience).

Religiously, we are a heterogeneous nation, and the military chaplaincy reflects that heterogeneity. Rather than restrict how an individual chaplain expresses his faith, the chaplain should be free to act consistently with his conscience and faith tradition. ✎

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Endnotes

- 1 See 10 U.S.C. § 3581 (2006).
- 2 Field Manual 1-05: Religious Support, *supra* note 54, § 3-106.
- 3 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 different. Legislative chaplains exist 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. See Andy G. Olree, "James Madison and Legislative Chaplains," 102 Nw. U. L. Rev. 145, 151 (2008).
- 4 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).
- 5 *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985).
- 6 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 . . .").
- 7 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 . . .").
- 8 Dep't of Defense, Department of Defense Directive 1304.19: Appointment of Chaplains for the Military Departments para. 4.1 (2004).
- 9 Israel Drazin & Cecil B. Currey, *For God and Country: The History of a Constitutional Challenge to the Army*

Chaplaincy 35, 41 (1995).

10

11 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).

12 Drazin & Currey, *supra* note ix, at 32; Department of Defense Instruction 1304.28: Guidance for the Appointment of
Chaplains for the Military Departments, *supra* note x, at para. 6.5.

13 See *Rigdon v. Perry*, 962 F. Supp. 150, 159 (D.D.C. 1997) (attributing a chaplain’s words to his faith group, not the
military).

14 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).

15 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 remains the same.

16 Military Establishment Act of 1791, ch. XXVIII, § 5, 1 Stat. 222.

17 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”).

18 *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

19 See, e.g., “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).

20 Supra note 16 and accompanying text.

21 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).

22 Marsh, 463 U.S. at 792.

23 Snyder v. Murray City Corp., 159 F.3d 1227, 1234 n.10 (10th Cir. 1998).

24 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").

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

26 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").

27 E.g., Air Force Policy Directive 52-1: Chaplain Service, at para. 3.4.

28 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").

29 See *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 839 (1995) (recognizing that Government neutrality is respected, not offended, when evenhanded policies are applied to diverse viewpoints, including religious viewpoints).

30 Marsh, 463 U.S. at 792.

31 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.