

# Religious Freedom for Soldiers and Military Chaplains

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Evangelical Christians are committed to fostering faith and religious freedom. We understand the call to faith and the eternal importance of each person answering that call and living it without governmental interference. We reject the old model in which a government established the one "true" religion and either persecuted or tolerated disfavored religions. The old model was founded upon the discredited notion that "error has no rights." We understand that all men and women have the right to exercise their religion because, owing their very lives to the One who made and sustains them, they must worship and honor the Lord. Others also respect religious freedom because they, too, know the innate dignity of humankind.

Religious freedom is the distinctive characteristic of the American project — what Roger Williams called "the lively experiment." It is not a gift from the state as the English Parliament understood when, in 1689, it assumed authority to establish one religion, tolerate a few others, and persecute the rest.<sup>1</sup> Rather, it is an inalienable right that precedes the state itself. Defining the content of religious freedom requires care and an understanding of context. This is especially so in the lives of soldiers, military chaplains, and their families because of the common interplay between government and faith, freedom, and order in military life.

The National Association of Evangelicals (NAE) sponsors its Commission on Chaplains and Military Personnel, a endorsing body that identifies evangelical ministers eligible to serve as chaplains in the United States Army, Navy, Air Force, Marines, and Coast Guard. The NAE represents men and women exercising their faith while serving in the United States military. As an endorser of military chaplains, the NAE has a special interest in ensuring that those who have answered the call of their country have the opportunity to exercise their faith. Men and women willing to serve must neither be deprived of the challenge nor the comfort of faith. The National Association of Evangelicals, therefore, respectfully offers this Statement as a guide to religious practice in military life.

## **Religion and Military Life**

Soldiers commit to offer their lives in the nation's service. They submit to discipline and often suffer deprivation and stress. They accept separation from family and home. They move to foreign lands. They face danger, loneliness, loss,

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<sup>1</sup> This statement was prepared with legal review by L. Martin Nussbaum, Esq. and Eric V. Hall, Esq. of the Religious Institutions Group at Rothgerber Johnson & Lyons LLP. "Soldiers" is used herein to include all those who serve in the United States Army, Navy, Air Force, Marines, and Coast Guard.

<sup>2</sup> English Act of Toleration of 1689 (entitled "An Act for Exempting their Majesties Protestant Subjects, Dissenting from the Church of England, from the Penalties of certain laws").

and death. Soldiers are authorized by their country to take the lives of others. Because of this extraordinary work, many soldiers have increased desire and need for faith. They need and desire the daily practice, comfort, counsel, and challenge of religion.<sup>2</sup>

## History of Religion in Military Life

Respect for and accommodation of the religious practices of American soldiers precedes the founding of our nation. Indeed, this respect, manifested, in part, by the provision of military chaplains is woven into the fabric of our founding, our history, and our laws.<sup>3</sup>

Colonel George Washington provided for the religious needs of his troops. In 1758, during the French and Indian War, Virginia created regimental chaplaincies at his request. Virginia's chaplains came not only from the established Church of England but also from the Baptist Church, a minority religion.<sup>4</sup> Thirty-one chaplains, including Congregationalists, Presbyterians, Baptists, and Anglicans served the troops during that conflict.<sup>5</sup> When "Washington assumed command of the Continental Army at Cambridge, Massachusetts, chaplains were already present for duty." He "count[ed] fifteen chaplains serving the twenty-three regiments gathered around Boston."<sup>6</sup> On July 29, 1775, the Continental Congress officially recognized the chaplains and provided for their compensation.<sup>7</sup> The following year, Washington ordered the "Colonels or commanding officers of each regiment to procure Chaplains accordingly; persons of good Characters and exemplary lives [who would ensure] that all officers and soldiers ... attend carefully upon religious exercises."<sup>8</sup> On April 19, 1783, eight days after Congress declared an end to the Revolutionary War, Chaplain John Gano "led the assembled personnel in a prayer of thanksgiving for independence and victory from the doorway of the first Army chapel ..."<sup>9</sup>

Robert L. Cord describes how Congress continued Washington's care for the religious needs of the American soldier:

The First Congress did more than provide for a Chaplain system of its own — by a law enacted

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<sup>2</sup> See *Katcoff v. Marsh*, 755 F.2d 223, 227-28 (2d Cir. 1985) (noting soldiers' "increased needs for religion as the result" of the nature of their work); *Anderson v. Laird*, 466 F.2d 283, 313, n.26 (D.C. Cir. 1972) (MacKinnon, J., dissenting) (describing the "tremendous religious revival" during the Civil War).

<sup>3</sup> See discussion in 1 Anson Phelps Stokes, *Church and State in the United States* 267-72 (1950); *Katcoff*, 755 F.2d 223 (2d Cir. 1985) (military chaplains constitutional). Cf. history of legislative chaplains as described in *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

<sup>4</sup> 1 Stokes, *supra*, at 268.

<sup>5</sup> *Id.*; William J. Hourihan, *A Brief History of the United States Chaplain Corps: Pro Deo et Patria* Ch. 1 at 3 (2004) (reprinted at [www.usachcs.army.mil/history/brief/chapter\\_1.htm](http://www.usachcs.army.mil/history/brief/chapter_1.htm)). See also P. Thompson, *The United States Army Chaplaincy* (1978).

<sup>6</sup> Hourihan, *supra*, Ch. 1 at 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, Ch. 1 at 5.

<sup>9</sup> *Id.*, Ch.1 at 6.

March 3, 1791, it authorized the President, “by and with the advice and consent of the Senate,” to appoint a chaplain for the “Military Establishment of the United States.” The compensation for the chaplain was to be “fifty dollars per month, including pay, rations, and forage.” This statute was superseded by “An Act for making farther and more effectual Provision for the Protection of the Frontiers of the United States,” passed by the Second Congress and also providing for a chaplain at the pay of fifty dollars monthly.

The Third Congress further enlarged the U.S. Military Establishment with the passage of “An Act to provide a Naval Armament,” on March 27, 1794. This federal law provided for a United States Navy with “one chaplain” which was to be paid “forty dollars per month and two rations per day.”<sup>10</sup>

Some 3,000 chaplains served the Union Army in the Civil War; 2,300 in World War I; and over 8,000 in World War II.<sup>11</sup> These chaplains, many of whom sacrificed their lives to tend to the spiritual needs of American soldiers, exemplify the care the United States has taken to ensure that those removed from their home synagogues, churches, and mosques might still participate in religious study, fellowship, counsel, and worship.

### **Social Benefits of Religion in Military Life**

Soldiers of faith are not the only beneficiaries of vital religious practice in military life. A vital religious environment benefits the military itself which has long recognized that religion helps develop soldiers’ character and morality.<sup>12</sup> Religion helps soldiers meet the problems inherent in military life.<sup>13</sup>

The military has long shown other Americans the possibilities of pluralism. Soldiers have modeled how to live together despite deep differences. Anson Phelps Stokes noted:

[Among the advantages of life in the Revolutionary] army ... was that those who served broadened their outlook both with reference to their own denomination and their political allegiance. They came in contact with men of different religious bodies from different parts of the country and gained respect for them. They increasingly felt that they were fighting not for their colony only, but for the united colonies which were to form a new nation. Massachusetts Congregationalists, Rhode Island Baptists, New York Episcopalians and Dutch Reformed, New Jersey Presbyterians, Pennsylvania members of many small Protestant sects ..., Maryland Roman Catholics, and a scattering of Jews ...

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<sup>10</sup> Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 54 (1982). See also *Katcoff*, 755 F.2d at 225 (“In providing our armed forces with a military chaplaincy Congress has perpetuated a facility that began during Revolutionary days before the adoption of our Constitution, and that has continued ever since then, with the size of the chaplaincy growing larger in proportion to the increase in the size of our Army.”).

<sup>11</sup> Hourihan, *supra*, Ch. 3 at 1; Ch. 5 at 1; Ch. 6 at 5. By 1981, the U.S. Army alone had “1,427 active-duty commissioned chaplains, 10 auxiliary chaplains, 1,383 chaplain’s assistants, and 48 Directors of Religious Education.” *Katcoff*, 755 F.2d at 225.

<sup>12</sup> *Anderson v. Laird*, 466 F.2d at 306 (MacKinnon, J., dissenting).

<sup>13</sup> *Katcoff*, 755 F.2d at 226.

met in the same camps and gained a new idea of the need and possibility of religious tolerance. Such an intermingling of men of different religious faiths and backgrounds had not taken place before in America except in a few of the larger cities, and in three or four small universities ...<sup>14</sup>

By living and working together, religiously diverse troops in the Revolutionary Army anticipated the promise of religious pluralism, freedom, and non-establishment that became one of the great historical achievements of the American experiment. By learning to respect each other in a context of religious diversity, the American military was well prepared to subsequently show civilian society how to prosper amidst religious and, later, racial diversity.

### Legal Sources of Religious Freedom

Many constitutional provisions and federal statutes and regulations protect the religious freedom of military personnel and chaplains. Even before the adoption of the First Amendment, the Constitution endorsed principles of non-preferentialism and accommodation. By allowing the solemn declaration of the truthfulness of testimony by either religious oath or secular affirmation, the Constitution accommodated Quakers, Mennonites, and Jews who had religious objections against swearing.<sup>15</sup> By prohibiting religious tests for public office, it endorsed the principle that government may not prefer one denomination or religious group over another.<sup>16</sup>

The primary legal sources protecting the religious freedom of soldiers and military chaplains are the First Amendment — including its Free Exercise, Establishment, Speech, and Assembly Clauses — and the Religious Freedom Restoration Act of 1993 (“RFRA”).<sup>17</sup> Further protections are articulated in the Act Regarding Religious Apparel While in Uniform<sup>18</sup> and the military rules and regulations related to religion.<sup>19</sup>

### Legal Principles and Values

Before considering governmental policies regarding religious exercise in military life, it is helpful to identify the values that should inform such policies. Some of these values are from the law, and some come from pastoral and prudential judgments. Others are derived from common sense. They are:

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<sup>14</sup> 1 Stokes, *supra*, at 268.

<sup>15</sup> U.S. Const., arts. I § 3; II § 1; VI. Mennonites and Quakers strictly applied Mt. 5:34 (“Do not swear at all.”) and James 5:12 (“But above all, my brethren, do not swear, either by heaven or by earth or with any other oath, but let your yes be yes and your no be no, that you may not fall under condemnation.”). Because of explicitly Christian language appended to many oaths, Jews were foreclosed from giving testimony or holding office preceded by such oaths.

<sup>16</sup> U.S. Const., art. VI.

<sup>17</sup> 42 U.S.C. § 2000bb.

<sup>18</sup> 10 U.S.C. § 774.

<sup>19</sup> See e.g., *Department of Defense (“DoD”) Directive 1300.17* “Accommodation of Religious Practices Within the Military Services”; *Air Force Policy Directive 52-1*; *Air Force Instruction 52-101*; *Air Force Instruction 36-2903*, Table 2.6, Items 15-16; Table 2.9; *Army Regulation 165-1*; *Naval Regulation 0817*.

1. Soldiers have a right to the daily practice, counsel, comfort, and challenge of religion.<sup>20</sup>
2. When soldiers model how to live and work together in an environment that is religiously, ethnically, and racially diverse, military society and American society benefit.
3. Because of their isolation from civilian society and their duty to relocate far from home, soldiers and their families often cannot exercise their religion unless the government makes religion available to them through chaplains, chapels, accommodation, and religious assistance. Making religion available to soldiers and their families is a crucial governmental imperative.<sup>21</sup>
4. Accommodation of religion is commonplace in hundreds of federal and state statutes and regulations, and it stands in the worthiest tradition of promoting free exercise and helping avoid governmental entanglement with religion.<sup>22</sup> The accommodation of religion, *permitted* by government in non-military settings, is *required* in military settings<sup>23</sup> because soldiers would otherwise be deprived of the ability to exercise their faith.<sup>24</sup>
5. Government may not favor one religion over another.<sup>25</sup>

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<sup>20</sup> See U.S. Const. amend I; 42 U.S.C. § 2000bb; 10 U.S.C. § 774; and related regulations.

<sup>21</sup> Adair v. England, 183 F.Supp.2d 31, 51 (D.D.C. 2002) (“making religion available to soldiers qualified as a crucial imperative”).

<sup>22</sup> Government accommodates religion by granting religious exemptions from laws, regulations, and rules that burden the practice of religion. See, e.g., 42 U.S.C. § 2000bb (Religious Freedom Restoration Act’s religious exemption from federal law); 42 U.S.C. § 2000cc (Religious Land Use and Institutionalized Persons Act’s religious exemption from land use regulations and regulations affecting prisoners); 42 U.S.C. § 2000e-1(a) (exempting religious organizations from the Civil Rights Act’s command that employer may not discriminate on the basis of religion); 26 U.S.C. § § 3309 (exempting religious organizations from federal unemployment tax); 26 U.S.C. § 6033 (exempting religious organizations from requirement of filing information tax returns); Walz v. Tax Commission, 397 U.S. 664, 673 (1970) (religious organization property tax exemptions).

<sup>23</sup> Cutter v. Wilkinson, 125 S.Ct. 2113 (2005); Hobbie v. Unemployment Appeals Comm. of Florida, 480 U.S. 136, 144-45 (1987) (“the government may [and sometimes must] accommodate religious practices and that it may do so without violating the Establishment Clause”); Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (same); Mueller v. Allen, 463 U.S. 388, 393 (1983) (“One fixed principle in this field is our consistent rejection of the argument that ‘any program which in some manner aids an institution with a religious affiliation’ violates the Establishment Clause.”).

<sup>24</sup> Katcoff, 755 F.2d at 228 (“[The military] owes [soldiers] a duty to satisfy their Free Exercise rights, especially since the failure to do so would diminish morale, thereby weakening our national defense.”); *id.* at 232 (“[The Army] could be accused of violating the Establishment Clause unless it provided [soldiers] with a chaplaincy since its conduct would amount to inhibiting religion.”) (emphasis in original); *id.* at 234 (“It is readily apparent that [the Free Exercise] Clause, like the Establishment Clause, obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them. Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses of the First Amendment.”). See also DoD Directive 1304.19 “Appointment of Chaplains for Military Departments” § 4.2 (“commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility”).

<sup>25</sup> Larson v. Valente, 456 U.S. 228 (1982); Adair v. England, 183 F.Supp.2d 31, 51 (D.D.C. 2002) (applying Free Exercise, Establishment, and Speech Clauses as well as equal protection analysis to strike down Navy’s allocation of chaplaincies favoring liturgical churches). “[T]he Fifth Amendment’s Due Process Clause includes an equal-protection component that can be applied

6. Government may not target one religion for particular burdens.<sup>26</sup>
7. Government may not entangle itself in core ecclesiastical subject matters, including the manner in which a military chaplain teaches, counsels, hears confessions, preaches, or conducts religious services for those who voluntarily seek his or her ministry.<sup>27</sup>
8. When a generally applicable law, regulation, or order that includes a system of individualized exemptions, burdens religious exercise, it must give way to the religious exercise unless it serves a compelling governmental interest through the means least restrictive on the religious exercise.<sup>28</sup>
9. While other types of generally applicable laws, regulations, or orders burdening religious exercise may require the government to provide only a justification of rationality to satisfy the Free Exercise Clause,<sup>29</sup> this is not so under the Religious Freedom Restoration Act. RFRA applies to the federal government in civilian and military settings alike.<sup>30</sup> Under RFRA, a generally applicable law that substantially burdens religious exercise must give way to the religious exercise unless it serves a compelling governmental interest through the means least restrictive on the religious exercise.<sup>31</sup>

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to potential equal-protection violations by the federal government.” *Id.* at 53 n.22 (citing Bolling v. Sharpe, 347 U.S. 497, 498-500 (1954)).

<sup>26</sup> Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993) (“Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”).

<sup>27</sup> See e.g., Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) (government may not become entangled in matters touching upon “questions of discipline, or of faith, or ecclesiastical rule, custom, or law”); Mabus v. St. James Episcopal Church, 884 So.2d 747, 764 (Miss. 2004) (collecting cases rejecting clergy malpractice claims because government may not set standards of care for ministerial practices); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (church-minister relationship is intrinsically religious and beyond government purview); United States v. Ballard, 322 U.S. 78 (1944) (protecting church communications from governmental oversight); Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002) (protecting both church communications and church-minister relationship from government oversight); Rigdon v. Perry, 962 F.Supp. 150 (D.D.C. 1997) (military chaplains may preach freely at voluntary worship service, despite orders to limit content of preaching). See also discussion regarding military chaplains, *infra*; Montano v. Hedgepeth, 120 F.3d 844, 850 (8th Cir. 1997) (“It is hard to imagine any greater affront to the First Amendment than a state’s attempt to influence a prison chaplain’s interpretation and application of religious dogma.”); Air Force Instruction 52-101 § 4.1 (chaplain may not disclose confession); Army Regulation 165-1 § 4-4(m) (same) M.C.M. While the application of the church autonomy legal principle would not protect fraud or collusion by a military chaplain or a religious institution, see, e.g., Jones v. Wolf, 443 U.S. 595, 609 n.8 (1979) (fraud and collusion exception to church autonomy doctrine); Serbian Eastern Orthodox Diocese v. Milivojevic, 426 U.S. 696, 713 (1976) (same), courts have not identified other limitations of this doctrine in a military setting. See also n. 51, *infra*.

<sup>28</sup> Lukumi, 508 U.S. at 543; Employment Div. v. Smith, 494 U.S. 872, 884 (1990); Sherbert v. Verner, 374 U.S. 398 (1963); Fraternal Order of Police v. City of Newark, 170 F.3d. 359, 365 (3d Cir. 1999) (concluding “the [police] Department’s decision to provide medical exemptions [to a no-beards policy] while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny”).

<sup>29</sup> Employment Div. v. Smith, 494 U.S. 872 (1990).

<sup>30</sup> 42 U.S.C. § 2000bb.

<sup>31</sup> 42 U.S.C. § 2000bb-1. Courts and governmental officials must apply RFRA with the rigor respecting religion exemplified in Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963). 42 U.S.C. § 2000bb(b)(1). When balancing the governmental interest, the Sherbert Court emphasized: “It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘(o)nly the gravest abuses, endangering paramount [governmental] interest, give occasion for possible limitation,’” of the affected religious exercise. Sherbert, 374 U.S. at 406.

10. The weighing of a governmental interest that burdens religious exercise in a military setting, as required under the previous two paragraphs, must be informed and fair. It should never be predetermined or based on mere speculation.<sup>32</sup> Indeed, history has repeatedly shown that when "military need" is invoked to justify overriding free exercise and speech rights, there is a particular risk that unfounded fear will triumph over religious rights.<sup>33</sup>
11. The amount of religious exercise permitted in military life is not determined by the person most sensitive to or offended by the religious exercise. In other words, there is no "heckler's veto."<sup>34</sup>

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<sup>32</sup> Brown v. Polk County, Iowa, 61 F.3d 650, 656-57 (8th Cir. 1995) (en banc).

<sup>33</sup> The lessons of Gobitis and Korematsu must not be forgotten. In 1940, contemporaneously with the fall of France to Hitler's Army, the United States Supreme Court found no constitutional impediment for a Pennsylvania school board to expel Lillian and William Gobitas (the Supreme court spelled the Gobitas name incorrectly in the title of the case), aged ten and twelve, from a public school for refusing to salute the flag even though their Jehovah's Witness' faith, founded upon Exodus 20, stopped them from "bowing down before any graven image." Gobitis v. Minersville Sch. Dist., 310 U.S. 586 (1940). The Gobitis court reasoned that compulsory flag salute by pre-teens served the national interest by instilling the "binding tie of cohesive sentiment" which is "[t]he ultimate foundation of a free society." Id. at 597. Upon cooler reflection, the court reversed itself three years later in West Virginia v. Barnette, 319 U.S. 624 (1943). See Shawn Francis Peters, Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution 19-72, 230-60 (2000).

In 1944, the Supreme Court found no constitutional impediment with the internment of over 100,000 Japanese Americans because military authorities speculated that Japanese Americans — unlike their German American or Italian American counterparts—might engage in espionage or sabotage. Korematsu v. United States, 323 U.S. 214 (1945). President Gerald Ford apologized for this error during the 1976 bicentennial celebration of the Constitution. Geoffrey R. Stone, Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism 305 (2004). In 1983 the Congressional Commission on Wartime Relocation and Internment of Civilians determined that the factors informing the internment decision "were race prejudice, war hysteria and a failure of political leadership." Id. at 306. Congress effectively nullified Korematsu by enacting the Civil Liberties Act of 1988, 50 U.S.C. app. § 1989(b) (1996), which "declared the Japanese internment a 'grave injustice' that was 'carried out without adequate security reasons'" and which provided reparations to the internees. Stone, *supra*, at 307.

Even outside of wartime, the United States Supreme Court so overly deferred "to the judgment of military authorities" that it permitted an Air Force regulation forbidding indoor wearing of "headgear" to prevent an Orthodox Jewish psychiatrist, serving as a colonel in a military hospital, from wearing a yarmulke. Goldman v. Weinberger, 475 U.S. 503 (1986). The Court permitted this prohibition of a Jewish airman's religious exercise even though Colonel Goldman had worn his yarmulke within the hospital for eight years without detrimental effect to military order, id. at 504-05; even though the Court found it to be only a "modest departure from the uniform regulation [that] create[d] almost no danger of impairment of the Air Force's military mission," id. at 511 (Stevens, J., concurring); even though Air Force regulations permitted the wearing of non-visible religious garments at all times and visible "headgear" for indoor religious services, id. at 509, AFR 35-10 ¶ 1-6.h(2)(d) (1980); and even though "covering [one's] head before an omnipresent God" was "one of the traditional religious obligations of a male Orthodox Jew." Goldman, 475 U.S. at 514 (1986) (Brennan, J., dissenting). Congress, unhappy with the Supreme Court's overemphasis of "military need," effectively reversed Goldman by establishing that soldiers should be permitted to wear items of religious apparel while in uniform, so long as it is neat, conservative, and unlikely to interfere with the performance of his or her duties. 10 U.S.C. § 774.

<sup>34</sup> Lee v. Weisman, 505 U.S. 577, 597 (1992) ("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."); Brown v. Polk County, Iowa, 61 F.3d 650, 659 (8th Cir. 1995) (en banc) ("A phobia of religion, no matter how real subjectively, will not do."). The United States Supreme Court rejected the "heckler's veto" argument made by Justice William Brennan in dissent, against legislative prayer. See Marsh v. Chambers, 463 U.S. 783, 819-21 (1983) (Brennan, J., dissenting) (listing types of objections individuals might have to legislative prayer).

12. Nurturing diverse religious voices helps avoid an establishment of religion.<sup>35</sup>
13. The government, including its military leadership, may not mandate chapel attendance.<sup>36</sup>
14. Historical patterns of religious practices in military life, especially when approved of by the First Congress or the founders, not only shed light on what the draftsmen intended the Establishment Clause to mean, but also on how they thought it applied to the religious practice they authorized.<sup>37</sup>
15. In religious matters, courtesy aids diversity. Differences of opinion about religion are often deeply felt. Whether they are religious or not, soldiers and chaplains should be respectful of others about matters of faith and religion.

## Importance of Context

The American model of religious freedom is a precious constitutional inheritance that each generation must steward. The good judgment of individual service soldiers, military officials, members of Congress, and judges is required to apply the legal principles and values identified above.

Context matters. A commander may not, for example, order his or her troops to Catholic mass, but the commander may attend and join in worship without restraint. A military chaplain may preside, preach, or pray in sectarian language with a like-minded congregation that has voluntarily assembled. The same chaplain ought to use the more inclusive language of civic faith when praying at memorials or convocations with religiously diverse audiences.

With these general principles in mind, it is appropriate to turn to some specific contexts.

## Military Chaplains

Military chaplains serve the religious needs of soldiers and their families.<sup>38</sup> They provide pastoral care, preside at

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<sup>35</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (in religion context: “We sponsor an attitude on the part of government 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.”); Federalist No. 10 (James Madison) (recognizing that while a “religious sect may degenerate into a political faction . . . , the variety of sects dispersed over the entire face [of the nation] must secure the national councils against any danger from that source”); Federalist No. 51 (James Madison) (“In a free government the security for civil rights must be the same for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . .”). Freedom of speech, similarly, is nurtured by more speech, not less. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (in the speech context: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (“we depend for . . . correction [of a false idea] not on the conscience of judges and juries but on the competition of other ideas.”).

<sup>36</sup> *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (mandatory chapel attendance at military academies unconstitutional). See *West Virginia v. Barnette*, 319 U.S. 624 (1943) (Jehovah’s Witness’ children may not be forced to salute the flag).

<sup>37</sup> *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“An Act ‘passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.’”) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 267 (1888)).

<sup>38</sup> *Army Regulation* 165-1 § 4-4(a); *Katcoff v. Marsh*, 755 F.2d 223, 226 (2d Cir. 1985) (“The primary function of the military chaplain is to engage in activities designed to meet the religious needs of a pluralistic military community, including military personnel and their dependents.”); *Navy Chaplains Manual* § 1102.

worship, and advise commanders regarding religious and moral issues.<sup>39</sup>

Chaplains occupy a unique place in military life<sup>40</sup> for they are, at once, *ministers* attached to and endorsed by a religious community<sup>41</sup> and *officers* of a military branch.<sup>42</sup> Their special role requires them, literally and figuratively, to wear both the vesture of their faith tradition and the uniform of their military branch.<sup>43</sup>

As officers, chaplains have rank but no command.<sup>44</sup> They are noncombatants.<sup>45</sup> Under the Geneva Conventions, chaplains may not be considered “prisoners of war” and may be detained only if they are needed to offer religious assistance to other prisoners.<sup>46</sup> When detained, chaplains, like doctors, may continue to assist others.<sup>47</sup> When American forces detain enemy combatants, chaplains advise their commanders of their obligation to provide for the religious needs of those captured.<sup>48</sup>

The sponsoring religious body is primarily responsible for providing training and education of those eligible to be endorsed as chaplains. Military officials should accommodate the different ways that various faith groups use to

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<sup>39</sup> See *Air Force Policy Directive* 52-1 (introductory paragraph); *Army Regulation* 165-1 § 4-4(a); *Navy Chaplains Manual* § 1102; SECNAVINST 1730.7b.

<sup>40</sup> The unique place of chaplains in the military is illustrated by comparing *Goldman v. Weinberger*, 475 U.S. 503 (1986) and *Geller v. Secretary of Defense*, 423 F.Supp. 16 (D.D.C. 1976). In the former, Air Force officer Simcha Goldman, an Orthodox Jew and ordained rabbi, was denied the religious right to wear a yarmulke, in contravention of *Air Force Regulation* 35-10, which prohibited all headgear indoors. In the latter, however, Michell Geller, a Jewish Air Force chaplain, was permitted to defy a different portion of the same Air Force Regulation, 35-10, which prohibited facial hair, on free exercise grounds. The only distinguishing factor between Goldman and Geller was that the latter was a chaplain. It is also worth noting that, in December 1987, Congress reversed the Supreme Court’s decision in *Goldman* when it enacted Public Law 100-180 § 508, codified at 10 U.S.C. § 774; *Navy Chaplains Manual* § 1203.

<sup>41</sup> *Army Regulation* 165-1 § 4-3(b); *Katcoff*, 755 F.2d at 225.

<sup>42</sup> *Army Regulation* 165-1 § 4-3(a) (“Army chaplains have a dual role as religious leaders and staff officers.”); *Navy Chaplains Manual* § 1202.

<sup>43</sup> *Army Regulation* 165-1 § 4-4(d) (“When conducting religious services, a chaplain will wear the military uniform, vestments, or other appropriate attire established by church law or denominational practice; (chaplain’s scarf, stole, or tallit may be worn with the uniform) (see AR 670–1).”); *Rigdon v. Perry*, 962 F.Supp. 150, 159-60 & n.7 (D.D.C. 1997).

<sup>44</sup> 10 U.S.C. § 8581 (“An officer designated as a chaplain has rank without command.”) (Air Force statute); 10 U.S.C. §§ 3293, 3581 (Army); *Katcoff*, 755 F.2d at 225; *Rigdon*, 962 F.Supp. at 157.

<sup>45</sup> *Air Force Instruction* 52-101 § 2.1.3 (“Chaplains are noncombatants and will not be placed in any duty status that compromises their status as noncombatants.”); *Army Regulation* 165-1 § 4-3(c) (“Chaplains are noncombatants and will not bear arms.”); Protocol I, Art.43 § 2 of *Geneva Conventions*.

<sup>46</sup> Convention I, Art. 28 and Convention III, Art. 33 of *Geneva Conventions*.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* Accord *Air Force Instruction* 52-101 § 2.1.9.

prepare a person for ministry in the chaplaincy. The military should not establish training requirements inconsistent with the custom and practice of a chaplain candidate's faith group.

The rights and responsibilities of chaplains depend upon the context of their work. When performing core ecclesiastical functions for those who voluntarily seek such ministry, chaplains minister without governmental intrusion.<sup>49</sup> Core ecclesiastical functions include teaching, counseling, hearing confession, preaching, performing religious rites, and presiding at worship. Such functions also include imposing congregational discipline and selecting, forming, assigning, and removing individuals to assist the chaplain's ministry. Thus, for example, when preaching at a voluntary worship service, a chaplain has virtually unrestricted discretion as to the content of the religious message.<sup>50</sup> A chaplain may not be forced to disclose a soldier's confession.<sup>51</sup>

Chaplains also serve as "visible reminders of the Holy" for *all* soldiers.<sup>52</sup> Chaplains must be willing and able to provide

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<sup>49</sup> See n. 29, *supra*. This is equally true for other government-paid chaplains, like those who work in prisons or hospitals. See e.g., Montano v. Hedgepeth, 120 F.3d 844, 850 (8th Cir. 1997) ("[A] prison chaplain, although a state employee, sometimes behaves in ways which are beyond the bounds of governmental authority. In matters of faith, a pastor ... is not answerable to an administrative supervisor. The teachings endorsed and practiced by recognized spiritual leaders are not, and should not be, subject to governmental pressures, and the canons which underlie most of the world's denominations are typically thought to derive from the divine, rather than worldly, inspiration. ... It is hard to imagine any greater affront to the First Amendment than a state's attempt to influence a prison chaplain's interpretation and application of religious dogma."); *id.* at 851 n.11 ("At least insofar as matters of religious theory are implicated ... prison chaplains enjoy complete protection from the prospect of governmental intrusion. ... [A] prison chaplain [has] constitutionally mandated independence on matters of doctrinal significance."). Compare Baz v. Walters, 782 F.2d 701, 708 (7th Cir. 1986) (V.A. hospital chaplain has no absolute constitutional right to initiate proselytizing conversations with mentally ill patients); *id.* at 705 n.4 (noting that the Veterans' Administration Chaplain's manual states, "The chaplain continues to be a clergyman of his church and will not be required to perform any act or function contrary to the doctrine or practice of his church."); *Navy Chaplains Manual* § 1204; SECNAVINST 1730.7b.

<sup>50</sup> This principle is best illustrated in the case of Rigdon v. Perry, 962 F.Supp. 150 (D.D.C. 1997). In that case, the United States District Court for the District of Columbia held that constitutional guarantees of freedom of religious exercise and speech required that military chaplains be permitted to preach sermons at voluntary worship services encouraging congregants to contact their representatives in Congress regarding pending anti-abortion legislation, despite direct orders from their commanders forbidding such sermons. *Id.* at 165 ("What we have here is the government's attempt to override the Constitution and the laws of the land by a directive that clearly interferes with military chaplains' free exercise and free speech rights, as well as those of their congregants."). The Rigdon court noted that "when chaplains are conducting worship, when they are surrounded by all the accouterments of religion, they are acting in their religious capacity, not as representatives of the military ... The words that a chaplain utters during the course of religious worship no more bear the official imprimatur of the military than the magazines, alcohol, and tobacco sold by military exchanges." *Id.* at 160 & n.8. See also 10 U.S.C. § 6031(a) ("An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.") (statute for Navy chaplains); *Naval Regulation 0817* (same); *Air Force Instruction 52-101* § 2.1 ("Chaplains do not perform duties incompatible with their faith group tenets . . .") § 3.2.2.1 ("Chaplains will conduct services that are within the scope of their personal faith tenets and religious convictions."); *Army Regulation 165-1* § 4-4(e) ("Chaplains are authorized to conduct rites, sacraments, and services as required by their respective denomination. Chaplains will not be required to take part in worship when such participation is at variance with the tenets of their faith.").

<sup>51</sup> *Air Force Instruction 52-101* § 4.1; *Army Regulation 165-1* § 4-4(m).

<sup>52</sup> *Air Force Instruction 52-101* §§ 2.1, 5.1.

spiritual help to soldiers of any faith or no faith.<sup>53</sup> Because soldiers frequently have no access to a chaplain from their own faith tradition, a chaplain of one faith often ministers to a soldier of another. Generally, when a soldier of one faith seeks spiritual assistance from a chaplain from another religious tradition, the chaplain should not attempt to persuade the soldier to align with the chaplain's religion.<sup>54</sup> This is because a soldier should be comfortable in coming forward to the pastoral counselor who is available to the soldier. If, however, a soldier seeking assistance indicates that he or she is not rooted in a faith tradition or expresses interest in finding a new faith home, the chaplain should use his or her pastoral judgment to help the soldier in need — including the option of inviting the soldier to join the chaplain's religious tradition.

When called upon to offer a blessing or conduct religious services for an inter-faith group, or to offer a prayer at a mandatory military event, common courtesy, pastoral judgment, and constitutional principle commend offering a religious message or prayer respectful of all present.<sup>55</sup>

### Soldiers' Religious Freedom

Religious men and women need not shed or hide their religious beliefs upon entering the military. While balanced against true military necessity,<sup>56</sup> soldiers retain their rights to practice and speak about their faith while serving in uniform.<sup>57</sup> Indeed, the military has an affirmative duty to provide the means — like government-funded chaplains, places of worship, and periods of time—for soldiers to practice their faith.<sup>58</sup> The military must accommodate equally and fairly every soldier's and every faith group's religious observances.

Some believe they are called by God to share their faith with others through persuasion and by example. At times called “witnessing,” “evangelizing,” or “proselytizing,” soldiers may engage in such faith sharing, even when in uniform and on duty, so long as there is no coercion involved.<sup>59</sup> Witnessing soldiers should respect others' faith and honor their statements that they are not interested in continuing a discussion about religious matters, just as they would regarding other topics.

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<sup>53</sup> *Navy Chaplains Manual* § 1202(5); *Veitch v. England*, 2005 WL 762099 at \*4 n.2 (D.D.C.); *Air Force Instruction 52-101* § 2.1.

<sup>54</sup> See *Veitch v. England*, 2005 WL 762099 (D.D.C.) (former Navy chaplain who failed to respect religious beliefs of others was properly disciplined by commanders); M.R.E. 502(b)(4) (Navy).

<sup>55</sup> See generally discussion regarding “Ceremonial Prayer,” *infra*.

<sup>56</sup> See n. 34, *supra*, and related text.

<sup>57</sup> 42 U.S.C. § 2000bb; *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (noting both (i) judicial deference to military and (ii) that “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes”) (quoting former Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L.Rev. 181, 188 (1962)).

<sup>58</sup> See *Katcoff*, 755 F.2d at 228, 232, 234 and discussion, *supra*, at ns. 22 through 25 and related text.

<sup>59</sup> See *Cantwell v. Connecticut*, 310 U.S. 296 (U.S. 1940) (reversing convictions of Jehovah's Witnesses convicted of solicitation without a license and disturbing the peace because of their door-to-door evangelizing). See *Child Evangelism Fellowship v. Stafford Township Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004) (J. Alito) (barring a school district from permitting proselytizing by some groups, like Boys and Girls Scouts, but not others, like the Child Evangelism Fellowship).

Commanders, acting in their individual capacity, have the same rights to exercise their religion as other soldiers. As described below, when they act in their capacity as commanders, special rules apply to avoid either religious discrimination or religious coercion, or a reasonable perception of the same.

Military leadership and supervising chaplains should accommodate the needs of soldiers and their families by providing them, at reasonable times, appropriate places to study their faith and to worship in accordance with their own faith traditions.

Religious traditions may also require certain types of religious dress.<sup>60</sup> The military has already adopted procedures to accommodate these religious needs, while at the same time maintaining uniform and appearance regulations which foster discipline and morale as well as promote safety.<sup>61</sup> Military leadership, when applying these regulations, should recognize the religious importance of certain dress requirements and carefully assess whether certain military uniform requirements are truly necessary in specific cases.<sup>62</sup>

Soldiers may follow other religious observances which affect aspects of their military life, such as receiving immunizations,<sup>63</sup> following religious dietary requirements,<sup>64</sup> and reading or distributing religious literature.<sup>65</sup> Generally, such observances should not conflict with the soldier's obligations to carry out military duties. Except in extraordinary circumstances, a commander should accommodate reasonable requests for such religious needs.

### Commander-Subordinate Religious Practices

Commanders, as individuals, may exercise their religion and speak about their faith. Commanders are responsible to plan and implement a comprehensive religious program for those under their command.<sup>66</sup> When acting in their capacities as commanders, they bear a special responsibility of not using their authority to discriminate against a subordinate on the basis of religion or to coerce a person into participating in a religious practice. Thus, absent special

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<sup>60</sup> See *e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (Orthodox Jew and Air Force officer sought to wear yarmulke for religious reasons); Geller v. Secretary of Defense, 423 F.Supp. 16 (D.D.C. 1976) (Jewish Air Force chaplain sought to wear beard for religious reasons); Khalsa v. Weinberger, 779 F.2d 1393, 1394 (9th Cir. 1986) (“Practicing Sikh’s must wear unshorn head and facial hair and iron bracelets, and are strongly encouraged to wear turbans.”); Sherwood v. Brown, 619 F.2d 47, 47 (9th Cir. 1980) (same).

<sup>61</sup> See *e.g.*, *AFI 36-2903, Table 2.6, Items 15-16; Table 2.9* (procedures for approval of religious apparel waivers). Congress overturned an unnecessarily narrow reading of the Free Exercise Clause in this context when it passed Public Law 100-180 § 508, codified at 10 U.S.C. § 774, which reversed the Supreme Court’s decision in Goldman v. Weinberger, 475 U.S. 503 (1986).

<sup>62</sup> *DoD Directive 1300.17 “Accommodation of Religious Practices Within the Military Services”* §§ 3.2.6 & 3.2.7 (listing factors to determine how to accommodate religious apparel requirements).

<sup>63</sup> See *e.g.*, *Air Force Joint Instruction 48-110* ¶ 13 (permitting waivers of immunizations due to legitimate religious beliefs subject to military necessity); NAVADMIN 6405.

<sup>64</sup> *AFI 36-2706* § 8.2.2; *Army Regulation 165-1* § 3-2(c) (citing other Army regulations).

<sup>65</sup> See Cantwell v. Connecticut, 310 U.S. 296 (U.S. 1940).

<sup>66</sup> See, *supra*, n. 25 and related text.

circumstances, such as prayers at memorial and ceremonial events discussed in the following section, commanders may not mandate religious observances of their subordinates.<sup>67</sup> In addition, commanders may not make advancement or disciplinary decisions based upon a subordinate's religious beliefs, or lack thereof.

Commanders should be sensitive to appearances. The higher a commander's rank, the more careful he or she must be about appearing to endorse or disparage particular religious beliefs.

Official coercion is the touchstone in cases involving commanders and subordinates.<sup>68</sup> Courts recognize that religious expression by government speakers to adult audiences has reduced constitutional concern because adults are generally less susceptible to coercion.<sup>69</sup> This reduced concern is present in the context of the military, including university students at the military academies.<sup>70</sup> Commanders, nevertheless, must be careful to distinguish between actions carried out or statements made in an official capacity and those that are private and personal. It follows that able commanders make it possible for soldiers to recognize the difference between a superior's military command and his or her expression of particular personal belief.

### Ceremonial Prayer

The offering of prayer by chaplains or others in memorial and ceremonial contexts has been part of military and American life since the founding of the country.<sup>71</sup> The Continental Congress issued the first national Thanksgiving proclamation on November 1, 1777, setting aside December 18 as a national day for "solemn thanksgiving and praise."<sup>72</sup> General Washington at Valley Forge referred to this proclamation in his orderly book:

Tomorrow being the day set apart by the honorable Congress for Public Thanksgiving and praise, and duty calling us devoutly to express our grateful acknowledgment to God for the manifold blessings he has granted us, the general directs that the army remain in its present quarters, and that the chaplains perform divine service with their several corps and brigades, and earnestly exhorts all officers and soldiers whose absence is not indispensably necessary to attend with reverence the solemnities of the day.<sup>73</sup>

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<sup>67</sup> See *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (VMI's mandatory dinner prayer unconstitutional).

<sup>68</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise ..."); *Mellen v. Bunting*, 181 F.Supp.2d 619, 635 (W.D.Va. 2002) ("The Establishment Clause is concerned with coercion ..."), *aff'd*, 327 F.3d 355 (4th Cir. 2003).

<sup>69</sup> *Lee v. Weisman*, 505 U.S. at 597 (distinguishing *Marsh v. Chambers* for a number of reasons, including that adults are more mature and less susceptible to coercion or confusion).

<sup>70</sup> *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students ... are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality of religion").

<sup>71</sup> See generally 1 Anson Phelps Stokes, *Church and State in the United States* 448-58 (1950).

<sup>72</sup> *Id.* at 452.

<sup>73</sup> *Id.* at 453.

When General Washington surrendered his post as the leader of the Revolutionary Army in June 1783, he distributed his “Circular to the States” that concluded with his earnest prayer for the nation, a prayer that still serves as a model civic prayer:

I now make it my earnest prayer, that God would have you, and the State over which you preside, in his holy protection, that he would incline the hearts of the Citizens to cultivate a spirit of subordination and obedience to Government, to entertain a brotherly affection and love for another, for their fellow Citizens of the United States at large, and particularly for their brethren who have served in the Field, and finally, that he would most graciously be pleased to dispose us all, to do Justice, to love mercy, and to demean ourselves with that Charity, humility and pacific temper of mind, where were the Characteristicks of the Divine Author of our blessed Religion, and without an humble imitation of whose example in these things, we can never hope to be a happy Nation.<sup>74</sup>

Every president, save two, has called for days of prayer and Thanksgiving,<sup>75</sup> and other national and military leaders have prayed on behalf of the country. On the eve of the Normandy invasion, June 5, 1944, General Dwight Eisenhower spoke to the American troops, ending with this prayer: “Let us all beseech the blessing of Almighty God upon this great and noble undertaking.” The following evening on NBC radio, a United States Army Chaplain offered a prayer, followed by a newscast. Then Ronald Colman read Edna St. Vincent Millay’s “Poem and Prayer for an Invading Army,” followed by a prayer from a United States Navy Chaplain.<sup>76</sup> Millay’s prayer, commissioned by the War Writers Board, stated: “Oh, let the battle, Lord, be brief, and let our boys come home!”<sup>77</sup>

Just before taking his oath of office as president on January 20, 1953, Dwight Eisenhower led the nation in prayer, concluding with: “Especially we pray that our concern shall be for all the people regardless of station, race or calling. May cooperation be permitted and be the mutual aim of those who, under the concepts of our Constitution, hold to differing political beliefs, so that all may work for the good of our beloved country and Thy glory. Amen.”<sup>78</sup>

From the founding of the United States to the present, presidents, military chaplains, and others, have offered civil prayer in appropriate contexts, including Independence Day, Memorial Day, Veterans Day, and Martin Luther King Day events; graduation ceremonies; promotion ceremonies; ceremonial dinners and award services; memorial services;

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<sup>74</sup> See, e.g., *George Washington* Circular Letter to John Hancock (June 11, 1783) *The Papers of George Washington* at the Electronic Text Center of the University of Virginia, <http://gwpapers.virginia.edu/documents/constitution/1784/hancock.html>.

<sup>75</sup> President "Abraham Lincoln, for example, issued nine separate calls to public penitence, fasting, prayer, and thanksgiving." Elton Trueblood, *Abraham Lincoln: Theologian of American Anguish* 84-94 (1973). Presidents Thomas Jefferson and Andrew Jackson are the only presidents who declined to declare national days of thanksgiving or fasting. *Marsh v. Chambers* 463 US at 807 (Brennan, J., dissenting).

<sup>76</sup> James P. Moore, Jr., “American Prayers, on D-Day and Today,” *washingtonpost.com* B03 (June 6, 2004); “Radio Memories: NBC D-Day Coverage,” <http://www.radiomemories.com/radiomemories/nbccddaycoverage.html>.

<sup>77</sup> *Id.*

<sup>78</sup> Dwight D. Eisenhower, Inaugural Address (January 20, 1953), *The Dwight D. Eisenhower Presidential Library*, Abilene, Kansas (available at: [www.eisenhower.archives.gov/1stinaug.htm](http://www.eisenhower.archives.gov/1stinaug.htm)). For examples of other historical prayers by United States Presidents, see *Engel v. Vitale*, 370 U.S. 421, 446-48 (1962) (Stewart, J., dissenting).

sporting events; and military retirements. Certain features distinguish settings for civic prayer in the military. Those who have gathered are mostly adults who have voluntarily chosen to come together to mark a special occasion. Those present are not to be confused with a worshiping assembly. These are religiously diverse gatherings. One's presence, therefore, should not be seen or construed as assent to all that is expressed during the event.

The purpose of the prayers offered at these events is neither to favor one religion over another nor to proselytize. It is to dignify and mark a public occasion by reflecting upon the deeper significance of that which has or is about to transpire.<sup>79</sup> It is to honor the most basic human impulses of giving thanks and of invoking God's protection, guidance, and blessing, and it is to reflect upon those religious values that unite the American people.<sup>80</sup>

While those offering civic prayer must use their own judgment,<sup>81</sup> some guidelines may be helpful. In general, civic prayer should be non-sectarian. One who would, in the setting of one's own congregation, pray "in the name of Jesus," or "in the name of Allah," or "in the name of the Father, and of the Son, and of the Holy Spirit," should consider if those formulations exclude believers from other faith traditions. Two judicial decisions indicate that making such prayers the common practice would violate the Establishment Clause.<sup>82</sup>

There are, however, many "wide and embracive terms" for addressing God in civic prayer.<sup>83</sup> Washington's 1783 prayer

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<sup>79</sup> Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) ("[Certain] government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."); Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997) ("[T]he invocation and benediction [offered at a public university] serve the legitimate secular purposes of solemnizing public occasions rather than approving particular religious beliefs.").

<sup>80</sup> There may be no more religiously, ethnically, racially, or linguistically diverse people than the citizens of the United States. John Courtney Murray noted that the *unum* from this *pluribus* rested on the famous phrase from the Declaration of Independence, "We hold these truths to be self-evident ..." John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition viii (1960).

The sense of the famous phrase is simply this: "There are truths, and we hold them, and we here lay them down as the basis and inspiration of the American project, this constitutional commonwealth."

Id. at viii-ix.

<sup>81</sup> There is a constitutionally significant difference between private groups, like the authors of this statement, offering guidelines for civic prayer and government authorities doing the same.

<sup>82</sup> Compare Marsh v. Chambers, 463 U.S. 783 (1983) (First Amendment permits paid legislative chaplains offering non-sectarian prayer); Simpson v. Chesterfield County, 404 F.3d 276 (4th Cir. 2005) (First Amendment permits county board's practice of inviting Protestant, Catholic, Jewish, and Muslim clergy to offer non-sectarian legislative prayer while excluding a self-identified witch affiliated with Reclaiming Tradition of Wicca and Broom Riders Association), Newdow v. Bush, 355 F.Supp.2d 265 (D.D.C. 2005) (First Amendment permits prayer at Presidential inauguration even though some such prayers include Christological references), Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997) (First Amendment permits non-sectarian college graduation prayer), Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997) (same); Murray v. Buchanan, 720 F.2d 689 (D.C. Cir. 1983) with Wynn v. Town of Great Falls, South Carolina, 376 F.3d 292 (4th Cir. 2004) (First Amendment precludes city council's prayer with Christological references); Hinrichs v. Bosma, 2005 WL 3263883 (S.D. Ind. November 30, 2005) (First Amendment precludes Indiana legislative prayer with Christological references).

<sup>83</sup> Chesterfield County, 404 F.3d at 284 (identifying acceptable names for God in legislative prayer as including: "Lord God," "Heavenly Father," "Lord of Lords," "King of Kings," and "[C]reator").

for the nation remains a model. Such is the preferred method of ceremonial prayer. Alternatively, a chaplain could identify his or her religious tradition and acknowledge that others present adhere to other religious traditions and then offer a prayer in keeping with civic traditions.<sup>84</sup> One experienced chaplain suggests that Psalm 19:14 offers a solution. It states, “Let the words of my mouth, and the meditation of my heart, be acceptable in thy sight, O Lord, my strength, and my redeemer.” The words of a chaplain’s mouth, in a civic setting, could be religiously inclusive while the meditation of his or her heart would be deeply rooted in the chaplain’s own faith tradition. The Psalms — esteemed by Protestants, Catholics, Jews, Mormons, and Muslims — provide many examples of prayer appropriate for

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<sup>84</sup> A chaplain could, for example, pray:

I am a Christian. I pray in Jesus’ name. Many of you, my brothers and sisters in faith, are Christians of other traditions than my own. Many of you, my brothers and sisters in service, follow the teachings of other faiths. All of us seek God’s guidance. Each of us seeks God’s will. Together we can pray:

Lord, Creator of the Universe, we give you thanks and praise for your mercy. We thank you for our families, our friends, and our country. May you guide our nation. Grant wisdom to our leaders and courage to those who serve in the armed forces.

We give you thanks for all that unites us. May we grow in affection for and loyalty to one another. We pray for the safety of our comrades who are in danger this day, and for the comfort of their families.

We ask for your help, that we might seek justice and walk humbly with You, O Lord, Our God and Our Redeemer. Amen.

A military chaplain, sensitive to the issues discussed here, recently prayed at a meeting with other military chaplains as follows:

Today, I am keenly aware that we are a very diverse group of ecclesiastical endorsers and Chiefs of Chaplains and staffs. As such we come from many religious perspectives. We live in a pluralistic society where we honor and respect one another. I am a Christian and a Pentecostal. Today, I want to encourage you to pray to God according to your own tradition, while I pray according to mine. I will pray in the Name of Jesus in the first person.

Our Heavenly Father, we thank You for this season of the year when we honor and respect those who will celebrate Hanukkah and Christmas. We are reminded that Your love for all mankind is found in every place and circumstance and that You offer peace to everyone.

We remember the men and women in the military, many of whom will spend this Christmas at posts far from home. They stand between Americans and grave danger. They serve in the cause of peace and freedom. They wear the uniform proudly, and we are proud of them.

We are equally proud of every military chaplain who serves as a visible reminder of Your presence, protection, promises, and provisions.

You are the guard and guide of all who place their trust in You. So now may they rest in Your abundant love and be strong. Give them believing minds and trusting hearts. Your peace shall be their strength, and into Your hand of love may they place their hands, and face the future unafraid.

It is in the Name of Jesus Christ, my Lord and Savior, I pray these things. Amen.

ceremonial settings.<sup>85</sup> Further, the chaplain corps has previously composed fine examples of ceremonial prayer for every branch of the military.<sup>86</sup>

There is a rich tradition of civic prayer in the United States that draws its content and strength from religious ideas shared by the founders and a large number of Americans.<sup>87</sup> Those offering civic prayers in military settings should respect this tradition.<sup>88</sup> Like legislative prayer, civic prayer

... perform[s] the venerable function of seeking divine guidance ... As such, these invocations constitute a tolerable acknowledgment of beliefs widely held among the people of this country, being as we are a religious people whose institutions presuppose a Supreme Being. [L]egislative invocations comport with the Establishment Clause not only because that tradition is ancient, but because invocations are intended to harmonize broadly with tenets of some or all religions. Legislative invocations thus belong among those government acknowledgments of religion that serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in our society.<sup>89</sup>

Those offering civic prayer should also remember the humility of President Lincoln, who cautioned “malice toward none” and “charity for all,” and publicly acknowledged that, regarding the Union soldiers and their adversaries: “Both read the same Bible, and pray to the same God; and each invokes His aid against the other.”<sup>90</sup>

Some are uncomfortable with civic prayer because not everyone present is in religious agreement. They oppose the

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<sup>85</sup> See, e.g., Psalms 8, 18:1-3, 19:14; 23, 27, 34:1-4; 62:1-7; 63, 67, 85:1-5, 91, 93, 95, 96, 100, 103, 111, 113, 117, 123, 127, 138, 139, 144, and 150. See also the Aaronic prayer at Numbers 6:24-26 (“The Lord bless you and keep you; the Lord make His face shine upon you and be gracious to you; the Lord turn His face toward you and give you peace.”).

<sup>86</sup> See Appendix A.

<sup>87</sup> See e.g., Robert N. Bellah & Phillip E. Hammond, Varieties of Civil Religion (1980); W. Herberg, Protestant, Catholic, Jew: An Essay in American Religious Sociology 74-90 (1983); Sidney E. Mead, The Lively Experiment: The Shaping of Christianity in America 80-83 (1963); John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition 40-53 (1964); Robert N. Bellah, “American Civil Religion in the 1970’s,” Anglican Theological Review 8-20 (July 1973).

<sup>88</sup> The core tenets of this tradition are the sovereignty of God and the sacredness of man. The phrase, “one nation, under God,” bespeaks the former, see 36 U.S.C. § 172 (pledge of allegiance) and President Abraham Lincoln’s formulation, “of the people, by the people, and for the people,” bespeaks the latter. These tenets are consistent with both the founding ideals of the country and the religious beliefs of the overwhelming majority of Americans. See Sidney E. Mead, *supra*, at 80 (regarding the sovereignty of God); John Courtney Murray, *supra*, at 45 (regarding the sacredness of man, noting the “American consensus . . . includes a great act of faith in the capacity of the people to govern themselves” and the “sense of justice inherent in the people, in virtue of which they are empowered” to define the common good and thereby control the process of government). See generally, L. Martin Nussbaum, “A Garment for the Naked Public Square: Nurturing American Public Theology,” 16 Cumberland L. Rev. 53, 68-72 (1985-86).

<sup>89</sup> Chesterfield Country Bd. of Supervisors, 404 F.3d at 282-82 (4th Cir. 2005) (internal citations and quotations omitted).

<sup>90</sup> Abraham Lincoln, Second Inaugural Address (March 4, 1865) reprinted in Abraham Lincoln: Speeches and Writing 1859-1865, at 686-86 (1989).

offering of civic prayer altogether by contending that no dissenter from the sentiments expressed in such a prayer should be required to be present during its utterance. These critics confuse presence and assent. Their solution would neuter solemn civic gatherings in military life of religious content — even those religious ideas long recognized as central to the American founding. This is not a new problem. Samuel Adams long ago modeled what common courtesy commended for such situations. When John Jay and John Rutledge opposed legislative prayer in the Continental Congress, Samuel Adams responded that “he was no bigot, and could hear a prayer from a gentlemen of piety and virtue, who was at the same time a friend of the country.”<sup>91</sup> Samuel Adams, a Congregationalist, then nominated Rev. Jacob Duche, to read the prayer in Congress the following morning. John Adams, writing to his wife, Abigail, described what transpired:

[Rev. Duche] appeared with his clerk and in his pontificals, and read several prayers [including] the thirty-fifth Psalm. You must remember this was the next morning after we heard the horrible rumor of the cannonade of Boston. I never saw a greater effect upon an audience. It seemed as if Heaven had ordained that Psalm to be read on that morning.

After this, Mr. Duche, unexpected to everybody, struck out into an extemporary prayer, which filled the bosom of every man present. I must confess I never heard a better prayer, or one so well pronounced, Episcopalian as he is ... It had an excellent effect upon everybody here.<sup>92</sup>

Given the long history of civic prayer in military settings, the ceremonial nature of most of that prayer, and the other circumstances described above, civic prayer by military chaplains and other military officials is constitutional.<sup>93</sup>

## Academic Freedom

All universities, including military ones, “occupy a special niche in our constitutional tradition.”<sup>94</sup> Pursuing truth and developing critical thinking require permitting a high degree of academic freedom. Like other universities, the military academies themselves share this interest in academic freedom and may, in Justice Felix Frankfurter’s words, “determine for [themselves] on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>95</sup>

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<sup>91</sup> *Marsh v. Chambers*, 463 U.S. at 791-92 (quoting 1 Anson Phelps Stokes, *Church and State in the United States* 449 (1950)). Professor Stokes notes that Samuel Adams “performed the same type of service in 1788 when the Massachusetts convention was held to ratify the Federal Constitution.” *Id.*

<sup>92</sup> *Id.* at 449-50.

<sup>93</sup> See *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative chaplains and legislative prayer constitutional); *Katcoff v. Marsh*, 755 F.2d 223, 227-28 (2d Cir. 1985) (finding the analysis of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) inapposite and then invoking *Marsh v. Chambers* to hold that the First Amendment not only permits but requires government to provide for military chaplains and the related observances).

<sup>94</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”) (citing cases).

<sup>95</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

Military academies also seek to instill certain virtues in their cadets, such as integrity, service before self, and excellence in all endeavors.<sup>96</sup> Religion plays a role for many in appropriating these military virtues, and the military academies would be remiss if they did not permit soldiers to benefit from religion in this way.<sup>97</sup> As noted above, however, respect for every person's religious tradition, including those who reject religion, and lack of coercion is essential to these discussions.<sup>98</sup>

Religious diversity is a hallmark of the American experience.<sup>99</sup> Indeed, the military has long been the incubator for American diversity. It would be unwise, therefore, to try to cleanse the military, including the classrooms of military academies, of religious content. Soldiers, even those who practice no faith, will encounter religious people and their practices. It is clear that the conflicts in the Middle East have a religious component. Soldiers need to encounter deeply held religious beliefs, including those they neither accept nor practice.

## Conclusion

From the struggle for independence and on through the years, American soldiers have served both God and country. This dual service requires balance and compromise. The military must protect and accommodate the free exercise of religion even as it ensures that essential military goals and objectives are achieved. The American military has ably served both its soldiers' faith and its country's mission for over 225 years. The National Association of Evangelicals is confident that the American military is capable and willing to continue this honorable service into the twenty-first century. We hope this "National Association of Evangelicals Statement on Religious Freedom for Soldiers and Military Chaplains" may be of service to its mission.

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<sup>96</sup> These are the core values of the U.S. Air Force Academy. Similarly, the mission of the U.S. Military Academy at West Point is: "To educate, train, and inspire the Corps of Cadets so that each graduate is a commissioned leader of character committed to the values of Duty, Honor, Country and prepared for a career of professional excellence and service to the Nation as an officer in the United States Army." The Naval Academy's mission is "to develop midshipmen morally, mentally, and physically and to imbue them with the highest ideals of duty, honor, and loyalty in order to provide graduates who are dedicated to a career of naval service and have potential for future development in mind and character to assume the highest responsibilities of command, citizenship, and government." These statements are at: <http://www.usafa.af.mil/core-value/cv-mastr.html>; <http://www.usma.edu/mission.asp>; <http://www.usna.edu/toc.html#m> ("Mission of the United States Naval Academy"). Cite last visited on January 14, 2006.

<sup>97</sup> Cadets at United States military academies are not, and should not be treated as, wilting flowers, too fragile to withstand disagreement or controversy. They should be afforded the respect of the mature officers they are training to become by challenging them with the hard questions asked by religion. *Compare Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students ... are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality of religion."). The military academies, and every individual instructor, has a duty to ensure that religious minorities are not persecuted or demeaned.

<sup>98</sup> Courts have struck down both mandatory chapel attendance and mandatory meal time prayers at military institutions. *See Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (mandatory chapel attendance at service academies unconstitutional); *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (mandatory meal time prayers at Virginia Military Institute unconstitutional).

<sup>99</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

## APPENDIX A

### Examples of Ceremonial Prayer

#### Marine Corps Prayer

Eternal God, we humbly beseech You that your hand of mercy extend to all United States Marines from sea to shining sea, from ports near and far, amphibious bases and airfields, to embassies around the world. Wherever our Marines stand watch this day, may they be persuaded that neither death, nor life, nor angels, nor principalities, nor powers, nor things present, nor things to come, nor height, nor depth, nor any other creature, shall be able to separate them from the love of God.

Lord, stand beside these Marines whom you have called to serve. Help them to serve honorably. Give them courage, strength and skill, and if they are called to sacrifice, may it be worthy of their Lord.

For the tasks that lay before the Commandant and Sergeant Major of the Marine Corps, we ask an extra measure of strength. When they pass through the waters, make known that you will be with them, and when they walk through the fires they shall not be burned.

God, we pray that you would sustain our Marines, and just as they are always faithful to the Corps, we ask that you would call them by name, and they would hear your voice and they would be faithful to you. (Semper Fidelis.)

#### Navy Prayer

O Eternal Lord God, who alone spreadest out the heavens and rulest the raging of the sea; vouchsafe to take into Thy almighty and most gracious protection our country's Navy and all who serve therein. Preserve them from the dangers of the sea and from the violence of the enemy; that they may be a safeguard unto the United States of America and a security for such as pass on the seas upon their lawful occasions; that the inhabitants of our land may in peace and quietness serve Thee our God to the glory of Thy name. Amen.

#### Air Force Prayer

O Lord God of hosts, you stretch out the heavens like a curtain. Watch over and protect, we pray, the airmen of our country as they fly upon their appointed tasks. Give them courage as they face the foe, and skill in the performance of their duty. Sustain them with your everlasting arms. May your hand lead them, and your right hand hold them up, through all that is holy. Amen.

#### Coast Guard Prayer

Almighty and Everlasting God, Whose hand stills the tumult of the deep, we offer our prayers for those who serve in our Coast Guard. We are mindful of their traditions of selfless service to the seafarers who make their ways to appointed ports. Employ their devotions of good ends as they track the weather and search the seas for those in extremity of storm, shipwreck or battle. Make their soundings and markings sure that safe passages may be found by those who go down to the sea in ships. Encourage them, O Lord, as they stand guard over our coasts and the bulwarks of our freedoms. Graciously deliver them from threatening calamities in all their perilous voyages. Bless the keepers of

the lights and be Thou their close friend in lonely watches. Keep the beacons of honor and duty burning that they may reach the home port with duty well performed, in service to Thee and our land. Amen.

### **A Soldier's Prayer For the Army**

Almighty God, with an upright heart I have left my dear ones at home, to defend my country against its enemies. My thoughts constantly go back to them. They are thoughts of love and of anxiety. I ask You, loving God, to keep a watchful eye over each and every one of them. Soothe their hearts and help them to bear my absence patiently. Protect them from the dreadful dangers of war.

O my Lord, I ask not much for myself—just courage to perform my duties well. I offer You this day and every day my thoughts, words and actions as prayers of faith in You, of hope in Your provident care, of love of You and Your justice. May my prayers parallel all my service and sacrifices for my fellow comrades, my family and my country. Protect them all and bless them now and forever. For all those who have died, welcome them into your loving embrace. Gracious Lord, lend an ear of compassion to the supplication of a soldier, your child, serving my country to the best of my ability out of love for You. Amen.