



May 14, 2020

The Honorable Mark T. Esper
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301

Subject: Unlawful Religious Discrimination Against Service Members

Dear Secretary Esper,

First Liberty Institute is the largest legal organization dedicated exclusively to protecting religious liberty for all Americans. The Chaplain Alliance for Religious Liberty is an organization comprised of more than 30 ecclesiastical endorsing agencies; those agencies endorse more than 2,600 military chaplains, which is approximately 50% of the current armed forces chaplaincy. The Restore Military Religious Freedom Coalition is comprised of more than 25 organizations dedicated to defending religious freedom for America's service members and veterans. We write collectively to express our dismay at recent incidents within the U.S. Army that have resulted in unlawful religious discrimination against service members.

The Chaplain Response to the COVID-19 Pandemic

The COVID-19 pandemic has wreaked havoc upon every corner of our land. Despite our collective efforts no one has been immune to the virus' ravages, including our service members. Yet even as the nation quickly adjusted to a "new normal," we observed with great pride the many creative ways in which our service members demonstrated the very best of America in response to a global crisis. Among those seeking creative ways to carry out their mission, military chaplains face particularly challenging circumstances.

As you know, DOD installation chapels were ordered closed due to the COVID-19 pandemic. Thousands of service members, veterans, and their dependents were left without a place to worship. This actually created a constitutional dilemma because one of the chaplain's primary roles is to carry out the DOD's constitutional mandate to provide for service members' free exercise of religion. As at least one federal court has recognized, the Constitution "obligates Congress upon creating an Army, to make religion available to soldiers."¹ Indeed, that is why chaplains have always accompanied our troops into harm's way, unarmed yet undeterred in their mission to ensure their spiritual needs are met.

As the pandemic unfolded, many chaplains sought creative and alternative means of providing for the spiritual needs of the DOD communities they serve. While some chaplains live streamed their messages via the internet, others used social media, and often with very positive responses. For example, one Army chaplain assigned to Fort

¹ *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985).

Knox, KY reported “where normally we see 45 and 50 people each Sunday, I’ve had over 650 views of last Sunday’s service, and our numbers are still climbing.”² Such efforts to “bring God to the soldier” should be commended. But sadly, some organizations saw the COVID-19 pandemic as an opportunity to advance their anti-Constitution agendas.

The Army Censors Chaplains for Being Chaplains

The Military Religious Freedom Foundation (MRFF)—who once demanded 400 trials by courts-martial for service members who dared to exercise their First Amendment rights—recently embarked on a campaign of assaults against religious freedom within the military.

As you are undoubtedly aware, the MRFF publicly demanded immediate adverse action against a number of Army chaplains because they had the audacity to carry out their constitutionally-mandated mission.

At Fort Drum, NY, chaplains assigned to the Army’s legendary 10th Mountain Division—famed for its exploits to rid the world of tyranny during World War II—published a series of videos to a social media site inviting viewers to pray in the midst of the COVID-19 pandemic. The MRFF demanded the videos be removed as violations of the so-called separation of church and state. The Army quickly complied with the MRFF’s demands.

At Redstone Arsenal, AL, another Army chaplain also published a video to social media in which he sought to encourage viewers with a message of hope during difficult times. Again the MRFF demanded the video’s removal due to the so-called separation of church and state. And again, the Army quickly complied.

At Camp Humphreys, South Korea, yet another Army chaplain who sought to offer encouragement and hope sent an email to his fellow Christian chaplains commending to them a Christian book he had recently read. The MRFF demanded that this chaplain “be officially, swiftly, aggressively, and visibly investigated and disciplined in punishment for his deplorable actions.” The Army quickly undertook to investigate the chaplain’s actions.

The Army’s Actions are Unlawful

Each of the aforementioned incidents share two common characteristics. First, in each instance, the chaplains at issue did nothing illegal, immoral, or unethical. To the contrary, they were merely carrying out their noble duties as chaplains. Second, the Army’s actions in each incident are unlawful.

² *Fort Knox Chaplains Begin Live Streaming to Isolated Congregants*, <https://www.dvidshub.net/news/366457/fort-knox-chaplains-begin-live-streaming-isolated-congregants> (last accessed on May 12, 2020).

The MRFF's demands are based on the flawed notion that military chaplains may not carry out their official duties outside of a religious ceremony that occurs within the four walls of a chapel. Army leaders must know better by now. Federal law, military regulations, and court precedents belie the MRFF's specious claims.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, is a federal law that codifies longstanding religious freedom principles. RFRA forbids the federal government, including the Department of Defense (DoD), from substantially burdening a person's religious exercise absent a demonstrated compelling government interest that is achieved by the least restrictive means. This standard, known as "strict scrutiny," is a high hurdle for the government to clear when it seeks to censor or prohibit religious expression.

Moreover, under Section 532 of the FY2014 National Defense Authorization Act (Section 532), absent an adverse impact on military readiness, unit cohesion, or good order and discipline, the DoD must accommodate individual expressions of religious belief, which undoubtedly include a military chaplain's religious expression, whether conveyed via social media, email, or other means. Contrary to the MRFF's assertion, there is no exception when such religious expressions occur outside the chapel.

DoD Instruction (DoDI) 1300.17, "Accommodation of Religious Practices Within the Military Services," promulgates Section 532 within the armed services. And by adopting RFRA's strict scrutiny standard within the military, DoDI 1300.17 arguably affords even greater protection than does Section 532. DoDI 1300.17 is incorporated within the Army via Army Regulation (AR) 600-20.

In each of the aforementioned incidents, the Army's immediate reaction to the MRFF's demands violated the First Amendment to the Constitution, RFRA, Section 532, DoDI 1300.17, and AR 600-20.

Request for Clarifying Policy Guidance

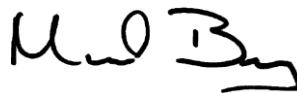
There was a time when confusion reigned supreme when it came to religious freedom within the armed forces. That time has passed. In 2017, the President issued Executive Order 13798-Promoting Free Speech and Religious Liberty. Shortly thereafter, the United States Attorney General issued a guidance memorandum interpreting religious liberty protections in federal law. In 2018, Congress directed the DOD to implement a comprehensive training program for chaplains and judge advocates that further incorporates EO 13798 and the Attorney General's guidance within DOD. To date, the DOD has not complied with Congress' directive.

We urge you to issue clear DOD guidance, consistent with Congress' directive, that strongly protects religious freedom within DOD. Such guidance will slow the spread of misinformation, flawed legal arguments, and religious discrimination.

Mr. Secretary, we thank you for your leadership during a time of crisis that is without precedent in our lifetimes. We certainly appreciate the unique challenges you face daily. Yet, as one federal judge recently observed:

The Constitution will endure. It would be easy to put it on the shelf in times like this, to be pulled down and dusted off when more convenient. But that is not our tradition. Its enduring quality requires that it be respected even when it is hard.³

Thank you for your attention to this matter, and for valuing the principles of religious freedom upon which our nation was founded, and which our service members defend.



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³ *Tabernacle Baptist Church v. Beshear*, No. 3:20-cv-00033-GFVT (E.D. Ky. May 8, 2020).