FIRST LIBERTY

The Role of Religion in the United States Armed Forces

by Michael Berry[1]

Abstract

Attempts to secularize America's military have existed for as long as America has had a military. Amid increasing diversity, some question the role that religion should, or may permissibly play, in the military. This paper attempts to address the role of religion in the United States Armed Forces from the historic and legal bases.

By the Numbers - Religious Diversity in America's Military

In 2009, the Department of Defense conducted a Religious Identification and Practices Survey (RIPS) as Part B of the Defense Equal Opportunity Climate Survey (DEOCS).[2] The RIPS was submitted to 14,769 service members, of whom 6,384 elected to participate. The RIPS revealed no statistically significant variations in race, ethnicity, age, gender, or military rank. And of those who completed the RIPS, only 0.25 percent did not provide valid responses regarding religious affiliation.

The RIPS reveals what appears to be a gradual trend in the United States towards greater percentages of the population reporting no religious affiliation. This is particularly true among younger adults, of whom the military contains in disproportionately greater numbers than society in general. This is consistent with the data reported by two other, well-respected surveys: the American Religious Identification Survey (ARIS)[3], and the U.S. Religious Landscape Survey[4].

Overall, the No Religious Preference (NRP) population comprises approximately one quarter (25.50 percent) of RIPS participants. Nevertheless, service members who claim some form of Christian identity continue to comprise the largest population (65.84 percent). Within Christian denominational groups, Catholics (20.11 percent) and Baptists (17.56 percent) comprise the largest populations within the military. In fact, no other category claims even a double-digit percentage. The chart below provides a graphical representation of this data:

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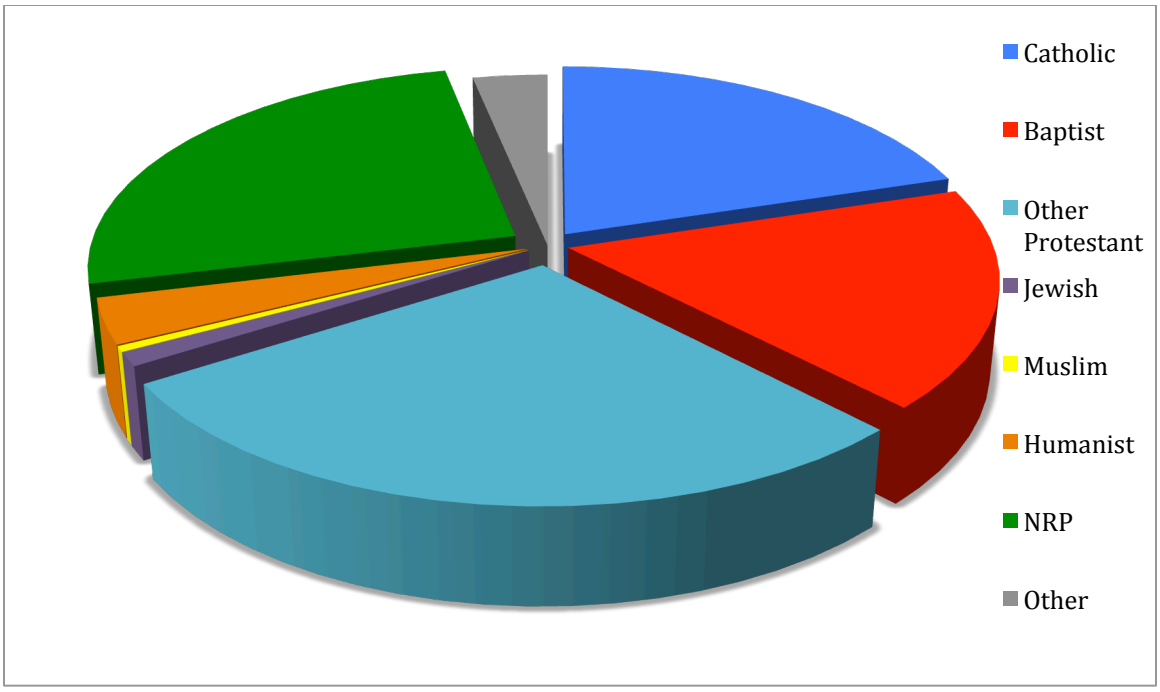
[1] Senior Counsel and Director of Military Affairs, First Liberty Institute.
[2] Issue Paper #22 (June 2010), *Religious Diversity in the U.S. Military*, Military Leadership Diversity Commission.
[3] Kosmin & Keysar, 2008.
[4] Pew Forum on Religion in Public Life, 2008.



The RIPS also captured other important data on religion within the military. On the question of the importance of religion in one's life, a substantial majority claimed that religion is either "important" or "very important." Moreover, the RIPS reveals that age and rank may factor into the role religion plays. Older service members, who are typically also higher in rank, are more likely to claim a religious affiliation or preference, as well as placing more importance on religion in their lives. A corollary to this is that those in positions of leadership must prepare themselves to lead more religiously diverse populations—to include NRPs—into the twenty-first century.

Despite this increased diversity, without a doubt America's military continues to remain a force that places a high value on the role of religion in life. This is not a new phenomenon. Indeed, there exists a robust historical framework for religion and religious expression within the United States military.

The Historical Foundations of Religion in the Military

Since the United States' founding, American civil and military leadership have taken deliberate steps to meet the religious needs of the military and to prevent it from becoming a purely secular entity. The founders were no strangers to government provision of religious support. For example, in 1789 the first federal Congress passed a law providing for the payment of legislative chaplains.[5] Nearly two centuries later, the

[5] *Journal of the First Session of the Senate of the United States of America* (Washington: Gales and Seaton, 1820), p. 67, August 28, 1789. *See also The Public Statutes at Large* (Boston: Little & Brown, 1845), Vol. I, pp. 70-71, September 22, 1789, "An Act for allowing compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses (c)."

Supreme Court upheld the constitutionality of those legislative chaplains, concluding that it "is not . . . an establishment of religion," but rather "a tolerable acknowledgement of beliefs widely held among the people of this country."[6] Today, in continuance of the first Congress' policy, the government directly funds the salaries, activities, and operations of more than 4,500 military chaplains.[7] Despite periodic legal challenges, the Supreme 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."[8] This includes military chaplains.

It is important to note that, while paid chaplains may constitute an official acceptance of, or authorization for, the presence of organized religion in military life, chaplains are the personification—not the limits—of such religious expression. In other words, if the government pays chaplains to perform religious exercises, it may also approve other forms of religious expression that are distinct from a formal chaplaincy, including service members' religious expression.

Perhaps no individual had a greater influence in shaping our nation's armed forces than George Washington, its first Commander-in-Chief. He made known his convictions on the importance of religion within the military early in his career while serving as a young Colonel during the French & Indian War (1753-1763). Throughout that time, he repeatedly requested religious support for his troops,[9] explaining:

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[6] *Marsh v. Chambers*, 463 U.S. 783 (1983).

[7] As of June 2006, there were 1,432 Army chaplains; 825 Navy chaplains, and 602 Air Force chaplains, for a total of 2,859 regular duty chaplains. Additionally, there are 433 chaplains in the Army Reserve National Guard, 500 chaplains in the U. S. Army Reserves, 237 chaplains in the U. S. Navy Reserves, 254 in the Air National Guard, and 316 in the U. S. Air Force Reserves, for a total of 1740 reserve chaplains. This makes a combined 4,599 federally-funded chaplains in the regular and reserve military. From information provided from the office of then-U. S. Congressman Bobby Jindal (LA) on September 28, 2006.

[8] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

[9] Washington made at least six separate pleas for chaplains, including five times to Virginia Governor Robert Dinwiddie and once to Virginia Governor John Blair. These occasions included to Governor Dinwiddie: George Washington, *The Writings of George Washington*, John C. Fitzpatrick, editor (Washington, D. C.: Government Printing Office, 1931), Vol. I, p. 470, September 23, 1756; Vol. I, p. 498, November 9, 1756; Vol. I, p. 510, November 24, 1756; Vol. II, p. 33, April 29, 1757; Vol. II, p. 56, June 12, 1757; and to Governor Blair: Vol. II, p. 178, April 17, 1758. He also wrote a letter to John Robinson, speaker of the House of Burgesses from 1738-1766, on this issue: Vol. I, p. 505, to John Robinson on November 9, 1756.

> *Common decency, Sir, in a camp calls for the services of a divine, and which ought not to be dispensed with, altho' the world should be so uncharitable as to think us void of religion*.[10]

Washington's British superiors refused each of his requests. But Washington believed so firmly that religious exercises and activities were essential to the well-being of his troops that he periodically undertook to perform those duties himself, including reading Scriptures, offering prayers, and conducting funeral services.[11]

Future presidents and legislatures followed Washington's lead, laying a solid foundation for religious expression in the military. After the Battles of Lexington, Concord, and Bunker Hill, it became evident that reconciliation with Great Britain was unlikely. In response, Congress officially established the Continental Army, and explicitly recommended that "all officers and soldiers diligently to attend Divine Service."[12] Similarly, Congress instructed America's fledgling navy that "commanders of the ships of the Thirteen United Colonies are to take care that Divine Service be performed twice a day on board, and a sermon be preached on Sundays."[13]

America's second Commander-in-Chief, John Adams, was no less insistent that religious expression be promoted in the military. Known as "The Father of the American Navy," Adams' presidency saw the U.S. Navy grow from its humble origins, as an organization comprised largely of privateers[14], into a formidable fighting force capable of defending the nation. During the Navy's ascendency under his watch, Adams instructed his Secretary of the Navy, Benjamin Stoddert, on the importance of a Navy chaplaincy:

> *I know not whether the commanders of our ships have given much attention to this subject [chaplains], but in my humble opinion, we shall be very unskillful politicians as well as bad Christians and unwise men if we neglect this important office in our infant navy*.[15]

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[10] George Washington, *The Writings of George Washington*, John C. Fitzpatrick, editor (Washington, D.C.: Government Printing Office, 1931), Vol. II, p. 178, to John Blair on April 17, 1758.

[11] *See*, *e.g.*, Jared Sparks, *The Writings of George Washington* (Boston: Russell, Odiorne, & Metcalf, 1834), Vol. 2, p. 54; E. C. M'Guire, *The Religious Opinions and Character of Washington* (New York: Harper & Brothers, 1836), p. 136; Washington Irving, *Life of George Washington* (New York: G. P. Putnam & Co., 1855), Vol. I, pp. 128-129, 201; C. M. Kirkland, *Memoirs of Washington* (New York: D. Appleton & Company, 1857), p. 155; Hon. J. T. Headley, *The Illustrated Life of Washington* (New York: G. & F. Bill, 1859), p. 60; etc.

[12] *Journals of the Continental Congress* (Washington, D.C.: Government Printing Office, 1905), Vol. II, p. 112, June 30, 1775.

[13] *Journals of the Continental Congress* (Washington, D.C.: Government Printing Office, 1905), Vol. III, pp. 378, November 28, 1775.

[14] A private citizen authorized by the government to serve aboard military naval vessels.

[15] John Adams, *The Works of John Adams*, Charles Francis Adams, editor (Boston: Little, Brown and Company, 1853), Vol. VIII, pp. 661-662, to B. Stoddert on July 3, 1799.

Congress responded favorably to President Adams' desire by establishing and providing for naval chaplains, and re-issuing the naval regulations it established during the Revolutionary War, requiring that Divine Service be performed twice each day aboard all naval vessels, and that a sermon be preached each Sunday.[16]

With this foundation firmly established, the tradition of religious expression within the military carried well into the twentieth century. For example, shortly after taking office, and during the military build-up preceding World War II, President Franklin Roosevelt declared:

> *I want every father and every mother who has a son in the service to know – again, from what I have seen with my own eyes – that the men in the Army, Navy, and Marine Corps are receiving today the best possible training, equipment, and medical care. And we will never fail to provide for the spiritual needs of our officers and men*.[17]

During World War II, President Roosevelt apparently became even more committed to preserving the spiritual fitness of the military. So committed was Roosevelt, in fact, that he directed, at government expense, the printing and distribution of the Bible to troops along with his exhortation that "I take pleasure in commending the reading of the Bible to all who serve in the Armed Forces of the United States."[18]

Following World War II, with the emergence of communism as the preeminent threat to American and western European democracies, the battle for ideological superiority commenced. President Harry Truman, wanting assurances that American service members were prepared to combat communism, convened a commission to examine the role of chaplains and spiritual faith in the military. The commission reported:

> One of the fundamental differences dividing this world today lies in the field of ideas. **One side of the world, to which we belong, holds to the idea of a moral law which is based on religious convictions and teachings. The fundamental principles which give our democratic ideas their intellectual and emotional vigor are rooted in the religions which most of us have been taught. Our religious convictions continue to give our democratic faith a very large measure of its strength.** The

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[16] *The Public Statutes at Large* (Boston: Charles C. Little and James Brown, 1845), Vol. II, p. 45, "An Act for the better government of the navy of the United States," April 23, 1800, Art. II.

[17] Franklin D. Roosevelt, "Fireside Chat," *The American Presidency Project*, October 12, 1942.

[18] *The New Testament of Our Lord and Savior Jesus Christ, Prepared for Use of Protestant Personnel of the Army of the United States* (Washington, DC: US Government Printing Office, 1942), letter by Franklin Roosevelt inside front cover.

> other side of the conflict has organized its idea upon a rejection of moral law and individual dignity that is utterly repugnant to any of our religions. Indeed, it has been necessary for the totalitarians to attack and stifle religion because such faith represents the antithesis of everything they teach. **It follows, therefore, that if we expect our Armed Forces to be physically prepared, we must also expect them to be ideologically prepared. A program of adequate religious opportunities for service personnel provides an essential way for strengthening their fundamental beliefs in democracy and, therefore, strengthening their effectiveness as an instrument of our democratic form of government**.[19]

The commission's report was not unfounded. During and after World War II, the U.S. Army surveyed thousands of soldiers about their attitudes toward military service. In 1949, the U.S. Army's Research Branch, Information and Education Division, produced a three-volume record of the survey's results.[20] In Volume II, *The American Soldier, Combat and Its Aftermath*, the U.S. Army surveyed its officers and enlisted service members about the importance of prayer. Among a list of options that included "thinking that you couldn't let the other men down," and "thinking that you had to finish the job in order to get home again," World War II veterans most frequently identified prayer as their source of motivation during combat. It is therefore reasonable to conclude that a permissive religious climate was essential to America's combat efficacy during World War II.

The preceding anecdotes are but a sample of the hundreds of historical examples establishing a clear and unambiguous message: the practice of permitting, encouraging, and at times requiring, religious expression within the armed forces was instituted by those who first won America's independence. And, despite multiple challenges, it has continued uninterrupted since then.

Legal Challenges to Religious Expression in the Military

Legal challenges to the constitutionality of religious expression within the military may take various forms. But the substance of the argument is generally similar: because service members are representatives and agents of the federal government, service member religious expression necessarily implies governmental endorsement of religion, thereby violating the Establishment Clause of the First Amendment. And although courts have repeatedly rejected this argument, as discussed below, the unique

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[19] *The Military Chaplaincy: A Report to the President by the President's Committee on Religion and Welfare in the Armed Forces*. October 1, 1950 (Washington, D. C.: 1951)[emphasis added].

[20] Stouffer, Samuel A., *et al*. *Studies in Social Psychology in World War II*. Princeton University Press (1949).

nature of the military and its mission[21] means that courts often apply the First Amendment to service members differently than in other contexts. This is because, in contrast to civilian society, there is less individual autonomy in the military. Obedience to orders, good order, and discipline are vital to a military force that is capable of fighting and winning wars. The United States Supreme Court repeated this on multiple occasions:

> The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service is the subordination of the desires and interests of the individual to the needs of the service. . . . [W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community.[22]

And:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[23]

Nevertheless, even the military's mission to fight and win wars, which necessitates obedience to authority, good order, and discipline, does not absolve it from ensuring the constitutional right to religious expression. In fact, one court stated that the military not only *may* accommodate religious expression, but it *must*.

In 1985, the United States Court of Appeals for the Second Circuit decided the case of *Katcoff v. Marsh*.[24] In *Katcoff*, two Harvard Law School students challenged the constitutionality of the U.S. Army's chaplaincy, arguing that government provision and funding of chaplains in order to provide for religious practice violated the Establishment Clause. The court rejected that argument, reasoning that, because of the rigors of military life, a service member's ability to freely practice their religion would be stifled unless the military provided chaplains.[25] Importantly, the court held that the Constitution "*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

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[21] *See Parker v. Levy*, 417 U.S. 733, 743 (1974) ("[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.").
[22] *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).
[23] *Parker*, 417 U.S. at 758.
[24] *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).
[25] *Id*. at 234.

not available to them."[26] The principle *Katcoff* exemplifies is now embodied in official DoD policy. Joint Publication 1-05, Religious Affairs in Joint Operations, states:

> U.S. military chaplains are a unique manifestation of the nation's commitment to the values of freedom of conscience and free exercise of religion proclaimed in her founding documents . . .. Uniformed chaplaincies are essential in fulfilling the government's, and especially the Department of Defense's, responsibilities to all members of the Armed Forces of the United States.[27]

In other words, without a military chaplaincy, Congress would be unable to ensure service members' rights under the Free Exercise clause.

American service members assigned to austere environs or forward-deployed experience this reality every day. They are unable to freely exercise their religion by virtue of their military service. Generally speaking, a service member assigned to an air base in Europe or Japan, or to a remote outpost in the Middle East, cannot attend services at his or her church, synagogue, mosque, etc. Thus, military chaplains provide an invaluable service that our forefathers understood to be a bulwark of liberty—military chaplains facilitate the free exercise of religion as guaranteed by the First Amendment. But the challenges to the chaplaincy and chaplains' religious expression did not stop with *Katcoff*.

In the 1990's, Congress considered a legislative override to President Clinton's veto of the Partial-Birth Abortion Ban Act. Seeking to present a unified voice in support of the congressional override, the Catholic Church in the United States engaged in a "Project Life Postcard Campaign," which began in 1996. The campaign consisted of Catholic priests throughout the country—including the Archdiocese for Military Services—preaching to their parishioners against the "partial-birth abortion" procedure. Priests encouraged parishioners to sign postcards urging their elected representatives to vote to override President Clinton's veto.

In response, the Judge Advocate General of the Air Force—the highest-ranking attorney in the Air Force—issued an opinion letter prohibiting participation in the Postcard Campaign. The Army and the Navy[28] subsequently issued similar guidance to their chaplains.

Father Rigdon and Rabbi Kaye, a Roman Catholic priest and Jewish rabbi, respectively, were U.S. Air Force chaplains. Believing that partial-birth abortion was a significant issue to their denominations and congregations, both chaplains wanted to take part in the Postcard Campaign. But the Air Force prohibited them from doing so. In 1996,

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[26] *Katcoff*, 755 F.2d at 234 [emphasis added].
[27] JP 1-05, at I-1.
[28] The U.S. Marine Corps does not have an independent chaplains corps. The U.S. Navy provides chaplains for the U.S. Marine Corps.

Father Rigdon and Rabbi Kaye sued the Secretary of Defense, alleging that the military's prohibition on military chaplains encouraging their congregants to contact Congress in favor of the Partial-Birth Abortion Ban Act violated the Religious Freedom Restoration Act.[29] In 1997, the United States District Court for the District of Columbia ruled in favor of the chaplains.

The court's rationale was straightforward:

> When chaplains are conducting worship . . . they are acting in their religious capacity, not as representatives of the military or . . . under the color of military authority . . .. [M]ilitary chaplains do not invoke the official imprimatur of the military when they give a sermon; they are acting in a religious capacity, and therefore, it is wholly appropriate for them to advance their religious beliefs in that context.[30]

Thus, not only does the First Amendment's Free Exercise Clause require the provision and funding of military chaplains, it also prohibits censorship of their speech when performed in their religious capacity. When chaplains perform their religious duties—whether it be delivering the Sacraments, preaching from the pulpit, or counseling the penitent—they enjoy enhanced First Amendment protection compared to their military colleagues.

Military Restrictions on Religious Expression

As *Katcoff* and *Rigdon* demonstrate, religious expression in the military does not run afoul of the First Amendment to the Constitution simply because it amounts to government acceptance or approval of such religious expression. *Rigdon*, however, did not define the limits on military proscription of a chaplain's non-religious speech. Nor did the court disturb the Supreme Court's holding in *Parker v. Levy*, which arguably grants the military greater authority to curb non-religious speech.[31] Indeed, it is not difficult to imagine a multitude of scenarios in which the needs of the military conceivably outweigh the right of free exercise. Nevertheless, the Constitution, federal law, and military regulations require a careful balancing of these interests.

Because the fundamental concept of the "needs of the service" being greater than the "desires and interests of the individual" is central to how courts view service members' religious liberties, the right to religious expression in the military is not without limitation. The Department of Defense and each of the five military service branches have policies that govern how the military must accommodate the religious needs of service members. The notion that military commanders retain the authority and

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[29] *Rigdon v. Perry,* 962 F.Supp. 150 (D.D.C. 1997).
[30] *Id*. at 160-61 (internal quotations and citations omitted).
[31] *Parker* involved an Army medical specialist who, in protest against the Vietnam War, encouraged Soldiers to refuse to deploy to Vietnam for political reasons.

discretion to maintain good order and discipline, military readiness, and mission capability, are embedded in those policies.

For example, the U.S. Army policy states "the Army will approve requests for accommodation of religious practices unless accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, discipline, safety, and/or health."[32]

The U.S. Navy and Marine Corps policy states the "Department of the Navy 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."[33]

The U.S. Air Force policy is perhaps the most restrictive of the service branches on this subject. It states "leaders at all levels must balance constitutional protections for an individual's free exercise of religion or other personal beliefs and the constitutional prohibition against government establishment of religion."[34] Paradoxically, the same regulation also states that "all Airmen are able to choose to practice their particular religion" and that Airmen "should confidently practice [their] own beliefs."[35] But even then, an Airman's "right to practice [their] beliefs does not excuse [them] from complying with directives, instructions, and lawful orders . . .."[36]

Clearly, the right to engage in religious expression in the military is not unfettered. Military commanders retain substantial discretion in leading, training, and regulating the conduct of their subordinates. This even extends to expressive conduct.[37]

Limitations on Military Authority to Censor Expressive Conduct

Although *Greer v. Spock* upheld the authority of military officials to restrict speech in furtherance of military objectives, it did not grant *carte blanche* to the military.[38] Indeed, a military commander who engages in censorship in an arbitrary and capricious manner, even under the guise of military necessity, may find him or herself on the losing end of a lawsuit. Such was the case in *Nieto v. Flatau*.[39]

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[32] AR 600-20 of March 18, 2008, ¶ 5-6a.
[33] SECNAVINST 1730.8B of October 2, 2008.
[34] AFI 1-1 of August 7, 2012 at ¶ 2.11.
[35] *Id*. at ¶ 2.12.1.
[36] *Id*. at ¶ 2.12.2.
[37] *See Greer v. Spock*, 424 U.S. 828 (1976) (holding that military ban on partisan political activity is consistent with military objectives and does not violate First Amendment).
[38] *Greer*, 424 U.S. at 839 (concluding that policy was "objectively and evenhandedly applied").
[39] *Nieto v. Flatau*, 715 F.Supp. 2d 650 (E.D. N.C. 2010).

Jesse Nieto's son, Marc Nieto, was an American Sailor killed in the Islamic terrorist attack on the U.S.S. Cole in 2000. Mr. Nieto, a retired U.S. Marine, worked as a civilian contractor at Marine Corps Base Camp Lejeune, North Carolina. In response to his son's death, Mr. Nieto began displaying various decals on his vehicle to honor his son's memory, and to express his views criticizing Islam and terrorism.

In 2008, Camp Lejeune officials began receiving complaints that Mr. Nieto's decals were offensive. Colonel Richard Flatau, Jr., the base commander, responded by ordering Mr. Nieto to remove his decals, citing Camp Lejeune regulations prohibiting "extremist, indecent, sexist, or racist messages on . . . motor vehicles in any format."[40] When Mr. Nieto refused to remove the decals from his vehicle, Camp Lejeune officials ordered him to remove his vehicle from Camp Lejeune, and banned him from the base and all other federal installations until he complied. Mr. Nieto sued, arguing that Colonel Flatau applied the base regulation against him in an arbitrary and capricious manner, and that he engaged in viewpoint discrimination.[41]

The court agreed with Mr. Nieto, holding that because Camp Lejeune officials permitted some decals to be displayed, they could not arbitrarily pick and choose those decals that were not permitted simply because some may find their message offensive.[42] Specifically, pro-Islam messages were permitted, while anti-Islam messages were not. Importantly, the court stated "[w]hile the military may have greater leeway in restricting offensive material in furtherance of securing order and discipline among its troops, it may not do so in a manner that allows one message while prohibiting the messages of those who can reasonably be expected to respond."[43] This form of censorship is referred to as viewpoint discrimination, and it is unconstitutional.[44]

Thus, even when a military regulation authorizes a commander to prohibit certain forms of speech in order to maintain good order and discipline, commanders may not engage in viewpoint discrimination against religious expression.

Challenging Alleged Constitutional Violations by the Military

Inevitably, the question arises: What recourse or remedy is available to a service member whose constitutional rights are violated by the military? It is a question courts have yet to address in a comprehensive and satisfactory manner. The unfortunate result is the lingering misconception that *no* recourse is available. This subsection attempts to dispel that myth.

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[40] *Nieto*, 715 F.Supp. 2d. at 652.
[41] *Id.* at 656.
[42] *Id*.
[43] *Id*. at 656.
[44] *See*, *e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

In 1986, the Supreme Court decided the case of *Goldman v. Weinberger*.[45] In *Goldman*, the Court held that the U.S. Air Force did not violate the First Amendment rights of an Orthodox Jew and ordained rabbi who served in the Air Force by prohibiting him from wearing his yarmulke while indoors and on duty. The Court held that the regulation at issue reasonably and even-handedly regulated attire in a manner that accomplished the military's need for uniformity and discipline.[46] Although Mr. Goldman did not prevail on the substance of his constitutional claim, his case is notable because it stands for the proposition that service members *can* sue the federal government for violating an individual's constitutional rights.

Just three years earlier, and in contrast to *Goldman*, the Supreme Court decided *Chappell v. Wallace*,[47] in which it held that enlisted service members could not sue to recover damages from superior officers for constitutional violations in the course of military service. The Court's rationale was that, because of the unique and special nature of the military, Congress created a separate system of justice for service members under the Uniform Code of Military Justice (UCMJ).[48] Were the Court to craft a judicial remedy exposing officers to personal liability to those whom they command, it could severely undermine the special nature of military life. Moreover, because Congress—to whom the Constitution delegates control over the armed forces—had not provided a cause of action and remedy for constitutional violations by individual officers, any judicially created remedy would be inconsistent with Congress' authority in military matters.[49] In other words, the *Chappell* Court held there is no military analog to a *Bivens*[50] action, meaning enlisted service members may not sue their superiors for constitutional violations. Subsequent Congressional action, however, renders continued reliance on *Chappell* misplaced.

Ten years after the Supreme Court decided *Chappell*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).[51] Although a subsequent decision limited RFRA's reach to only the federal government,[52] RFRA nevertheless prohibits "a government" from substantially burdening a person's free exercise of religion unless it can demonstrate a compelling interest that is implemented in the least restrictive way. RFRA creates a cause of action against "a government" that is unable to satisfy this standard. By its own terms, RFRA defines "a government" as including "a branch, department, agency, instrumentality, and official (or other person acting under color of

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[45] *Goldman*, *supra.*
[46] *Goldman*, 475 U.S. at 510.
[47] *Chappell v. Wallace*, 462 U.S. 296 (1983).
[48] *Id*. at 302-04.
[49] *Id*. at 304.
[50] *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (providing money damages remedy for injuries resulting when federal officials violate an individual's constitutional rights).
[51] 42 U.S.C. §§ 2000bb – bb-4.
[52] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

law) of the United States . . .."[53] Thus, post-*Chappell*, Congress *did* create a cause of action for constitutional violations by individuals. Accordingly, *Chappell*'s validity is questionable, at best. And although it may be difficult to prevail against an individual military officer on a constitutional violation claim—for example, the officer may claim qualified immunity—it is clear that RFRA creates a cause of action for such claims.

Therefore, service members who are victims of constitutional violations *can*, in fact, sue the United States, the responsible individual, or both.

Conclusion

American service members voluntarily surrender many freedoms and liberties upon entering the military. Religious freedom, however, is not one of them. Religion and faith have played integral roles in America's military since before our founding. Today, service members continue to enjoy broad, robust First Amendment rights. Service members are free to engage in religious expression in a manner consistent with their faith. The authority and discretion of military officials to curb such expression is not unfettered. And those who find themselves the victims of First Amendment violations may allege constitutional claims against those responsible.

About the Author

Michael Berry is Senior Counsel and Director of Military Affairs for First Liberty Institute. Berry represents some of the most high-profile cases involving service members' religious liberty. A recognized expert in military law, Berry has testified before the House Armed Services Committee on legal issues within the military, authored numerous articles and editorials, and speaks nationally about the need for robust religious freedom in the military. Berry joined First Liberty Institute in 2013 after serving for more than seven years as an attorney with the U.S. Marine Corps. From 2009 until 2012, Berry served as an Adjunct Professor of Law at the United States Naval Academy.

In 2008, Berry was selected for a high-profile combat deployment to Afghanistan with a Marine Corps infantry unit, where he served as the primary legal advisor and subject-matter expert on complex legal matters.

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[53] 42 U.S.C. § 2000bb-2(1).