

September 8, 2020

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

Subject: Religious Discrimination Against Catholic Service Members

Dear Secretary Esper,

First Liberty Institute is the largest legal organization dedicated exclusively to protecting religious liberty for all Americans. In May of this year, we wrote to you on behalf of military chaplains whose messages of hope and encouragement in the midst of the COVID-19 the Army sought to censor. We wrote again in July on behalf of service members who the U.S. Navy prohibited from attending in-person religious services off base. Now, for the third time in less than six months, we again write to express our dismay at yet another affront to religious liberty within our armed forces.

Numerous media outlets report that the U.S. Navy ended Catholic services aboard its installations, while Protestant and other services continue. According to a Navy spokesperson:

The Navy's religious ministries priority is reaching and ministering to our largest demographic—active duty Sailors and Marines in the 18-25 year-old range. To meet that mission, the Navy has had to make the difficult decision to discontinue most contracted ministry services.

The Navy's decision is wrong because it has no basis in fact or law.

According to the Department of Defense's *Religious Identification and Practices Survey*, Catholics comprise the single largest religious demographic, with more than 1 in 5 service members. Moreover, on the question of the importance of religion in one's life, the *Survey* reveals that a substantial majority of service members claim that religion is either "important" or "very important." Thus, if the Navy's priority is truly to reach and minister to its largest demographic, it cannot exclude Catholics.

Excluding Catholics from the benefits of religious ministry is not only unsupported by the data, it is also unconstitutional. As one federal court famously observed, the Constitution "*obligates* Congress, upon creating [a military], to make religion available to [service members] who have been moved by the [military] to areas of the world where religion of their own denomination is not available to them."¹ In other words, the Department of Defense has a constitutional mandate to ensure that every service member has access to chaplains of their own denomination.

This principle is reflected in Joint Publication 1-05, Religious Affairs in Joint Operations:

Uniformed chaplaincies are essential in fulfilling the U.S. Government's, and specifically the Department of Defense's, responsibilities to all members of the Armed Forces of the United States and authorized civilians.

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

Denying service members access to Catholic priests is also unlawful. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, is a federal law that codifies the longstanding religious freedom principles enshrined in our Constitution. 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. Clearly, depriving service members access to Catholic priests is a substantial burden on their religious exercise that is unlikely to withstand strict scrutiny.

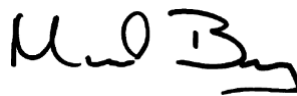
In 2017, the President issued Executive Order (EO) 13798—Promoting Free Speech and Religious Liberty. Shortly thereafter, the United States Attorney General issued a guidance memorandum interpreting religious liberty protections in federal law. Both EO 13798 and the Attorney General's guidance memorandum make clear that service members do not give up their religious liberty by virtue of their military service.

Finally, the government cannot provide for Protestant and other chaplains while excluding Catholics. This kind of preferential treatment and discrimination is abhorrent to the Constitution and violates the Establishment Clause. The Department of Defense must provide for chaplains in a manner that reflects the relative populations of the groups they serve within the military. Thus, if 1 in 5 service members identify as Catholic, we should expect to see a relatively commensurate proportion of Catholic chaplains.

The Navy's stated excuse of funding constraints is unacceptable. We would never allow America's sons and daughters to march off to war without the physical means to accomplish their mission. Likewise, we can never allow our service members to enter battle without the spiritual means to accomplish the mission. Indeed, as the *President's Committee on Religion and Welfare in the Armed Forces* reported to President Truman as America emerged victorious from World War II:

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.

Mr. Secretary, our military faces many challenges on many fronts. As Americans, we are obligated to ensure that our service members are equipped to perform their noble mission. We urge you to take immediate and affirmative steps to remedy this situation. 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.



Michael Berry
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