

March 22, 2021

Lieutenant Colonel Aaron L. B. Cox
Commanding Officer
3rd Security Force Assistance Brigade
Bldg 9425, 16th Street
Ft. Hood, Texas 76544

Subject: Response to Report of Investigation dated March 3, 2021

Dear Lieutenant Colonel Cox,

First Liberty Institute represents Chaplain Andrew Calvert in this matter. This letter constitutes Chaplain Calvert's response in rebuttal to the Report of Investigation (ROI) dated March 3, 2021, submitted by Lieutenant Colonel (LTC) Simon Grimm, the Investigating Officer.

Background

On January 25, 2021, the Army Times published an article titled "Source: Biden to drop Trump's military transgender ban." In response to the article, and in accordance with his sincerely held religious beliefs, Chaplain Calvert used his personal Facebook page to question the alleged policy change. Chaplain Calvert's personal Facebook account disclaims all posts and opinions as his own, and not representative of the Department of Defense (DoD) or the U.S. Army.

Later that day, the 3rd Security Forces Assistance Brigade's (3SFAB) official Facebook account received several anonymous direct messages with screenshots of Chaplain Calvert's January 25 posting. In response to these direct messages, you directed an investigation to determine whether Chaplain Calvert violated Army regulations or policy.

The Investigating Officer concluded that Chaplain Calvert violated DoD Directive 1344.10 and Army Regulation (AR) 600-20, and recommended that Chaplain Calvert receive a General Officer Memorandum of Reprimand (GOMOR).

Taking adverse action against Chaplain Calvert because he expressed his sincerely held religious beliefs and personal views on matters of public concern lacks any basis in law.

The Report of Investigation is Legally Flawed

The Investigating Officer made three adverse findings against Chaplain Calvert. As discussed below, all three adverse findings are legally flawed.

First, the Investigating Officer found that Chaplain Calvert violated AR 600-20 by engaging in discrimination. But he incorrectly stated the legal standard for discrimination. According to AR 600-20, Para 6-2, unlawful discrimination may occur by actions or by the use of disparaging words. Importantly, in order to meet the definition of discrimination, two elements must be satisfied: 1) the actions or disparaging terms must be with respect to a protected class, such as race, religion, gender, etc.; and 2) the actions or disparaging terms must contribute to a hostile work environment. Stated differently, words alone are insufficient to constitute discrimination. They must create a hostile work environment. AR 600-20

defines hostile work environment as “a series of acts that are so severe and pervasive as to alter an individual’s work conditions.”

There are no findings in the Report of Investigation to support the hostile work environment element of discrimination. That is because there is neither allegation nor evidence that Chaplain Calvert’s personal Facebook comments contributed to a hostile work environment in the Army workplace. Indeed, such a claim would be dubious, and could lead to claims that a chaplain’s pulpit sermon constitutes discrimination. The Investigating Officer’s failure to include this critical element of discrimination is a fatal legal flaw that renders his conclusions and recommendations without merit.

Second, the Investigating Officer found that Chaplain Calvert’s Facebook comments violate the Army’s prohibition against “Online Misconduct.” The Investigating Officer concluded that Chaplain Calvert’s comments “inflicted harm” because he used “disparaging terms to discriminate against transgender persons.” For the aforementioned reasons, Chaplain Calvert’s words alone cannot constitute discrimination. Moreover, the “inflicted harm” standard is unconstitutionally vague. The Report of Investigation is devoid of any evidence of harm inflicted upon another person.

Third, the Investigating Officer found that Chaplain Calvert violated the DoD Directive (DoDD) 1344.10’s prohibition against political activity. Once again, the Investigating Officer used an incorrect legal standard. DoDD 1344.10 prohibits partisan political activity by service members using their official position or title, or when purporting to speak on behalf of the DoD. Chaplain Calvert at no time stated or implied that he was speaking in his official capacity, or on behalf of the DoD. Indeed, Chaplain Calvert’s Facebook account unequivocally stated that all views expressed therein are his own.

Further, none of the evidence the Investigating Officer cites supports his conclusion. Exhibit E is a screenshot of a Facebook post Chaplain Calvert made in which he re-posted a video titled “11 Reasons Why Christians Should Vote for Trump.” Exhibit G is merely a photo of two American presidents with statements attributed to them. Quoting the Commander in Chief is hardly partisan political activity. But even if it were, as a Christian chaplain, Chaplain Calvert is permitted to speak publicly on a matter of public concern to Christians. And the Constitution, federal law, and DoD regulations all prohibit the Army from discriminating against him when he does so.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, prohibits the government from substantially burdening a person’s religious exercise absent a compelling government interest that is furthered by the least restrictive means. Under RFRA, the Army may not substantially burden Chaplain Calvert’s religious beliefs, but must provide a religious accommodation for his beliefs unless it can demonstrate: 1) a compelling governmental interest, and 2) that the interest is furthered 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.

DoDI 1300.17, Paragraph 4d, states that “a Service member’s expression of sincerely held beliefs may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.” DoDI 1300.17 also incorporates RFRA as the applicable legal standard in such cases.

AR 600-20—the very regulation Chaplain Calvert is alleged to have violated—also references DoDI 1300.17 and prohibits the Army from substantially burdening a Soldier’s sincerely held beliefs. “Sincerely held beliefs” are defined as conscience, moral principles, or religious beliefs. There can be no question that Chaplain Calvert’s statements arose from his Christian principles and beliefs.

Under existing military case law, Chaplain Calvert's sincerely held beliefs are also protected by the First Amendment to the Constitution. Federal courts have repeatedly ruled in favor of First Amendment protection for religious expression such as Chaplain Calvert's.

In *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997), U.S. District Court for the District of Columbia held that there is a distinction between a chaplain who acts and speaks in his official military capacity, and when he does so as a religious leader or private citizen. Here, Chaplain Calvert clearly communicated in his personal capacity as a religious leader.

In *United States v. Priest*, 21 U.S.C.M.A. 564 (C.M.A. 1972), the nation's highest military court recognized that "we must be sensitive to protection of 'the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.'"

It is also insufficient to allege that Chaplain Calvert's Facebook comments undermined good order and discipline or unit morale merely because it might offend someone. The possibility of offense is irrelevant to the analysis. Rather, the critical inquiry is whether there is religious coercion, which the Establishment Clause of the First Amendment forbids. But the United States Supreme Court has repeatedly, and recently, stated that offense does not equal coercion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004). Moreover, in *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces stated that even racist or supremacist speech, without more, is not punishable under the Uniform Code of Military Justice (UCMJ) because it is protected by the First Amendment. If the First Amendment protects racist or supremacist speech under certain circumstances, then it certainly protects Chaplain Calvert's religious speech.

Finally, it is important to note that, at the time of the Army Times article's publication, President Biden had not yet signed Executive Order (EO) 14004, Enabling All Qualified Americans to Serve Their Country in Uniform. Moreover, EO 14004, by its terms, simply directs the DoD to "take all necessary steps to ensure that all directives, orders, regulations, and policies . . . are consistent with this order."

As of January 25, 2021, DoD Instruction 6130.03-VI clearly stated that "a history of gender dysphoria is disqualifying" unless a licensed health provider certifies that certain criteria are satisfied. Therefore, at the time of the investigation, Chaplain Calvert's statements were fully consistent with and supportive of existing DoD policy.

Conclusion

As you are undoubtedly aware, Chaplain Calvert is a decorated Army chaplain. Chaplain Calvert's professionalism and dedication are evidenced by his multiple deployments and numerous awards and decorations he has received, such as the Bronze Star, Meritorious Service Medal, and the Army Commendation Medal. Throughout Chaplain Calvert's military career, he has personified selfless service and sacrifice, and a desire to provide for the spiritual needs of those under his care. Several of Chaplain Calvert's colleagues provided statements to this effect:

An Army Chief Warrant Officer 2, who happens to be Muslim, deployed to Afghanistan with 3SFAB. He stated that, during the deployment, Chaplain Calvert worked to confirm him as a "Stand-In Imam" because there was no Muslim Chaplain present. He further stated that his many interactions and observations of Chaplain Calvert led him to conclude

that Chaplain Calvert “is not capable of discrimination of any kind regardless of religion, race, color, or gender.”

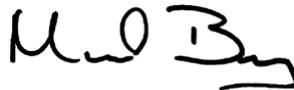
The Brigade Deputy S2 stated that he has personally witnessed Chaplain Calvert “serving Soldiers and civilians who are male, female, American, African, European, Afghan, African-American, White, Hispanic, Catholic, Protestant, Muslim, religiously unaffiliated, heterosexual, homosexual, old, and young alike.”

The Brigade Physical Therapist stated that she “witnessed [Chaplain] Calvert being pulled aside by individuals of all political views, genders, and religious affiliations requesting his counsel both personally and professionally. [Chaplain] Calvert was eager and genuinely concerned with providing exceptional spiritual support to the formation without regard to differing opinions.”

The Brigade Public Affairs Officer stated he personally observed Chaplain Calvert at unit functions, and that Chaplain Calvert “provided the same support and care to all he interacted with regardless of their political or religious affiliation.”

Chaplain Calvert has dedicated his professional life to serving his country, his fellow Soldiers, and the Army family. Taking adverse action against Chaplain Calvert because of his religious beliefs is not only legally wrong, it is morally wrong. We respectfully request you disapprove the findings and take no action against Chaplain Calvert. In the meantime, Chaplain Calvert is willing to receive refresher guidance and instruction on Army social media policy.

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
General Counsel
First Liberty Institute