Civilian Research Project
USAWC Fellow

FREEDOM OF RELIGION AND CONSCIENCE IN THE MILITARY: CLARIFYING POLICY

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Class of 2013

REPORT DOCUMENTATION PAGE	Form Approved OMB No. 0704-0188

1. REPORT DATE *(DD-MM-YYYY)*	2. REPORT TYPE	3. DATES COVERED *(From - To)*
xx-04-2013	CIVILIAN RESEARCH PROJECT	

4. TITLE AND SUBTITLE
FREEDOM OF RELIGION AND CONSCIENCE IN THE MILITARY: CLARIFYING POLICY

5a. CONTRACT NUMBER

5b. GRANT NUMBER

5c. PROGRAM ELEMENT NUMBER

6. AUTHOR(S)
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5d. PROJECT NUMBER

5e. TASK NUMBER

5f. WORK UNIT NUMBER

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
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8. PERFORMING ORGANIZATION REPORT NUMBER

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10. SPONSOR/MONITOR'S ACRONYM(S)

11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION / AVAILABILITY STATEMENT
Distribution A: Approved for Public Release. Distribution is Unlimited.

13. SUPPLEMENTARY NOTES
Word Count: 17,002

14. ABSTRACT

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15. SUBJECT TERMS
Secular, Diversity, Pluralism, Religion Clauses, Establishment Clause, Free Exercise Clause

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			19b. TELEPHONE NUMBER *(Include area code)*
UU	UU	UU	UU	82	

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This manuscript is submitted in partial fulfillment of the requirements of the U.S. Army War College Fellowship. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

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Abstract

Title:	FREEDOM OF RELIGION AND CONSCIENCE IN THE MILITARY: CLARIFYING POLICY
Report Date:	April 2013
Page Count:	82
Word Count:	17,002
Key Terms:	Secular, Diversity, Pluralism, Religion Clauses, Establishment Clause, Free Exercise Clause
Classification:	Unclassified

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FREEDOM OF RELIGION AND CONSCIENCE IN THE MILITARY: CLARIFYING POLICY

> The U.S. Constitution proscribes Congress from enacting any law prohibiting the free exercise of religion. The Department of Defense places a high value on the rights of members of the Military Services to observe the tenets of their respective religions.
>
> —Department of Defense Instruction 1300.17,
> Accommodation of Religious Practices within the Military Services[1]

The freedom of religion and its broader, but closely related concept, the freedom of conscience, have been important yet controversial concepts throughout the history of the United States of America.[2] From America's founding, debates have raged regarding the meaning and extent of these freedoms, and those debates rage on today.[3] Those debates have focused on the first two clauses of the First Amendment, referred to as the "Religion Clauses."

Typically, one side emphasizes the first, or the "Establishment Clause," as well as Thomas Jefferson's reference to "a wall of separation" between church and state. This side often argues for strict limits or even removal of any influence or inclusion of religion in the public forum, seeking for a completely secular government with no reference to or influence from religion. The other side typically focuses on the second, or the "Free Exercise Clause," and the history of the founders' words and actions supporting religious expression in public forums. This side often argues that the religious history and heritage of the United States has played, and should continue to play, an important role in the public arena. Others argue, especially as America has become more diverse religiously, that there should be more accommodation of diverse religious influences in the public forum beyond Christianity or Judaism. With the steady

and precipitous rise of cultural and religious diversity among the population of the United States, as well as with markedly increased global awareness and connectedness, the concomitant differing cultural influences and ideologies have added fuel to this ongoing debate.[4]

The United States Military, as a reflection and microcosm of the larger society, has also been impacted by this debate. In spite of marked efforts by the DOD and each of the branches of the military,[5] there are ongoing issues and concerns voiced by some with regard to policy and practice concerning the freedoms and protections espoused in the Religion Clauses.[6] Because of the critical importance of religious liberty and the freedom of conscience, and in light of the potential impact these freedoms have on good order, discipline, and morale within the ranks of the military, there is a need for further discussion, clarification, and understanding that can lead to informed recommendations for military policy and practice going forward.

This project examines the historical, legal and political aspects surrounding the text and history of the Religion Clauses of the First Amendment to the United States Constitution, as well their connection with the Free Speech Clause. Drawing from this examination, related issues impacting those who serve in the military are discussed and suggested implications and recommendations are given regarding policy guidance for the military.

Analysis

Definitions

Barbara McGraw[7] has noted the crucial nature of clear definitions in the "public religion" debate.[8] In pointing to the confusion that arises from the absence of clear definitions, she explained that this should be of concern "because the battle in the

religion-in-public-life debate is waged in large part over definitions, in particular, the definitions of 'religion' and 'secular' as the battle lines have been drawn with reference to these two opposing concepts…These definitions have real political and legal implications."[9] She pointed to the example of the Supreme Court case, *Lemon v. Kurtzman* (1971), which established, what has become known as, the "*Lemon* Test," which, in part, requires that a law have a "secular" purpose for it to be valid under the Establishment Clause.[10]

Many of the key terms and concepts referenced in this examination can have varied and multiple meanings, depending on the context in which they are used and the source from which a particular reference comes. In some cases, the meaning and usage of a term or concept in the eighteenth and nineteenth centuries were different from a common modern understanding today. Therefore, clearly delineated definitions are critical to lucidity in understanding the arguments and implications.

Freedom/Liberty

In this examination, freedom is defined as "the absence of necessity, coercion, or constraint in choice or action; to be free from arbitrary or despotic control."[11] "More specifically, it is the absence of coercion from governmental power so as to provide the maximum individual freedom possible up to the point where one's freedom would infringe on other individuals' freedoms."[12]

Religion

Jon Meacham stated that "Religion is one of the most pervasive but least understood forces in American life.[13] McGraw noted: "How we define 'religion' determines *who* is entitled to 'free exercise of religion' and *what*, if anything, is to be

‘accommodated’ as the Justices of the United States Supreme Court reconsider Establishment Clause jurisprudence.”[14]

McGraw relied heavily on Wilfred Cantwell Smith’s classic work *The Meaning and End of Religion* to explain the etymology and history of the word “religion.” Smith noted that the term, which comes from the Latin root “religio,” is notoriously difficult to define and that there have been “a bewildering variety of definitions.”[15] It is noteworthy, however, that with prominent Christian theologians, such as Augustine, Aquinas, Calvin, and Luther, “religio” was used to connote a personal relationship with God, a reference more akin to the words “piety” or “faith” than to what is generally meant by “religion” today.[16] It was not until the seventeenth and eighteenth centuries that it began to take on the additional meaning as a system of beliefs.[17]

Smith’s conclusion, as summarized by McGraw, is that there are multiple uses of the word today and that it can be used in four distinct ways:

- Personal piety or relationship with God.
- The ideal of a system of beliefs, practices, and values (i.e., the subject of theologians).
- The “empirical phenomenon” of a system of beliefs, practices, institutions, and values (i.e., the subject of historians and sociologists).
- A “generic summation, i.e., ‘religion in general’”[18]

McGraw noted that the context and usage of the word will likely determine its meaning. Often, in arguments about the founders’ original intentions, one meaning is assumed, such as the third in Smith’s list above, when what was understood at the time was most likely the first or second of his list.[19]

Relying on a host of scholars,[20] Timothy Shah and his colleagues[21] focused on an anthropological basis for defining religion, concluding that it possesses several crucial characteristics:

- A belief in some kind of ultimate reality, an unseen order, or a supernatural being (or beings)
- A belief that this "reality," "order," or "being" is enormously significant for one's life, that harmoniously adjusting one's self to this reality/order/being is a distinctive good, and perhaps even one's supreme good
- A belief that human beings can grasp and relate to this transcendent reality/order/being in some fashion
- Something people *do* in common—a set of beliefs and practices of a community, not of isolated individuals

In the present work, religion is used with reference to all of these meanings at different times. An explanation of which meaning is intended is given only as needed to make a point or when necessary for clarification.

Conscience

In her examination of John Locke and the founders' reliance on his political ideas, McGraw concluded: "We see that freedom of conscience generally was deemed by those of the founding generation to be the core civil right."[22] Generically, it can be defined as "the sense of" or "conformity to what one considers to be correct, right or morally good."[23] However, the founders almost always used it in connection with religious faith and/or reason.[24] As Robert J. Araujo stated: "Conscience and its frequent companion, religious liberty, form that core of the person who, with the exercise of right

reason guided by the quest for objective truth and frequently in the exercise of the practice of faith in God, deliberates and discerns regarding what is right and what is wrong and formulates the belief that guides one's path in life."[25]

Secular

The origin of the word "secular" is from the fourteenth century Latin word, "saeculum," which referred to the present world, time, or age.[26] It came to refer to being "of this world." As McGraw, relying on Hitchcock, explained, "A secular person is a "this-worldly" directed human being."[27] McGraw also noted that in popular usage the word "secular," and its derivatives, are generally defined in the negative and are seen as referring to "everything that is *not* 'religion.'"[28] This usage perhaps originated when nineteenth century scholars began to use the concept of "secularism" to distinguish "religion" from other aspects of life.

She further argued, however, supported by the work of David Lawrence Edwards concerning the use of the term "secularism" by a nineteenth century religious dissident in Europe,[29] that: "what was once deemed 'secular' was not necessarily exclusive of what was deemed to be 'religion.' Rather, the 'secular' could be this-worldly directed religion, in the sense of acting in accordance with one's personal piety or relationship with God *in this world*."[30] She concluded that the common usage today of "secular" as "that which is not religion" obscures the original intentions of the founders.[31] It should, therefore, be used and understood in congruence with its original meaning and intent, pertaining to "this world" or "worldly" affairs, rather than in any way in opposition to 'religion' or the 'religious.' Justice Harry Blackmun's statement in *Allegheny v. ACLU* (1989) supported this usage: "A secular state, it must be remembered, is not the same

as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed."[32]

Diversity and Pluralism

William R. Hutchison stated that "The terms *diversity* and *pluralism*, as applied to religion and to American society generally, have surged in prominence and common usage over the past several decades…*Pluralism*, understood as the acceptance and encouragement of diversity, is a fighting word for participants in contemporary culture wars, and a key concept for those who write about them."[33]

"Diversity" is defined as "the inclusion of different types of people (as people of different races or cultures) in a group or organization."[34] "Pluralism," on the other hand, is defined as "a state of society in which members of diverse ethnic, racial, religious, or social groups maintain and develop their traditional cultural or special interest within the confines of a common civilization."[35] Hutchison emphasized the standard linguistic distinction between the two as "the distinction between a fact or condition called diversity and an ideal or impulse for which the best term is *pluralism*."[36]

The "fact or condition" of diversity, although providing increased impetus for the importance of clarifying the public religion debate, has produced less confusion or angst in the debate than its counterpart, pluralism. One reason is in a variation of the definition that has often been applied to or assumed of the word or concept "pluralism" and its implications.

In an article by Michael A. Milton, relying heavily on the writings of "the late English missionary and Bishop of South India, Lesslie Newbigin (1909-1998),"[37] he distinguished between welcoming a pluralistic and diverse society on the one hand with the acceptance of the "ideology of pluralism" on the other.[38] The reason for this

distinction was in the definitions of pluralism he provided from both sides of the debate. Two examples of the several prominent scholars' and writers' definitions he mentioned are of John Stott, an Evangelical theologian, and Susan Laemmie, Rabbi and Dean of Religious Life at USC. He quoted Stott as saying, "Pluralism is an affirmation of the validity of every religion, and the refusal to choose between them, and the rejection of world evangelism…"[39] He stated that Rabbi Laemmie described the tenets of the ideology of religious pluralism as, "…all spiritual paths are finally leading to the same sacred ground."[40]

Such a definition, although clearly assumed or implied by some in the debate, goes beyond the definition to which this and other works ascribe, implying the necessity of concurrence with all other religions rather than maintaining "autonomy" and integrity of one's own religious traditions/beliefs. It also contradicts the principles of religious liberty and freedom of conscience set forth in the founding documents of the United States, particularly the religion clauses of the First Amendment. Therefore, the earlier definition given in this discussion is the one intended and assumed throughout this project.

Historical Considerations

The U. S. Constitution is the bedrock of the rights and freedoms of the citizens of the United States of America. Its importance in the eyes of the Founders is seen in the fact that the first law enacted by Congress in its first session on 1 June 1789 was to establish an oath or affirmation to be required of all civil and military officials to support the Constitution of the United States.[41] George Washington, in his Farewell Address in 1786, also stated:

> The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the Constitution which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power of the right of the people to establish government presupposes the duty of every individual to obey the established government.[42]

Because of its place in establishing rights and freedoms, knowing its content and understanding its meaning is paramount, especially to those who have sworn or affirmed the oath to "support and defend [it]…and to bear true faith and allegiance to the same."[43]

As with any historical document, scholars first seek to understand its intended meaning by examining the history of its authors and the surrounding historical context. Knowing and understanding the history of America's founding, therefore, is critical to understanding and applying the Constitution's principles.[44] Some have argued against the merits of "foundationalism" on the grounds that as society changes, new sources for resolving its problems should be considered.[45] Such claims, however, cannot refute the necessity of understanding the historical foundations of the Constitution as essential for an informed debate as to its meaning and place of preeminence in securing the liberties of Americans in each and every generation. Not doing so would undermine the fundamental and foundational principles that the founders sought to establish, leaving them to speculation and manipulation, and jeopardizing the rights and freedoms of future Americans. The process for changing the Constitution in the face of a "changing" society was established by the founders themselves in Article V of the Constitution which prescribes the method for proposing amendments.[46]

One factor that has been well documented concerning the revolutionary period is that religion played a significant role in the history of America's founding and in the lives

of its founders.[47] Although some have tried to disparage and down play its validity and importance,[48] an honest and thorough examination of historical references from the Pilgrims to Lincoln reveals otherwise. The testimony of the French politician, Alexis de Tocqueville, after his visit to America in the 1830's is revealing:

> I do not know if all Americans have faith in their religion—for who can read the secrets of the heart?—but I am sure that they think it necessary to the maintenance of republican institutions. That is not the view of one class or party among the citizens, but of the whole nation: it is found in all ranks.[49]

Supported as well by multiple sources of recorded public and private statements and arguments made by the founders, the Declaration of Independence and the First Amendment Religion Clauses provide the foundational documentation that lend credence to the public role of religion and its importance to our founders and the freedoms they sought to protect.

For instance, as reflected elsewhere by the founders, the Declaration of Independence clearly delineates the foundation of the "unalienable rights" in the statement that *all* are "created equal" and "endowed by their Creator" with these rights.[50] Elsewhere in that foundational document, similarly religious terms and phrases appear, such as "Nature's God," "appealing to the Supreme Judge of the world," and "with a firm reliance on the protection of divine Providence." Such references, written by Thomas Jefferson, with input from others, and approved by the representatives of all thirteen colonies, clearly showed that the founders were in agreement concerning an overarching religious/theological concept that provided the principle foundation and justification for certain rights as human beings. In fact, Jefferson, in a written statement, only days before his death on the 50th anniversary of the signing of the Declaration,

summarized its essence as being the establishment of "the free right to the unbounded exercise of reason and freedom of opinion."[51]

Similar thoughts were expressed by the founders with regard to the First Amendment Religion Clauses.[52] In fact, religious freedoms are often referred to as "First Freedoms" because of their prominence in the Bill of Rights and in the debates over their ratification in the Constitution.[53] As Jay Sekulow stated, "The writings of America's Founding Fathers made it clear that they viewed religious freedom as occupying the highest rung of civil liberty protections. For example, George Washington wrote that 'the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle.'"[54]

Sekulow and Ash noted as well that "[e]arly national leaders also acted in ways that some today argue expressly violate the establishment clause."[55] Following the earlier wartime precedent established by Congress, President George Washington continued the practice of issuing proclamations of thanksgiving.[56] A portion of his first proclamation read:

> Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey His will, to be grateful of His benefits, and humbly to implore His protection and favor…Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these States to the Service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be. That we may then all unite in rendering unto Him our sincere and humble thanks…[57]

There were a myriad of other similar acts by Presidents Adams and even Jefferson, such as a call for a national day of fasting and prayer, developing and funding curriculum which included Bible reading and a Christian hymnal in the District of Columbia schools, as well as other acts by the early Congresses, such as

recommending or legislating the holding of and attendance to "divine services."[58] As Sekulow and Ash conclude, an honest examination of the governmental acts contemporaneous with the adoption of the First Amendment makes it difficult to deny that, "in the early days of our republic, church and state existed relatively comfortably (and clearly) together, with contemporaries of the drafters of the First Amendment showing little concern that such acts violated the establishment clause."[59]

Religious liberty was often used in conjunction with another very prominent concept seen in the founders' writings: the freedom of conscience. McGraw noted that the right of conscience and its preservation as an inalienable right was central to the new system of government that the colonists envisioned and was recognized almost universally as fundamental. "In fact, freedom of conscience was everywhere espoused by Americans as central to liberty. Accordingly, it was memorialized in every Revolutionary period state constitution or declaration of rights."[60] In noting the connection between freedom of conscience and freedom of religion, McGraw further stated that It was readily apparent why free conscience was so important to the founding generation: "For all their diversity…they were united in one way: They were a religious people."[61]

James Madison, sometimes referred to as the "Father of the Constitution," in his *Memorial and Remonstrance Against Religious Assessments* (1785), also wrote:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. The right is in its nature an unalienable right…[T]he equal right of every citizen to the free exercise of his Religion according to the dictates of conscience is held by the same tenure with all our other rights.[62]

Thomas Jefferson, writing to the Society of the Methodist Episcopal Church, reflected the same sentiments concerning religion and conscience:

> No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority. It has not left the religion of its citizens under the power of its public functionaries, were it possible that any of these should consider a conquest over the consciences of men either attainable or applicable to any desirable purpose…I trust that the whole course of my life has proved me a sincere friend to religious as well as civil liberty.[63]

It is also noteworthy and well documented by McGraw and others that, even in light of the overwhelming evidence of the founders' religiosity,[64] key founders, following John Locke, also showed remarkable tolerance and were adamant concerning freedom of conscience for all.[65] Groups mentioned specifically by name or directly addressed included Muslims, Hindus, Pagans, Jews, Baptists, Methodist Episcopalians, and Catholics.[66] Jefferson and Washington provide the most noteworthy examples.

In his "Notes on Religion" (1776), Jefferson stated: "He [Locke] says 'neither Pagan nor Mahomedan nor Jew ought to be excluded from the civil rights of the Commonwealth because of his religion'…It is the refusing *toleration* to those of different opinion which has produced all the bustles and wars on account of religion."[67] Jefferson also defeated a motion to limit the protections of his "A Bill for Religious Freedom" in Virginia to Christians only.[68]

Washington provided one of the most memorable statements in this regard in his "Letter to the Hebrew Congregation in Newport, Rhode Island" (August 18, 1790), a copy of which is still on display in that congregation and is the focus of an annual ceremony that celebrates religious liberty. It is significant that he wrote it during the time of the ratification of the federal Bill of Rights by the states.[69] A portion of it read:

> All possess alike liberty of conscience, and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent national right. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support…May the children of the stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants, while everyone shall sit in the safety under his own vine and figtree, and there shall be none to make him afraid…[70]

In contrast to the vast evidence for the importance of religion and conscience exhibited by the founders, and yet in reflection of the remarkable tolerance key founders showed to diverse faith groups, the Constitution itself has no mention of God and its only reference to religion, other than in the First Amendment, is the admonition against a "religious test" for qualification for public service in Article VI.[71] Some might see this as an argument against any role of religion in public life. However, when seen in light of the evidence presented above, particularly in light of the addition of the First Amendment Religion Clauses at the forefront of the Bill of Rights, such an argument is not consistent with the founders' views and actions. In fact, it further demonstrates their commitment to the preservation of religious liberty and freedom of conscience.[72]

Evidence for this is found in the debates over adding the Bill of Rights, especially the Religion Clauses, to the Constitution as a prerequisite for its ratification. Some of the delegates, reflecting most of the states' constitutions, wanted references to religious ideals included, while others wanted at least some reference to the guarantee of protections from government intrusion or coercion with regard to religious matters.[73] Madison was against the idea at first, maintaining that the Constitution alone provided for the freedom of religion and conscience. In their wisdom, its framers, in light of the history of abuses of power in the hands of government and church leaders when the

two had established alliances, had avoided such an alliance between church and state in the newly formed Constitution. In that sense, it was secular—using the definition established above, not the one commonly referred to today—that is, it was focused on governing society without interference "in" or "from" religious dogma but resting on the foundational principles stated in the Declaration of Independence and espoused extensively by the founders.

However, many of the state delegates, including the Virginia Baptists (who held sway with Madison in Virginia) and others, were insistent that a Bill of Rights should be added to provide further protection for those freedoms they felt were inviolable, particularly including religion and conscience. Madison, recognizing that such a Bill of Rights was necessary for ratification, agreed and wrote the Bill of Rights (the first ten Amendments) to be added as part of the Constitution.

Based on McGraw's analysis surrounding the debate and passage of the First Amendment, its ratification by the states and passage by the First Congress was meant to preserve the "rights of conscience."[74] She explained that the free speech, free press, freedom of assembly, and right to petition clauses of the First Amendment *derive from* freedom of conscience, their purpose being "to create the political context within which free conscience can be informed and expressed." Therefore, understood together with the Religion Clauses, "they *are* the 'rights of conscience.'"[75]

She further noted, as discussed under definitions above, that the use of the word "religion" in the First Amendment was intended to preserve "personal piety or relationship with God," that is, faith and belief, which was the common meaning of the word at the time. It was *not* meant to "limit the effect of the Religion Clauses to religious

institutions and doctrine, as many in our contemporary debate mistakenly contend."[76] Her conclusion was that the Religion Clauses should be read together since it is apparent that they were designed to ensure that individual conscience would be free from coercion—"*not that religious organizations would be free or that only those who are members of religious organizations with systems of beliefs would be free.*"[77]

The first sixteen words of the First Amendment, the "Religion Clauses," therefore, became the foundation and litmus test for all matters relating to the freedom of religion and conscience and its expression in the public forum. The second core freedom, the freedom of speech, is sometimes considered alongside them as well.[78] As with the history and context of these First Amendment clauses, an examination and understanding of the legal debate over them is equally as important to consider.

Legal and Political Considerations

The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.[79]

Despite its importance to the founders and the prominent place it has been given both in our history and in our Constitution, the interpretation and application of religious liberty, as enumerated in the First Amendment Religion Clauses, have received focused but divided and fervent attention since the 1940s. As Murray,[80] relying on others, noted:

> Accommodating certain aspects of religion in public life, while barring others, has been the tortuous task of the Supreme Court. The lines of separation and accommodation have changed significantly since the 1940s, when the Court began a wholesale re-evaluation of the Religious Liberty Clauses—and their application to the states and local government. Over the past sixty-plus years, the Court's philosophy has changed significantly, and it continues to evolve. Old metaphors for describing

> "separation of church and state" are being cast aside, while new ones are being introduced.[81]

These changing "lines of separation and accommodation" regarding religion in public life have impacted the United States military as well. Major Paula Grant, in her award-winning essay, provided a succinct review of several of the high-visibility religious issues the United States military has recently been forced to address, including those at the service academies, in basic training, at the Pentagon, and in deployed locations.[82] She stated that these conflicts surrounding religious expression raise constitutional issues as commanders and lawyers attempt to accommodate members' rights under the first three clauses of the First Amendment. Therefore, military leaders must possess a clear understanding of the legal framework connecting them before they can formulate new religious guidance.[83]

Similar to the earlier discussion concerning the importance of history and context in understanding the Constitution's meaning and interpretation, Sekulow and Ash noted that one of the methods the United States Supreme Court has used to interpret the meaning and legal reach of the First Amendment is by examining "how early Congresses acted in light of the amendment's express terms. One can begin to understand what the establishment clause allows (and disallows) by examining what transpired in the earliest years of our nation during the period when Congress drafted the First Amendment and after the states ratified it."[84] Their analysis of those early actions, along with several Court case opinions they cite referencing them, lead them to conclude that "*strict* church-state separation has never been required in the United States and is not required now."[85] They noted that as a nation governed by the rule of law, "[w]e are also a nation with a robust, yet diverse, religious heritage. That religious

heritage is reflected throughout our society—including within the armed forces of the United States."[86] Citing *Zorach v. Clauson* (1952), they noted the Court's observation that "we are a religious people whose institutions presuppose a Supreme Being" and that the government "sponsor[s] an attitude…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."[87]

They acknowledged, however, citing agreement with *Locke v. Davey* (2004), that the Establishment Clause and the Free Exercise Clause are often in tension.[88] Inevitably, there are some state actions permitted by the Establishment Clause that are not required by the Free Exercise Clause. They concluded that "[t]he First Amendment clearly proscribes favoring religion over non-religion or one religion over others, but it likewise proscribes favoring non-religion over religion."[89]

An examination of the legal cases and political actions related to the first three clauses of the First Amendment are therefore necessary for an understanding of their meaning and application as seen by the courts and elected officials. Although by no means exhaustive, this discussion includes many of the important and landmark cases.

Establishment Clause Cases

With regard to Establishment Clause cases, it was the 1947 landmark case of *Everson v. Board of Education* in which the phrase "wall of separation between Church and State" was first emphasized, making "separation of church and state" the "catch phrase" for the Establishment Clause for years to come.[90] Writing for the majority (five-to-four), Justice Hugo Black in his comments referenced Thomas Jefferson's words in his letter to the Danbury Baptist Association in 1802. In spite of ruling in favor of permitting public funds to be used for transportation to parochial schools, Black wrote,

"That wall must be kept high and impregnable. We could not approve the slightest breach."[91] Although this reference was Jefferson's only time to use the phrase and a similar phrase was used only once by Madison, Murray noted that "the Court was stuck with the 'wall' metaphor for years to come, and many subsequent justices have tried to shake off its shadow."[92]

Another landmark case involving the Establishment Clause was *Engel v. Vitale* (1962), which considered the question of prayer in public school. Justice Black again spoke for the majority, finding the prayer unconstitutional. In his conclusion he wrote, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[93]

Mannino noted that Justice Douglas, in a concurring opinion, "pointed to the fact that the Supreme Court and Congress opened their sessions with prayers, and that the majority opinion dealt with only 'an extremely narrow' point."[94] Douglas stated that "[t]he First Amendment leaves the government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the unbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."[95]

Finally, in the only dissenting opinion, Justice Potter Stewart stated that "the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution," was not helpful.[96] Similar to Douglas' comments, but with a

different conclusion, he noted that “the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government” demonstrated that the prayer under consideration did not violate the Establishment Clause.[97]

The Court considered another landmark case only one year later when on an eight-to-one vote it struck down Bible reading in public schools in *Abington School District v. Schempp* (1963). Justice Tom Clark wrote the opinion, in which, he noted that prior opinions had focused on “the purpose and primary effect” of any challenged practice, concluding that “to withstand the strictures of the Establishment Clause there must be a *secular legislative purpose and a primary effect that neither advances nor inhibits religion*.”[98] Therefore, since the Bible was “an instrument of religion,” under this test it could be studied in the public school curriculum only “when presented objectively as part of a secular program of education.”[99]

Of the other concurring opinions, Justice William Brennan’s was significant in that he cited experiences where particular religions had been the victims of discrimination and noted the importance of the changing composition of religion in America.[100] He concluded that “our religious composition makes us a vastly more diverse people than were our forefathers…Today the nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.”[101] The only dissenting opinion was given by Justice Stewart. He again criticized the emphasis on the “wall of separation”, noting that such an emphasis on the Establishment Clause “leads to irreconcilable conflict with the Free Exercise Clause.”[102]

Lemon v. Kurtzman (1971) was another significant yet controversial landmark case. The Court found that attempts by Pennsylvania and Rhode Island to subsidize the salaries of teachers of secular subjects in religious schools violated the Establishment Clause. In doing so, the Court added a third test to the criteria enunciated in *Schempp*. It, therefore, established a three prong test, which came to be known as "the *Lemon* test." The test consists of three questions:

- Does the law/statute in question have a secular legislative purpose (meaning a legitimate, nonreligious purpose as judged by an objective observer)?
- Does its principle or primary effect advance or inhibit religion (is it "religion neutral")?
- Does it foster "an excessive government entanglement with religion" (meaning does the government involve itself in the workings of a religion or a religious organization and vice versa)?[103]

Accordingly, if a law fails any one of the three tests, it is said to violate the Establishment Clause and to be found unconstitutional.

In spite of this new test, Chief Justice Warren Burger, in his majority opinion, wrote that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." He also noted that the Court's prior holdings did not call for total separation between church and state, that total separation was not possible in an absolute sense, and that some relationship between government and religious organizations was inevitable.[104]

Monnino stated that Professor Noah Feldman has characterized *Lemon v. Kurtzman* as "the high point of legal secularism."[105] Murray also noted that although the

Supreme Court frequently refers to the *Lemon* case, in recent years justices have more often criticized it than adhered to it.[106] Such criticisms are highlighted in the next two landmark cases.

In *Wallace v. Jaffree* (1985), the Court struck down an Alabama statute which permitted a one minute period of silence in public schools "for meditation or voluntary prayer."[107] The statute was found to be unconstitutional under the first "prong" of the *Lemon* test ("secular purpose"). In her concurring opinion, Justice Sandra Day O'Conner, stating that she previously found the *Lemon* test to be proven problematic, proposed her own test. Her "endorsement" test would focus instead on whether a particular statute "actually conveys a message of endorsement of religion."[108]

Murray, again noting the debate and lack of consensus among the Justices concerning Establishment Clause tests, pointed to O'Conner's and Kennedy's opinions in *Allegheny County v. ACLU* (1989).[109] O'Conner argued that her endorsement test captured the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred."[110] Justice Anthony Kennedy criticized O'Conner's endorsement test and devised his own test, called the "coercion test." His test asked two questions:

- Does the law in question aid religion in a way that would tend to establish a state church?
- Does the law coerce people to support or participate in religion against their will?[111]

Kennedy stated that his test was designed for accommodation of longstanding traditions, such as legislative prayer and prayer before the opening of the Supreme Court, which a "faithful application" of O'Conner's endorsement test would preclude.[112]

According to Grant, the Fourth Circuit Court of Appeals applied Kennedy's coercion test in 2003 to a "voluntary" prayer at the noon meal at the Virginia Military Institute (VMI).[113] In that case, VMI Cadets were required to stand quietly during the prayer until it was over. The Court found the prayer unconstitutional because the strict military style environment at VMI took any real voluntariness out of the equation.[114]

However, going back to *Allegheny*, Justice O'Conner was equally critical of Kennedy's test stating that a standard that "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in any view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."[115] Such debates again indicate the difficulty and diversity in interpreting and applying the Religion Clauses, even for Justices.

Going back to *Jaffree*, it is noteworthy that Chief Justice William Rehnquist wrote the longest of the three dissenting opinions. Monnino stated that he "was perhaps the greatest historian ever to sit on the Supreme Court," which, he believed, made his opinion one of the most reasoned.[116] In his opinion, Rehnquist stated:

> In the 38 years since *Everson*, our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier…The "wall of separation" between church and state is a metaphor based on bad history, a metaphor which has proved useless as a guide of judging. It should be frankly and explicitly abandoned…The crucible of litigation has produced only consistent unpredictability, and today's effort

> is just a continuation of the Sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in *Lemon*. We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. Our perception has been clouded not by the Constitution, but by the mists of an unnecessary metaphor.[117]

Rehnquist also concluded that the founders saw the First Amendment "as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects." He stated he found no basis for a requirement of government neutrality between religion and irreligion nor did the Establishment Clause prohibit the Federal Government from providing nondiscriminatory aid to religion.[118]

This conclusion and explanation by Chief Justice Rehnquist is in line with an earlier opinion in *Marsh v. Chambers* (1983), in which the Court found that chaplain-led prayers opening each day's session in both houses of Congress was not "an establishment of religion," but "a tolerable acknowledgment of beliefs widely held among the people of this country."[119] As noted earlier, Sekulow and Ash pointed to the Court's method of examining the early history of Congress to establish its conclusion. In *Marsh*, the Court noted that "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer," and a "statute providing for the payment of these chaplains was enacted into law on September 22, 1789."[120] As the Court further noted, this timeframe is significant in that within days of its decision to pay congressional chaplains from the federal treasury, final agreement was reached on the language of the Bill of Rights.[121] Sekulow and Ash further highlighted that this First Congress also established the tradition of clergy-led prayer at presidential inaugurations, which "constitute military change-of-command ceremonies, where the nation's new commander-in-chief assumes office from his predecessor."[122] The *Marsh*

Court, clearly recognized that actions of the First Congress were "contemporaneous and weighty evidence of the Constitution's true meaning."[123]

Sekulow and Ash highlighted two other cases that further proscribe strict church-state separation. In the first, *Corporation of Presiding Bishop v. Amos* (1987), the Court noted that "this 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."[124] Further, it stated that permissible religious accommodation does not need to "come packaged with benefits to secular entities."[125] In an earlier case, *Zorach v. Clauson* (1952), the Court also noted that strict separation could lead to absurd results.[126] There, the Court concluded that the First Amendment:

> does not say that in every and all respects there shall be a separation of Church and State…Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly…Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution…A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God Save the United States and this Honorable Court."[127]

A final case considered here is one that was filed as an Establishment Clause case but had critically important ramifications with regard to the Free Exercise Clause as well, particularly with regard to the military. *Katcoff v. Marsh* (1986) is a case that did not reach the Supreme Court but had significant implications for religious liberty in the military as it related to the existence and purpose of the Chaplain Corps. Filed by two Harvard law students in 1979 against the Secretary of the Army, it sought a judgment declaring that the Army Chaplaincy Program violated the Establishment Clause.[128] The plaintiffs, recognizing the need to protect the Free Exercise rights of Soldiers, argued that to avoid violating the Establishment Clause some form of voluntary, privately

funded chaplaincy program was the answer.[129] It ended after several years of litigation when the district court rejected the plaintiffs' claim and the Court of Appeals for the Second Circuit essentially affirmed the District Court's dismissal of the lawsuit.[130] Emphasizing the importance of the Free Exercise Clause, the Court acknowledged the inherent tension between the Establishment and Free Exercise Clauses, but "found that if Congress did not establish an Army chaplaincy, it would deny soldiers the right to exercise their religion freely, particularly given the mobile and deployable nature of the nation's armed forces."[131]

Rosen also commented about the Court's application of the *Lemon* test (described above). In *Katcoff*, the Second Circuit acknowledged that a strict application of the *Lemon* test in isolation would have rendered the Army chaplaincy unconstitutional. The Court held that the standard to be applied must take into account the deference required to be given to Congress' exercise of its War Power and the necessity of recognizing the Free Exercise rights of military personnel. In other words, "the presence of two countervailing constitutional considerations—the War Powers clauses and the First Amendment's Free Exercise Clause—militated against application of the *Lemon* analysis."[132]

The evidence again underscores the difficulty and complexity in understanding and applying the Religion Clauses. With this reminder of the tension between the two Religion Clauses and being reminded of McGraw's admonition (p16 above) as to the importance of reading and considering them together, cases that focus on the Free Exercise Clause are now considered.

Free Exercise Clause Cases

Dr. Saby Ghoshray provided an insightful summary of the state of Free Exercise jurisprudence that is worth repeating:

> Answers to questions [regarding protection of free exercise of religion] reside within the very essence of the Establishment Clause and the Free Exercise Clause. Confusion, complexity and lack of clarity in understanding these clauses, however, have added to the fog of misapplication in various cases involving religious rights. Despite a litany of cases developed both at the Supreme Court and lower courts level, obstacles remain in developing a coherent analysis of the freedom of religious exercise in the U.S., as diverging interpretations have been provided by the scholars on two fundamental issues. The first emanates from not having a solid demarcation between the freedom to believe and the freedom to act within the Free Exercise Clause…The second comes from the inability of both the judiciary and legislative policy making bodies from fully grasping the connotations of religion within a multi-cultural cosmopolitan fabric.[133]

One of the earliest cases dealing with Free Exercise was *Reynolds v. U.S.* (1789). In it, the Court upheld a federal law prohibiting the practice of polygamy by a Mormon who claimed his religion required him to engage in that practice. The Court made a distinction between belief and conduct and concluded that the government had broad authority to prohibit religious conduct. The case remains as precedent for similar cases.[134]

The Court's opinion is important because of its delineation of the boundary between belief and conduct.[135] As Chief Justice Morrison R. Waite, writing for the Court, stated, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief or opinion, they may with practices."[136] Chief Justice Waite expounded on this theme with illustrations relating to religious practices of human sacrifice and suicide, which Western society forbids. Murray noted that "Waite invoked Western values as the appropriate standard to follow with respect to marriage."[137] In Waite's own words, "Polygamy has always been odious among the northern and

western nations of Europe…and from the earliest history of England polygamy has been treated as an offense against society."[138]

The key aspect of the Court's ruling is "whether the umbrella of protection offered from the Free Exercise Clause can be extended automatically to religious acts developed because of religious beliefs."[139] Goshray pointed to the early Court's ruling in *Reynolds*, and a similar ruling later in *Davis v. Beason* (1890), as a "slippery slope of restricted actions" that can descend "into restricting the freedom of religious expressions for minority religions."[140] However, in *Cantwell v. Conneticut* (1940), the Court seemed to downplay the "belief-conduct construct" somewhat.[141] In *Cantwell*, the Court held that the First Amendment embraced both the freedom to believe and the freedom to act, but stating that the freedom to believe was absolute but the freedom to act could not be. Conduct, therefore, remained subject to regulation for the protection of society, but only in ways that would not unduly infringe on the protected freedom.[142] In other words, a state may not by statute wholly deny a religious practice, but it may by "general and non-discriminatory legislation" regulate the practice in some manner or form as to "safeguard the peace, good order and comfort of the community without constitutionally invading the liberties protected by the Fourteenth Amendment."[143]

Both Murray and Goshray noted that the Supreme Court began to consider the state's interests and necessity, especially when public safety is involved, in juxtaposition with religious interests.[144] As with the Establishment Clause cases the Court began to apply tests in these Free Exercise cases. In *Sherbert v. Verner* (1963), the Court developed the now widely applied "compelling interest" test.[145] The case involved a Seventh Day Adventist who was fired for refusing to work on Saturday and then was

denied unemployment compensation. The Court ruled that the state, in denying unemployment benefits, "substantially infringed" upon Sherbert's free exercise of religion. Justice William Brennan, writing for the majority, found no "compelling state interest" to justify the infringement. As he concluded, "Only a situation that would 'endanger paramount interests' of the state or 'pose some substantial threat to public safety, peace or order' would permit the government to place limitations on the free exercise of religion."[146]

It is significant, however, that in the later landmark case, *Employment Division v. Smith* (1990), the Court departed from the "compelling interest" standard from *Sherbert*. The case involved two Native Americans who were fired and denied unemployment benefits for using peyote during their religious ceremonies.[147] The Oregon Supreme Court ruled in their favor, citing the *Sherbert* standard and concluding that "[t]he state's actions in denying them unemployment compensation 'significantly burdened [their] religious freedom in violation of the Free Exercise Clause…'"[148] However, U.S. Supreme Court Justice John Paul Stevens stated that the state court erred by not considering the fact that peyote possession was a felony in Oregon.[149] Similarly, Scalia, in his opinion, also stated the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[150]

Goshray contended that "the central theme of *Smith* is that individuals are no longer entitled to special exemptions on account of neutral laws burdening individual religious practices."[151] The term "neutral laws" refers to those laws that are made without reference to religion, such as the laws against banned substances. He expresses

concern that in examining the guiding principles of *Smith*, several questions remain unanswered and that "[w]hile *Smith* permits government regulation of individual religious practices, there remains a fuzziness surrounding what is neutral law, or, whether the concept of neutrality could be universally applicable to all religious sects."[152]

In his dissent, Justice Harry Blackmun stated that the Court should have upheld the *Sherbert* standard, which would have demonstrated that Oregon had "no compelling interest" in its prohibition of peyote without a religious exception. The state had also not demonstrated that the religious use of peyote had harmed anyone. He warned that the rollback of free exercise liberties in *Smith* would cause "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."[153]

Murray noted that since the *Smith* decision, numerous lower court cases have been decided against religious groups and individuals.[154] He and others agree that this led Congress in 1993 to attempt to invalidate the *Smith* decision by passing the Religious Freedom Restoration Act (RFRA).[155] The Act established that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[156]

Signed by President William J. Clinton, the Act sought to restore the compelling interest standard used in *Sherbert*. However, in *City of Boerne v. Flores* (1997), the Court struck down the Act as it applied to state and local governments, citing that "application of law beyond the federal level exceeded Congress's powers as enumerated in the Fourteenth Amendment."[157] In his majority opinion, Justice Kennedy

further stated that “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power to enforce, not the power to determine what constitutes a constitutional violation.”[158]

Murray noted that since *Boerne*, at least twelve states have passed their own religious freedom restoration acts to enforce “compelling interest” in their own jurisdictions.[159] As with the *Smith* decision, Congress responded to the *Boerne* decision by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000. Although less sweeping than the RFRA, it addressed land use regulation and the religious exercise of people institutionalized by the state and uses similar language regarding “compelling government interest” and “by the least restrictive means.”[160]

The constitutionality of the Act was first considered by the Supreme Court in *Cutter v. Wilkinson* (2005) where, in a unanimous decision, it was upheld. The plaintiffs were current and former inmates from “non-mainstream” religions, including Satanists, Wicca, Asatru religions, and the “Church of Jesus Christ Christian.”[161] Their complaint was that the state failed to accommodate their religious exercise, including barring access to religious literature, denying the same opportunities for group worship as members of mainstream religions, forbidding adherence to the dress and appearance mandates of their religions, withholding religious ceremonial items, and failing to provide a chaplain trained in their faith.[162]

The significance of the ruling has been noted by Steven Goldberg and others.[163] As Goldberg phrased it, “The Free Exercise Clause has been on life support for a number of years.”[164] In citing the negative impact of the Court’s ruling in *Smith* and the

related litigation that followed, Goldberg then explained that with the *Cutter* ruling, religion achieved a special status it had not enjoyed in years, and the result could only be explained by the Free Exercise Clause. The Court's decision revealed that when Congress accommodated the religious practices of inmates, it did not violate the Establishment Clause because Congress was furthering Free Exercise values. This accommodation went far beyond the legislative accommodations previously upheld by the Court. As emphasized by Goldberg, without the Free Exercise Clause, the result in *Cutter* would have been impossible.[165] He further noted the positive impact for religious exercise that *Cutter* has already had, citing a federal court of appeals case, *Warsoldier v. Woodford* (9th Cir. 2005), that reversed a pre-*Cutter* decision regarding a prisoner's right to exercise his religion by wearing his hair longer than the prison standards.[166] He surmised that the impact of *Cutter* would "extend far beyond this case."[167]

It is also noteworthy that in upholding the constitutionality of RLUIPA, the Court in *Cutter* "referred with favor to the Second Circuit's decision in *Katcoff v. Marsh*, 'not[ing]…the government's accommodation of religious practices by members of the military.'"[168] Such an acknowledgement from the Court lends further credence to the constitutionality of the military chaplaincy in light of the preeminence of the right of Free Exercise of Religion.[169]

It is also important to note that despite the Court's decision in *Boerne* against the application of the RFRA to state and local governments, the Act still applies at the federal level and in *Gonzales v O Centro Espirita Beneficente Uniao Do Vegetal* (2006), the RFRA was used to uphold a Brazilian religious sect's use of a tea containing a hallucinogen banned by federal law in its religious ceremonies.[170] This also means that it

has applicability to military settings as well. As Grant conjectured, when courts review actions by the military which substantially burden a service member's free exercise of religion, they will likely apply strict scrutiny to determine if the action is "in furtherance of a compelling governmental interest" and taken by "the least restrictive means of furthering that compelling government interest."[171]

The discussion of cases dealing with the Religion Clauses would not be complete without including those dealing with the Free Speech Clause. Their importance and impact is now examined.

Free Speech Clauses

As noted under the historical section above, McGraw has argued that the First Amendment Religion Clauses were seen by the founders as an integral piece of the whole Amendment that expressed the core principle of the right of conscience. As one looks back at the First Amendment, it is easy to see the connection, particularly with free speech as an expression of the free exercise of "religion"—of one's personal expression of faith/belief (see definitions above). Though the Free Speech Clause certainly does not apply exclusively to religious speech, it does cover such speech, as can be deduced from the founders' decision to include it immediately following the Religion Clauses.

Mark Cordes, though stating his view that free speech was not intentionally designed to protect religious liberty, did acknowledge that it has done so frequently. He noted that, in fact, the Free Speech Clause has been used much more often than the Free Exercise Clause in protecting a person's or group's right to exercise religion, and believes it will continue to play an increasingly important role.[172] He continued by adding that "religion and free speech have long had a strong, even symbiotic relationship."[173]

As Cordes noted, it was the Jehovah's Witnesses who played an important role in the religion and free speech relationship. Two of the approximately twenty Supreme Court cases in which the Witnesses were involved from the 1930's to the early 1950's are of particular note. The first case, *Lovell v. Griffin* (1938), dealt with a city ordinance in Griffin, Georgia that required written permission from the city manager before any written materials could be distributed. The Jehovah's Witness, Alma Lovell, violated the ordinance, stating that she was "sent by Jehovah to do this work" and to apply for permission from anyone else would have been "an act of disobedience to His command."[174] The Court sided with Lovell, not based on her religious free exercise rights, but on the basis that the permit requirement constituted a "prior restraint" on her right of free speech, and was, therefore, unconstitutional.[175]

The second case, *West Virginia State Board of Education v. Barnette* (1943), involved a state law requiring students to recite the Pledge of Allegiance. Barnette, as a Jehovah's Witness, was forbidden to pledge allegiance to anyone but Jehovah, and therefore refused to do so. The Court sided with Barnette as well, but again reasoned more from free speech principles than from religion.[176] This case established what is now known as "the compelled speech doctrine," which holds that the right to free speech includes the right *not* to speak, insuring that a person cannot be forced to espouse beliefs against his or her will.[177]

Cordes concluded that these early cases established two important principles regarding religious speech. The first is that protections of free speech were no doubt extended in full to a variety of religious speech activities, most of which involved proselytizing in some manner. The second is that when regulating speech government

cannot discriminate against speech because of its content. The Court indicated that government can impose reasonable restrictions with regard to time, place, and manner to further important government interests, but it struck down regulations that created the potential for content discrimination.[178]

According to Cordes, this principle "emerged over the next several decades as probably the central principle governing free speech jurisprudence."[179] In fact, this principle was reflected in the landmark decision in *Police Department of Chicago v. Mosely* (1972), which established that "government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[180]

Two other cases were highlighted by Cordes that indicated this growing emphasis on content-neutrality in regulating speech. The first was *Heffron v. International Society for Krishna Consciousness* (1981) in which "the Court reviewed a Minnesota state fair regulation which prohibited the sale or distribution of literature within the fairgrounds except from a designated booth."[181] The Society challenged the regulation, arguing that the regulation restricted its ability to practice its religion. The Court rejected the argument, stating that the regulation constituted a valid time, place, and manner restriction. The Court emphasized that the regulation applied equally to all speech, no matter what its content, that it served a significant government interest in controlling crowds at the fair, being narrowly tailored to serve that interest, and that it left adequate alternatives for speech, either by means of a designated booth or outside the fairgrounds.[182]

In the second case, *Widmar v. Vincent* (1981), the University of Missouri had permitted many different student groups to have access to campus buildings for

meetings. University police, however, prohibited such use for religious worship or teachings, believing it would violate the Establishment Clause. Therefore, the university refused a request by an Evangelical student group for their meetings that included prayer and worship. In an eight-to-one decision, the Court held for the student group finding that the exclusion based on religious speech violated the Free Speech Clause while the inclusion of a religious group on the same terms as other student groups did not violate the Establishment Clause.[183]

According to Cordes, *Widmar* was significant for three reasons. First, the Court clarified that free speech protections extended not only to religious proselytizing and preaching, but also to such core religious practices as prayer and worship. Second, the decision reaffirmed the content-neutrality requirement, doing so in what became known as a designated or limited public forum context. This meant that even though government is not required to open its facilities to speech, once it voluntarily does so, it cannot discriminate against speech because of its content. The third and perhaps most important reason was that the Court maintained that providing equal access to religious speech, as mandated by the Free Speech Clause, did not violate the Establishment Clause, even when it resulted in religious worship on public property. As the Court concluded, this did not violate the second prong of the *Lemon* test (not advancing or inhibiting religion, i.e., religion-neutral; see page 21 above) because equal access meant simply treating the religious student group like any other group and, since so many other non-religious groups participated in the open forum, the primary effect of the forum was not to advance religion.[184]

Four primary cases that followed *Widmar*, as noted by Cordes, demonstrated that the Court's emphasis on neutrality became even more pronounced. The Court largely began to take a view of religion as a co-equal participant in our nation's public life, to be neither favored nor disfavored. This resulted in an even more pronounced shift to free speech, and away from free exercise, as the dominant protection of religious liberty.[185] These cases were *Westside Board of Education v. Mergens* (1990)*, Lamb's Chapel v. Center Moriches Union Free School District* (1993)*, Rosenburger v. Rector and Visitors of the University of Virginia* (1995)*,* and *Good News Club v. Milford Central School* (2001).[186]

All four cases dealt with similar issues, all involving public schools. In each case, the school created what could be viewed as a forum for speech purposes, in two schools for the students themselves and two others for community groups. In all cases, the schools denied access to religious speech, again, to avoid perceived Establishment Clause problems. In all four cases, the Court held, as it did in *Widmar*, that denying access to groups because of religious content speech violated the Free Speech Clause and granting equal access to religious speech eliminated any Establishment Clause concerns.[187]

Cordes noted two important ways in which these cases took religious rights a step further and strengthened the protection given to religious speech. The first was that in *Lamb's Chapel, Rosenberger,* and *Good News Club*, the Court treated the religious speech exclusion as "viewpoint" discrimination rather than "content" discrimination. This form of speech discrimination is considered a much more problematic form and one that is almost always seen as unconstitutional.[188] As the Court concluded in *Rosenberger*,

"[W]hen the government targets not subject matter, but particular views taken by speakers on a subject the violation of the First Amendment is all the more blatant," and described such viewpoint discrimination as "an egregious form of content discrimination."[189]

The second way protection of religious speech was strengthened in these cases was how it handled the issues in relation to the Establishment Clause. The Court in these cases made it even more emphatic that the neutral treatment of religion does not violate the Establishment Clause. Even though in *Rosenberger* there was use of government monies in funding an overt, even blatant religious message, and in *Good News Club*, overtly religious activities, such as prayer and Bible study were present in an elementary school setting, the Court still "said the neutral treatment of religion, as required by the Free Speech clause, would trump any Establishment Clause concerns."[190]

The time period in which these cases occurred has been referred to as the "Rehnquist Court," in reference to the Chief Justice presiding at the time. Cordes concluded that the general view of religion that flowed from the cases during this period included three corollaries:

- religion is not intended to be merely a private affair, but has a public dimension to it;
- religious views have the same right to influence society as any other view; and
- as long as government treats religion equally and neutrally, religion is not a danger or threat to society.

His conclusion is that even though the Court remains skeptical about government involvement in and promotion of religion, it has become much more positive about religion per se and its role in American life. In his words, “Religion is a valued co-participant in America’s public life, and has the same right to influence the direction of the nation as any other belief or value system.”[191]

The consideration of free speech rights as they apply to military personnel, however, becomes more complicated. As Grant has noted, it is well established that the military may regulate certain types of speech by its members, which if made by civilians would be protected.[192] In a decisive case, *Parker v. Levy* (1972), CPT Howard Levy, an Army officer, encouraged African-American Soldiers to refuse to serve in Viet Nam and called Special Forces members “liars, thieves, killers of peasants, and murderers of women and children.”[193] He was convicted of conduct unbecoming of an officer and a gentleman and of conduct prejudicial to good order and discipline in the armed forces. He appealed to the Supreme Court on the basis that his First Amendment Free Speech rights had been violated. The Court upheld the conviction, however, stating that “While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”[194]

The Uniform Code of Military Justice (UCMJ) is clear in its prohibition of officers using contemptuous words against a long list of civilian officials and prohibits members from using disrespectful language toward superiors.[195] It is noteworthy that these UCMJ prohibitions apply whether a service member is on or off duty.[196] The UCMJ also prohibits conduct which is prejudicial to good order and discipline or is service

discrediting and conduct which is unbecoming an officer, which includes speech.[197] Although no religious speech is explicitly prohibited by the UCMJ, it is conceivable that under certain circumstances, a service member's religious speech could potentially violate UCMJ statutes.[198] For example, as Grant noted, the Court of Appeals for the Armed Forces has held that the military may prohibit speech which "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of troops."[199] The courts, however, have not yet ruled on this issue in the context of religious speech.[200]

Grant surmised that when analyzing cases of religious speech by military members, the Courts will also consider whether the speech is public or private. In doing so, they will most likely look at "the totality of circumstances, including the status of the speaker, the status of the listener, and the context and characteristics of the speech itself."[201] Such considerations were used in examining the issues surrounding "questionable behavior" with regard to religious expression among personnel at the Air Force Academy.[202]

Military Specific Considerations

As stated concerning free speech above, service in the military brings with it specific considerations that do not apply to the civilian population. It is important to keep "this key legal principle" in mind, as Sekulow and Ash refer to it, as we consider religious freedom and conscience in the military. This principle is stated succinctly by the Court in *Brown v. Glines* (1980): "Both Congress and this Court have found that the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale."[203] They further note that "In 10 US Code, 654, Congress expressly noted in its

findings that the military is a 'specialized society' that 'is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.'"[204]

The Department of Defense, following the First Amendment of the U.S. Constitution, strongly supports free exercise of religion by those in uniform, which "deserves due deference from the courts."[205] The DOD free exercise policy is delineated in DOD Instruction 1300.17, *Accommodation of Religious Practices within the Military Services*, a portion of which is quoted at the beginning of this paper. In addition, the Joint Chiefs have published Joint Publication 1-05, *Religious Affairs in Joint Operations*, which provides doctrine for religious affairs in joint operations as well as defining the roles of chaplains.

Each branch of the military also has clearly delineated policies that concur with the DOD policy. A good overview and sampling of each of these policies is given by Sekulow and Ash.[206] For example, statements concerning free exercise of religion in Air Force Policy Directive 52-1, *Chaplain Service* essentially concur with the statement expressed in DOD Instruction 1300.17 above. It also claims that "spiritual health is fundamental to the well being of Air Force personnel…and essential for operational success."[207] The policy also defines "religious accommodation" essentially in the same terms and standards as are required under the RFRA described above, but replacing "government" with the terms "military" and "Commanders". In it, accommodation is defined as:

> allowing for an individual or group religious practice. It is Air Force policy that we will accommodate free exercise of religion and other personal beliefs, as well as freedom of expression, except as must be limited by compelling military necessity (with such limitations being imposed in the

> least restrictive manner feasible). Commanders should ensure that requests for religious accommodation are welcomed and dealt with as fairly and as consistently as practicable throughout their commands. They should be approved unless approval would have a real, not hypothetical, adverse impact on military readiness, unit cohesion, standards, or discipline.[208]

The Department of the Navy (DON), in Secretary of the Navy Instruction (SONI) 1730.8B, *Accommodation of Religious Practices*, similarly reflects the DOD policy:

> The DON recognizes that religion can be as integral to a person's identity as one's race or sex. The DON promotes a culture of diversity, tolerance, and excellence by making every effort to accommodate religious practices absent a compelling operational reason to the contrary…DON 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.[209]

As with its "sister services,"[210] the Army's religious exercise policies reflect stated DOD policy. In Army Regulation 600-20, *Army Command Policy and Procedures*, the importance of an individual's spiritual state for "providing powerful support for values, morals, strength of character, and endurance in difficult and dangerous circumstances" is also recognized.[211] Other related Army publications include Army Regulation (AR) 165-1, *Religious Support: Army Chaplain Corps Activities* and Field Manual (FM) 1-05 (replacing FM 16-1), *Religious Support*.

Also noted by Sekulow and Ash, the Coast Guard as a uniformed service, though not considered a part of the DOD, supports the free exercise rights of its personnel.[212] As stated in Commandant of the Coast Guard Instruction M1730.4B, *Religious Ministries within the Coast Guard*, "It is Coast Guard policy that commanding officers shall provide for the free exercise of religion by all personnel of their commands."[213]

The House of Representatives, as Grant noted, has also continued to have interest in the issue of religious expression in the military, particularly with regard to

Chaplains.[214] Following the controversy surrounding religious expression at the Air Force Academy and in apparent response to the recommendations provided in a report published by the Headquarters Review Group Concerning the Religious Climate at the US Air Force Academy, the Air Force published its "Interim Guidelines Concerning Free Exercise of Religion in the Air Force" in August 2005.[215] As Grant indicated, both public and congressional response to these "Interim Guidelines" was immediate and decisive. Many Christian organizations saw them as a prohibition against chaplains using the name of Jesus or evangelizing and began an organized campaign against it.

This backlash of controversy seemed to be the catalyst that led the Air Force to quickly follow with the publication of their "Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force" in February 2006.[216] These guidelines were much shorter, removing any reference to coercion by supervisors, assuring supervisors that they "enjoy the same free exercise rights as other airmen," and assuring chaplains that they had the right "to adhere to the tenets of their religious beliefs" and would "not be required to participate in religious activities, including public prayer, inconsistent with their faiths."[217] The word "nonsectarian" was also removed regarding prayers.[218] The "Revised Guidelines" were praised by conservative Christian groups, but excoriated by others, including Mikey Weinstein from the Military Religious Freedom Foundation, as well as the national and executive directors of the Anti-Defamation League and the Americans United for the Separation of Church and State.[219]

Grant provided a succinct overview of related events during 2006.[220] The House of Representatives considered adding an amendment to The National Defense Authorization Act which stated that "Each Chaplain shall have the prerogative to pray

according to the dictates of the Chaplain's own conscience, except as must be limited by military necessity, with any such limitation being imposed in the least restrictive manner feasible."[221] Senator John Warner, chair of the Senate Armed Services Committee, stated that in his conversations with each of the Chiefs of Chaplains that all opposed the amendment as worded. This apparently led to a compromise that excluded the amendment from the bill. President Bush did not issue an executive order regarding military chaplains and Congress did not revisit the specific issue. The Secretary of Defense (SECDEF) did not order either the Air Force or the Navy to rescind their 2006 regulations. Consequently, the February 2006 "Revised Interim Guidelines" remain in effect for the Air Force.

The Air Force is not alone in dealing with such religious exercise issues, either with chaplains or with other personnel. Both the Navy and the Army have had similar issues as well, with several leading to litigation.[222] It is not, however, within the scope of this project to discuss them. However, the issues and implications discussed here provide insight and application of policy and practice recommendations that will have impact on the issues considered in those cases as well.

One final very recent political issue involving Congress and the religious freedoms of military chaplains is the inclusion of Section 533 of the 2013 National Defense Authorization Act (NDAA).[223] In light of the impact of the repeal of "Don't Ask, Don't Tell" (DADT) on service members, particularly chaplains, who hold to a conservative or traditional biblical view of marriage, the Chaplain Alliance for Religious Liberty and the Alliance Defending Freedom, along with others, petitioned Congress for relief from potential negative and unconstitutional repercussions toward military

personnel resulting from their religious beliefs.[224] In response, Congress included section 533, with the assistance of Representative Howard P. "Buck" McKeon, to the NDAA which was passed by both houses and signed by President Barrack H. Obama. The section reads:

> No member of the Armed Forces may—(1) require a chaplain to perform any rite, ritual or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain; or (2) discriminate or take any adverse personnel action against a chaplain, including denial of promotion, schooling, training, or assignment, on the basis of the refusal of the chaplain to comply with a requirement prohibited by paragraph.

At the signing, President Obama made contemporaneous comments concerning section 533, including that it was "an unnecessary and ill-advised provision" and restated his commitment against discriminatory actions, to the full implementation of the repeal of DADT, and "to protecting the rights of gay and lesbian service members."[225] In response, Congress sent a letter to Secretary of Defense, Chuck Hagel, on 11 March 2013, signed by some sixty members. The letter delineated the concern of those Representatives about the President's comments at the signing in relation to the separation of powers and urged the SECDEF to ensure that the DOD would "enthusiastically accommodate service members' moral and religious convictions and refrain from using service members' beliefs as the basis for adverse personnel action."[226]

In a related event, during a Congressional hearing on 12 April 2013, Secretary of Defense Chuck Hagel, while testifying, was asked by Representative Randy Forbes (R-VA) about section 533 of the NDAA, as well as other religious freedom issues, and whether or not the military was enforcing the section. Secretary Hagel admitted that he had not seen section 533 of the Act but stated that "Protection of religious rights is

pretty fundamental to this country."[227] It is evident that, as Grant noted above, the House of Representatives will continue to have interest in the issue of religious expression in the military as we move further into the twenty-first century.

Conclusion

As the argument in this paper demonstrates, the history of America's founding is replete with evidence that shows our founders as purveyors and defenders of religion and conscience and the importance of the expression of these core concepts to be free from coercion and restraint by the civil authorities. Many of their actions demonstrated this as well, providing evidence for the meaning and application of the First Amendment freedom of conscience clauses that they themselves had written and ratified. The history of the legal and political systems, though sometimes confusing, controversial, and contradicting, also demonstrates the ongoing expression of protecting the religious freedoms envisioned, codified, and demonstrated by the founders and many who followed them.

The importance and prominence of religion and conscience, as well as the inherent right of every citizen to live and express them freely, were the hallmarks of the founding generation of the United States of America. They will continue to be as long as the United States Constitution is protected and defended against all enemies, foreign and domestic, and is shown to bear true faith and allegiance by those whose rights it was established to protect. The meaning and application of these core Constitutional concepts, immortalized in the First Amendment to the Constitution, have always been, and will always be, debated, but they must never be disdained or discarded.

The application of these rights and freedoms to those who serve in the military is complex, but paramount in its importance because of the unique character and demands of military service and the critically important mission it has to provide for the defense of our nation and to fight and win its wars. Although its unique character allows for some restrictions of rights not allowable for civilians, the military must not, however, impose such constitutional restrictions unless there is a compelling interest that cannot be accommodated by any other reasonable or less restrictive means. Military service members maintain their free exercise rights but must be cognizant and respectful of the vast diversity of others who maintain differing beliefs and practices, religious or otherwise.

The history of America has been a storied one, sometimes filled with imperfections, misconceptions, and misguided policies, but also with wisdom, bravery, sacrificial service, and humility. It has been a history filled with religious zeal and a hunger for knowledge and wisdom. It has demonstrated both tolerance and intolerance. However, it is a society and nation built on a foundation that has provided its citizens with the certainty of a representative rule of law that is “of, by, and for” the people, as well as on a moral and transcendent assurance that rights are established and endowed by the Creator, *not* by the government. For this reason, there is always hope that the best of its founding will continue to be exhibited in the majority of its people.

Good and well meaning people on either side of the religious liberty debate, as is often the case with such differences of opinion on important topics, have often misunderstood or misrepresented certain issues or the people espousing them. In turn, they have themselves often been misunderstood or misrepresented by those on the

other side. Informed and reasoned debate is necessary and healthy for civil society and for the promotion of the "highest good" of society for all its citizens. Such debate with regard to religious liberty and freedom of conscience must continue, guided by passion that is tempered by wisdom, civility, humility, and grace, that is so often missing in the mostly contentious interactions exhibited today.

Recommendations

The Farewell Address of President George Washington was established by Thomas Jefferson as required reading at the University of Virginia, which he founded. A portion of that Address speaks well to the important place religion has had and should continue to have in our Nation's affairs:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensible supports…Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National Morality can prevail in exclusion of religious principle.[228]

Grant and others, such as Reverend Barry W. Lynn, executive director of Americans United for Separation of Church and State, and James Parco and Barry Fagin, professors at the Air Force Academy, have argued for increased limits of religious expression in the military, such as no or limited public prayer, no expressions of evangelism, and a required "Oath of Equal Character" for all officers in public command.[229] Dr. Jay Sekulow and Robert Ash, from the American Center of Law and Justice, have argued instead, from a historical constitutional perspective, for more protections of religious expressions in the military, more robust tolerance training, and an increased trust in military leaders to know how best to train their troops.[230]

All policy recommendations regarding religious freedom of expression in the military must reflect the core meaning and intent of the First Amendment Religion and Speech Clauses, based on a clear understanding of their history and application, legally and politically. They must also consider the unique circumstances of the military environment and mission and reflect respect for the inherent diversity among its ranks and with an expectation for a genuine pluralism that allows for diversity of belief and practice without prejudice or coercion toward either.

Commanders and Leaders

"Military CDRs, are responsible to provide for the free exercise of religion."[231] For the Army, "[t]he religious program…is the commander's program. Commanders establish and maintain a climate of high moral and ethical standards."[232] Therefore, commanders and leaders, regardless of their own religion or belief system, must be knowledgeable of and committed to this constitutional and professional mandate, especially in light of the oath they have taken "to support and defend the Constitution of the United States and to bear true faith and allegiance to the same."[233] Commanders and future commanders must be better educated and trained in the essentials of the constitutional mandates regarding the free exercise of religion and its implications. This must be done in light of both the importance given to religious freedom by the founders and because of the confusion and missteps that have often occurred in the past in this regard.

Such education and training should include the related historical, legal, and political aspects of the issue as well as scenario based interactive discussion that allows for real world understanding and application. It must also include education and training

related to the roles and responsibilities of chaplains, as well as the nature of the relationship between the commander and chaplain. Commanders must also receive education and training regarding respect and tolerance of differences. They must lead by example in respecting diversity and pluralism, protecting the rights of all with the same vigor and vigilance, showing neither favoritism nor malice to anyone based on a service member's religious belief or practice, or lack thereof.

Without unduly infringing on their own religious rights and personal identities, commanders must be trained to understand the nature of their leadership role and the power and influence it exudes. Their religious views and identity should only be shared in appropriate ways that are not in any way coercive or manipulative. The best leaders share their identity more by what they *do* than by what they *say* and lead by inspiration not manipulation. Leaders must understand that their roles and responsibilities are paramount and should never jeopardize the mission or the rights of their subordinates by abusing their position of power and influence.

Chaplains

The nature and purpose of the Chaplain Corps is clearly delineated in these statements from two Army publications:

> Chaplains are expected to advise the command on all matters pertaining to the free exercise of religion and to speak with a candor and urgency befitting the exercise of their religious duties. Chaplains assist the commander in providing for the accommodation of religious practices…The chaplaincy is an instrumentality of the U.S. Government to ensure that the 'free-exercise' rights of religion are not abridged.[234]

> Chaplains serve in the Army as clergy representing the respective faiths or denominations that endorse them. A chaplain's call, ministry, message, ecclesiastical authority, and responsibility come from the religious organization that the chaplain represents. Chaplains preach, teach, and conduct religious services, in accordance with the tenets and rules of their

> tradition, the principles of their faith and the dictates of their conscience. They perform…[or] provide for the religious needs of the soldier…[235]

In fulfilling their responsibilities to advise and assist commanders with regard to free exercise and to the accommodation of religious practices, chaplains are free, in fact remanded, to maintain the integrity of their faith and doctrine as representatives of their faith endorsers. They cannot legally and must not be in any way coerced to believe or act in contradiction to the tenets of the faith they hold or the endorsers they represent. This would not only violate their own free exercise rights guaranteed by the First Amendment, but would also violate the integrity of their oath to serve as chaplains as well as the original intent and purpose of military chaplains.[236]

The chaplaincy has a long history of diversity and pluralism from its founding, which is a necessity in meeting the demands of such a diverse population of religious beliefs and cultures found among military service members. There is no question that it has been difficult at times when diversity became more pronounced and faiths other than Catholic/Protestant Christian or Jewish began to be recognized and better accommodated. This set of circumstances, however, was inevitable, based on the impact of America's core founding principle: the right of freedom of religion and conscience. Change is often uncomfortable and difficult, but can also be beneficial. Chaplains and those who serve with them must patiently but intentionally learn to deal effectively with diversity and change and find ways to preserve good order and discipline for the sake of the mission.

Therefore, to reject, be critical of, demean, or target certain religious beliefs of the chaplains (or any service members) that hold them, which may not conform to a particular "acceptable" viewpoint, violates both the First Amendment and DOD policy.

The standard of evaluation for chaplains should be not what their beliefs and practices are, but how well they perform their duties as prescribed by DOD standards and policies. All chaplains (and service members) and chaplain candidates must be given the opportunity to maintain their doctrinal integrity while faithfully performing their duties freely without repercussions from others who disagree with their deeply held, even sacred, beliefs.

Chaplains, as with commanders, must understand their leadership role and the power and influence they represent in that role as religious leaders and military officers. Therefore, as with commanders, they are free to express their beliefs and identity, but it must be done in appropriate ways and is dependent on the circumstances. In the diverse and pluralistic environment of the military, all chaplains must show tolerance and respect for the right of others to believe and practice according to the dictates of their consciences. In turn, others must do the same, allowing the chaplain to serve the command while being faithful to the tenets of his or her faith and endorser.

Chaplains must never use their position to coerce, demean, or ridicule others or their faith/ideology. However, in the proper context, such as a worship service or a Bible or prayer meeting that is clearly stated as such, or a counseling session in which the chaplain's faith is known, chaplains must be free to express their views (often based on their sacred texts), accordingly, yet without malice or derogatory remarks directed toward other faiths or traditions. If the personnel to which a chaplain is ministering is of a different faith, or no faith, or expresses disagreement or discomfort, the chaplain is obliged to accommodate that service member's needs and "provide" other resources or another chaplain that would better meet those needs.

Although controversial for many today, chaplains, as well as all service members, should be free to “evangelize” but not “proselytize.” The keys here are the meanings and methods of each. “Evangelism” is a tenet of faith for many religious groups. Therefore, to forbid it without a “compelling interest” is a violation of the First Amendment. However, the government/military does have some authority to impose reasonable limitations if necessary to protect good order and discipline and the rights of others, as long as it is done in the “least restrictive means.” This is necessary in order to insure the protection of the rights of all service members in light of a diverse population.

Evangelism is often portrayed as unsolicited and coercive, which can sometimes be the case. However, this is not a necessary portrayal of the concept. It is more correctly portrayed as synonymous with simply telling one’s story so that others can make judgments regarding that story. People, in hearing that story, may decide on their own to change their beliefs, but it is their own decision made without coercion or being under duress. As long as it is not unsolicited, coercive, or manipulative, and in the proper context, it is not threatening or destructive and should not be forbidden. If it is forbidden, again, without a compelling interest, this would be a violation of one’s right to free speech and to free exercise. Sekulow and Ash provided helpful insight on this topic:

> To officially proscribe the sharing of a chaplain’s (or other service member’s) faith may itself run afoul of the establishment clause in that government officials sit in judgment of what constitutes acceptable religious belief and activities and what does not. This is not to say that a religious activity might not, under some circumstances, upset good order and discipline, just as a secular activity may do so. When that occurs *in either case*, of course commanders may intervene, but commanders must be careful not to limit free exercise merely because some individual or group does not appreciate or want to be bothered by the message shared. Persons can be offended by both religious and secular sentiments. Tolerance must be a two-way street. Just as adherents of the majority religious faith must understand and respect the rights of those of minority

> faiths, or no faith, so too must those of minority faiths and of no faith understand and respect the rights of those professing the majority faith.[237]

Proselytizing, however, is not permitted because it is a targeted and willful attempt to convince someone to change from his or her established faith or belief to accept another, which violates the Religion Clauses of the First Amendment. Unlike evangelism, it is usually willfully coercive and can be unsolicited and manipulative and, therefore, clearly unconstitutional and detrimental to good order and discipline.

The subject of public prayer has also been a topic of considerable controversy. Since the practice has clearly been an integral part of public ceremonies, political and military, from the beginning of and throughout our Nation's history, as often cited by Supreme Court Justices, it should not be sorely dismissed and summarily discarded with claims that it is divisive and unnecessary. As Sekulow and Ash noted, "calling on chaplains to continue such historical practice today merely reflects long-held traditions and constitutes 'tolerable acknowledgment[s] of beliefs widely held among the people of this country.'"[238] They refer particularly to prayers at presidential inaugurations, which, they note, essentially constitute "change of command ceremonies at the highest level of the armed forces," and "have frequently included references to Jesus or the Trinity."[239]

The Court's comments from *Marsh v. Chambers* (1983), in which the Court rejected the argument that a state legislature's selection of a clergyman who prayed in the "Judeo-Christian" tradition violated the Establishment Clause, are again instructive:

> We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergy man of one denomination advances the beliefs of a particular church…[T]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief.[240]

Public prayers, therefore, should be at the discretion of commanders and carefully considered as to their purpose and impact. They cannot and must not be required or their content mandated, which would be a violation of the Establishment Clause.[241] Chaplains should be and, constitutionally, must be, therefore, allowed to pray according to the tenets of their faith without coercion to pray "nonsectarian" prayers and without ramifications for not being willing to do so.

Sekulow and Ash again have provided some clarity to this issue. The problem is with trying to restrict religious speech, which prayer is one form, to avoid causing offense to the hearer. As they have noted, there is no language in the Free Speech Clause that protects the hearers from being offended. In fact, inoffensive speech needs no protections. Rather, it is offensive speech that needs protecting. Otherwise, there would be no need for the protection of free expression. For example, praying in Jesus' name is offensive to some but not others. Similarly, invoking the name of Allah also offends some people but not others. Others, such as atheists and agnostics may also be offended by any prayer at all. As one can see, "Advocating a 'cause no offense' strategy will surely fail…[and] is unconstitutional."[242]

Therefore, allowing prayers from chaplains of all faiths, instead of being divisive, "presents a great opportunity to demonstrate, recognize, and celebrate" [243] the diversity and pluralism that is inherent and respected in a military that serves and reflects a Nation that established, and continues to protect, the freedom of religion and conscience and their expressions. Military personnel should be informed and familiar with this diverse and pluralistic setting and understand that while they may be

uncomfortable or even offended, they are not being coerced to believe differently or made to participate in any way that violates their constitutional rights.

If a commander knows that a chaplain prays in a certain way and feels it would be inappropriate for the setting, he or she must choose either not to have a prayer or ask someone else to give the prayer. Chaplains as well, though protected by the First Amendment to pray according to their own consciences, must use wisdom and professional discretion in choosing the words and content of public prayers. They too should be willing to refuse to pray or participate in an event if it will, in their estimation, violate the tenets of their faith. Honesty, openness, discretion, and deference should all be displayed in dealing with these issues and finding the best solutions for all considered.

Service Members

As with commanders and chaplains, all service members are extended the right of free exercise. It must not be denied for any reason other than for a compelling interest, including good order and discipline and accomplishment of the mission, regardless how an official or group may disagree with the service member's belief or expression.[244] All service members must not only be afforded their rights, but must be informed and reminded of them to insure they are not violated. The reader should consult Sekulow and Ash for a long list of examples of free exercise rights.[245] Service Members must also be informed of their protections from coercive or derogatory actions related to their beliefs and practices. The discussions above provide some guidance in determining the difference between acceptable and unacceptable speech and actions

with regard to religious freedom and protection. Sekulow and Ash's comments are again informative:

> No official…regardless of rank or station…has the right to compel or pressure any other person (1) to assent to any specific philosophy or religious belief or creed, (2) to participate in a religious worship service (such as forcing someone to attend a chapel worship service—unless that person is on duty, for example, serving as a member of an honor guard or a color guard at a funeral or other ceremony), or (3) to engage in a religious act (even so simple an act as being asked to join hands with others when a short prayer of blessing is said over a Thanksgiving or Christmas meal in the military dining facility)…[Similarly,] [n]o commander or leader may require a subordinate to attend or remain in a meeting or other gathering…when the commander or leader intends to use the opportunity to convince those in attendance to adopt or assent to his religious faith or secular philosophy.[246]

Summary of Recommendations

To summarize, there appears to be a need across the armed forces for an extensive and "well-planned and executed program for educating service members",[247] of all ranks, levels of responsibility, and career phases, concerning (1) our religious heritage as a nation, (2) the historical context and meaning of the First Amendment, (3) as well as its legal interpretations and applications, (4) military policy and regulations regarding free exercise, (5) the role and responsibilities of commanders and chaplains with regard to free exercise, and (6) clarifications of the rights and protections afforded all service members regarding freedom of religion and conscience and their expressions. Although no proposed solution will ever eliminate or completely resolve the issue, such a program could help to reduce the misconceptions and confusion surrounding this critically important yet often contentious issue and help to resolve the potential, real, and perceived instances of religious discrimination.

In closing, it is only fitting to conclude with a long quote from Jon Meacham, winner of the Pulitzer Prize, in his New York Times Best Selling book, *American Gospel:*

God, the Founding Fathers, and the Making of a Nation. It fittingly and eloquently summarizes much of the findings of this research project:

> The victory over excessive religious influence and excessive secularism is often lost in the clatter of contemporary culture and political strife. Looking back to the Founding is neither an exercise in nostalgia nor an attempt to deify the dead, but a bracing lesson in how to make a diverse nation survive and thrive by cherishing freedom and protecting faith…
>
> …The great good news about America—the American gospel, if you will—is that religion shapes the life of the nation without strangling it. Belief in God is central to the country's experience, yet for the broad center, faith is a matter of choice, not coercion, and the legacy of the Founding is that the sensible center holds. It does so because the Founders believed themselves at work in the service of both God and man, not just one or the other. Driven by a sense of providence and an acute appreciation of the fallibility of humankind, they created a nation in which religion should not be singled out for special help or particular harm. The balance between the promise of the Declaration of Independence, with its evocation of divine origins and destiny, and the practicalities of the Constitution, with its checks on extremism, remains perhaps the most brilliant American success.[248]

Endnotes

[1] Also quoted in an epigraph in U.S. Joint Chiefs of Staff, *Religious Affairs in Joint Operations*, Joint Publication 1-05 (Washington, DC: U.S. Joint Chiefs of Staff, November 12, 2009), II-1.

[2] Barbara A. McGraw, *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (Albany, New York: State University of New York Press, 2003); Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (New York: Random House, 2007); Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (New York: Encounter Books, 2002); Robert Monahan Hogan and Lauretta Conklin Frederking, eds., *The American Experiment: Religious Freedom* (University of Portland: Garaventa Center for Catholic Intellectual Life and American Culture, 2008); Steven Waldman, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* (New York: Random House, 2008); Thomas Kidd, *God of Liberty: A Religious History of the American Revolution* (New Yor4k: Basic Books, 2010).

[3] McGraw, *Rediscovering*, 1-4, 109-174; Meacham, *American Gospel*, 4; John Eidsmore, *Christianity and the Constitution: The Faith of Our Founding Fathers* (Grand Rapids, MI: Baker Books, 1984); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Anchor Books, 1993); M. Stanton Evans, *The Theme is Freedom: Religion, Politics, and the American Tradition* (Washington, DC: Regnery Publishing, 1994); consider also the establishment of such organizations as the Georgetown University "Religious Freedom Project" at the Berkley Center for Religion, Peace & World Affairs.

[4] Eboo Patel, *Sacred Ground: Pluralism, Prejudice, and the Promise of America* (Boston: Beacon Press, 2012); Ed Stetzer, "Proselytizing in a Multi-Faith World," *Christianity Today*, March 28, 2011; Susan Brooks Thistlethwaite, "Pluralism and Prejudice: How Conflicts Over Religious Pluralism Reveal America's New 'Sacred Ground,'" *The Washington Post*, August 23, 2012; Diane L. Eck, *A New Religious America: How a "Christian Country" Has Become the World's Most Religiously Diverse Nation* (San Francisco, CA: HarperSanFrancisco, 2001); consider also the establishment of the Harvard Pluralism Project, of which Diane Eck is chair, and other groups such as Americans for the Separation of Church and State.

[5] U.S. Joint Chiefs of Staff, *Religious Affairs in Joint Operations*, Joint Publication 1-05 (Washington, DC: U.S. Joint Chiefs of Staff, November 12, 2009), iii, vii; Air Force Policy Directive (AFPD) 52-1, *Chaplain Service*, 2006; Secretary of the Navy Instruction (SONI) 1730.8B, *Accommodation of Religious Practices*, 2008; Headquarters, Department of the Army, *Religious Support: Army Chaplain Corps Activities*, Army Regulation 165-1 (Washington, DC: Headquarters, Department of the Army, December 3, 2009); Headquarters, Department of the Army, *Religious Support*, Field Manual 1-05 (Washington, DC: Headquarters, Department of the Army, April 2003); R. Chuck Mason and Cynthia Brougher, *Military Personnel and Freedom of Religious Expression: Selected Legal Issues* (Congressional Research Service Report for Congress, April 8, 2010); James E. Parco and David A. Levy, eds., *Attitudes Aren't Free: Thinking Deeply About Diversity in the US Armed Forces* (Maxwell Air Force Base, AL: Air University Press, 2010), 9-132.

[6] Headquarters, United States Air Force, *The Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy*, June 22, 2005; Parco and Levy, *Attitudes*, 9-132; Heather Cook, "Service Before Self? Evangelicals Flying High at the

U.S. Air Force Academy," *Journal of Law and Education*, 36, no 1 (January 2007); Jason G. Riley, *For God or Country? Religious Tensions Within the United States Military*, Thesis (Monterrey, CA: Naval Postgraduate School, December, 2006); Matthew Goff, *Living in Tension: Secularism and Christianity in the Military,* Strategy Research Project (Carlisle Barracks, PA: U.S. Army War College, March 24, 2011); Paula M. Grant, *The Need for (More) Guidance Regarding Religious Expression in the Air Force*, Research Report (Maxwell Air Force Base, AL: Air University, Air Command and Staff College, April 2009); Barbara K. Sherer, *Chaplaincy at a Crossroads: Fundamentalist Chaplains in a Pluralistic Army* (Carlisle Barracks, PA: U.S. Army War College, March 3, 2011); William A. Wildhack III, "Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exerccise, Establishment and Equal Protection," *Naval Law Review* 51 (2005), 217-251; Mikey Weinstein and Davin Seay, *With God on Our Side: One Man's War Against an Evangelical Coup in America's Military* (New York: Thomas Dunne Books, 2006).

[7] Much of the analysis concerning definitions and history relies heavily on Barbara McGraw's work in *Rediscovering*.

[8] McGraw, *Rediscovering*, 185.

[9] Ibid., 185.

[10] Ibid.; *Lemon v. Kurtzman*, 403 U.S. (1971), 602, 91 S.Ct. 2105, 29 L.Ed. 745.

[11] *Merriam-Webster Dictionary Online* (2013), http://www.merriam-webster.com/dictionary (accessed March 22, 2013).

[12] McGraw, *Rediscovering*, 192.

[13] Meacham, *American Gospel*, 16.

[14] Ibid., 185-186.

[15] Wilfred Cantwell Smith, *The Meaning and End of Religion* (1962; Minneapolis: Fortress Press, 1991), 20.

[16] McGraw, *Rediscovering*, 186.

[17] Ibid.

[18] Smith, *The Meaning*, 59-60; McGraw, *Rediscovering*, 187.

[19] McGraw, *Rediscovering*,187.

[20] Monica Duffy Toft, Daniel Philpott, and Timothy Samuel Shah, *God's Century: Resurgent Religion and Global Politics* (New York: W. W. Norton, 2011), 21, paraphrasing William P. Alston, "Religion," *Encyclopedia of Philosophy*, vol. 7 (New York: Macmillan, 1972), 140-45; Christian Smith, *Moral, Believing Animals: Human Personhood and Culture* (New York: Oxford University Press, 2003), 98; Joseph Boyle, "The Place of Religion in the Practical Reasoning of Individuals and Groups," *American Journal of Jurisprudence* 43 (1998): 3; Martin Riesebrodt, *The Promise of Salvation: A Theory of Religion*, tr. Steven Rendall (Chicago: University of

Chicago Press, 2010), 76, 83; all cited in notes 8-12 in Timothy Samuel Shah, Matthew J. Franck, and Thomas F. Farr, *Religious Freedom: Why Now? Defending an Embattled Human Right* (Princeton, NJ: the Witherspoon Institute, 2012), Kindle e-book.

[21] Shah, Franck, and Farr, *Religious Freedom*, 20-22.

[22] McGraw, *Rediscovering*, 73.

[23] *Merriam-Webster Online*.

[24] Novak, *On Two Wings*; McGraw, *Rediscovering*; Araujo, *Conscience*, 219.

[25] Araujo, *Conscience and Religious Liberty: Antidote to the Totalitarianism of the Positivist Mind*, in Robert Monahan Hogan and Lauretta Conklin Frederking, eds., *The American Experiment: Religious Freedom* (University of Portland: Garaventa Center for Catholic Intellectual Life and American Culture, 2008), 219.

[26] *Merriam-Webster Online*.

[27] McGraw, *Rediscovering*,188; James Hitchcock, *What is Secular Humanism: Why Humanism Became Secular and How It Is Changing Our World* (Ann Arbor, MI: Servant Books, 1982) 70, 131 .

[28] McGraw, *Rediscovering*,187.

[29] David Lawrence Edwards, *Religion and Change*, rev. ed. (London: Hodder & Stoughton, 1974), 15.

[30] McGraw, *Rediscovering*,188

[31] Ibid.

[32] *Allegheny County v. American Civil Liberties Union*, 492 U.S. (1989).

[33] William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (New Haven, CT: Yale University Press, 2003), 1.

[34] *Merriam-Webster Online*.

[35] Ibid. It is significant to note here that Hutchison's reference note which gives the definition of "pluralism," citing an earlier dictionary version, *Webster's Third International* (his work being published in 2003), includes a more detailed qualifier describing the diverse groups, as shown in the italicized and underlined portion of the definition: "a state of society in which members of diverse ethnic, racial, religious, or social groups maintain *an autonomous participation in and development of* their traditional culture or special interest within the confines of a common civilization." This earlier definition, though very similar, seems to provide a greater emphasis on each group's role in maintaining their own culture and interests. The writer of this work was unable to interview the editors of the later Merriam-Webster edition to discuss their reasons for the change in wording/emphasis. See also, Bruce T. Murray, *Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective* (Amherst, MA: University of

Massachusetts Press, 2008), 9; and Phillip Goff, "Historical Connections Between God & Country" (lecture presented at the FACS/Pew Journalism, Religion & Public Life seminar, "One Nation Under God: Political and Religious Dimensions of America" September 23, 2002 at the *Indianapolis Star*), as referenced by Murray in note 24 of Chapter 1, 172.

[36] Hutchison, *Religious Pluralism*, 3-4.

[37] Michael A. Milton, *Cooperation without Compromise: Faithful Gospel Witness in a Pluralistic Setting* (Charlotte, NC: Reformed Theological Seminary, 2006), 2.

[38] Ibid., 3-7.

[39] Ibid., 5; John Stott, "Interview with John Stott," *Orange County Register*, Oct 3, 1998. Cited November 9, 2006. Online: http//www.religioustolerance.org/rel_plurl.htm, quoted in Milton, *Cooperation*, 5.

[40] Susan Laemmie, Education as Transformation: A National Project on Religious Pluralism, Spirituality and Higher Education on the Wellesley College website, 1998, [cited November 9, 2006]. Online: http://www.wellesley.edu/RelLife/transformation/edu-ngoverview.html, quoted in Milton, *Cooperation*, 5.

[41] Kenneth Keskel, "The Oath of Office: A Historical Guide to Moral Leadership," *Air and Space Power Journal*, 16, no. 4 (Winter 2002), Online: http://www.airpower.au.af.mil/airchronicles/apj/apj02/win02/keskel.html (accessed January 2013).

[42] *George Washington's Farewell Address to the People of the United States*, 106th Congress, 2nd Session, Senate Document no. 106-21, Washington, 2000; also quoted in Novak, *On Two Wings*, 71.

[43] Military Officer Oath of Office, DA Form 71, July 1999; NGB Form 337, 20101105(EF).

[44] For a thorough examination of the application of history by Supreme Court Justices in deciding First Amendment Religion Clause cases, see, Saby Ghoshray, "Are You There God? It's Me, The Constitution," 144-147; Kyle Duncan, "The Establishment Clause and the Limits of *Pure* History," 197-212; and Mark Hall, "Jeffersonian Walls and Madisonian Lines," 227-262; all in Margaret Monahan Hogan and Lauretta Conklin Frederking, eds., *The American Experiment: Religious Freedom* (University of Portland: Garaventa Center for Catholic Intellectual Life and American Culture, 2008).

[45] McGraw, *Rediscovering*, xvi; Leonard W. Levy, *Original Intent and the Framers' Constitution* (New York: MacMillan Publishing Co., 1988); Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, 2nd ed. (Chapel Hill and London: The University of North Carolina Press, 1994), xix.

[46] U.S. Constitution, amend. V.

[47] Kidd, *God of Liberty*; McGraw, *Rediscovering*; Novak, *On Two Wings*; Evans, *The Theme is Freedom*; Michael Novak and Jana Novak, *Washington's God: Religion, Liberty, and the*

Father of Our Country (New York: Basic Books, 2006); Meacham, *American Gospel*; Waldman, *Founding Faith*.

[48] Evans, *The Theme*, 3-21; McGraw, *Rediscovering*, 110-115; Novak, *On Two Wings*, 147; Thomas W. Flynn, "The Case for Affirmative Secularism," *Free Inquiry*, Spring 1996: 12.

[49] Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence and ed. J.P. Mayer (New York: Doubleday, 1969) 292-293, cited in Novak, *On Two Wings*, note 15, 195-196.

[50] The Declaration of Independence, IN CONGRESS, July 4, 1776.

[51] Waldman, *Founding Faith*, 91.

[52] Murray, *Religious Liberty*; E*vans*, *The Theme is Freedom*; McGraw, *Rediscovering*.

[53] Jay Alan Sekulow, "Religious Liberty and Expression Under Attack: Restoring America's First Freedoms," *The Heritage Foundation*, no. 88 (October 1, 2012), Online: http://report.heritage.org/lm88 (obtained printed copy, October 2012); Lee Groberg, dir., *First Freedom: The Fight for Religious Liberty*, DVD (Groberg Films & Covenant Communications, Inc. 2012).

[54] Sekulow, "Religious Liberty," 2; Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 Notre Dame L. Rev. 1, 36 (2011) (quoting Michael Novak & Jana Novak, *Washington's God*, (2006), 111).

[55] Sekulow and Ash, "Religious Rights," 100.

[56] Ibid., 100-101.

[57] *President Washington's Thanksgiving Day Decree of 1789*, quoted in Novak, *On Two Wings*, 23; see also William J. Bennett, *Our Sacred Honor* (New York: Simon and Schuster, 1997), 387.

[58] Sekulow and Ash, "Religious Rights," 100.

[59] Ibid., 100-101.

[60] McGraw, *Rediscovering*, 66-67.

[61] Ibid., 67.

[62] James Madison, *A Memorial and Remonstrance* (1785), reprinted in 8 The Papers of James Madison 400 (R. Rutland & W. Rachal eds., 1973), quoted in Sekulow, "Religious Liberty," 3.

[63] Thomas Jefferson, "Reply to Address to the Society of the Methodist Episcopal Church at New London, Connecticut," February 4, 1809, in *The Complete Jefferson* (S.K. Padover, ed. Duell, Sloan & Pearce, Inc., 1943), quoted in Sekulow, "Religious Liberty," 3.

[64] This includes such founders as Thomas Jefferson, Thomas Paine, and Benjamin Franklin who have often been painted by some scholars as anti-religious. See Novak, *On Two Wings*; McGraw, *Rediscovering*; Meacham, *American Gospel*; and Waldman, *Founding Faith*.

[65] Kidd, *God of Liberty*; McGraw, *Rediscovering*, 83-84; Meacham, *American Gospel*; Sekulow, "Religious Liberty."

[66] McGraw, *Rediscovering*, 83.

[67] Thomas Jefferson, "Notes on Religion," October 1776, *The Complete Jefferson*, 945 (emphasis in orginal), quoted in McGraw, *Rediscovering*.

[68] Thomas Jefferson, "A Bill for Religious Freedom," 1779, *The Complete Jefferson*, 947, quoted in McGraw, *Rediscovering*, 83.

[69] McGraw, *Rediscovering*, 83.

[70] George Washington, "To the Hebrew Congregation," 18 August 1790, *The Papers of George Washington*, Presidential Series, ed. Dorothy Twohig, et. al., 7 vols., vol. 6 (Charlottesville, VA: University Press of Virginia, 1987-2000), 284-285, quoted in McGraw, *Rediscovering*, 83-84.

[71] U.S. Constitution, amend. VI; Barry W. Lynn, "Religion in the Military: Finding the Proper Balance," in James E. Parco and David A. Levy, *Attitudes Aren't Free: Thinking Deeply About Diversity in the US Armed Forces* (Maxwell Air Force Base, Alabama: Air University Press, 2010), 16.

[72] Lynn, "Religion in the Military," 17; McGraw, *Rediscovering*, 82; Frank Lambert, *The Founding Fathers and the Place of Religion in America* (Princeton, New Jersey: Princeton University Press, 2003), 2.

[73] Lambert, *The Founding Fathers*; Lynn, "Religion in the Military,"17; McGraw, *Rediscovering*.

[74] McGraw, *Rediscovering*, 86; as she also notes, refer to the earlier quote by George Washington in his letter to the Hebrew Congregation, 13.

[75] Ibid., 86 (emphasis added).

[76] Ibid., 87.

[77] Ibid., 87 (emphasis in original).

[78] Grant, "The Need for (More)," 39-58; Mark Cordes, "Religion as Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty," in Margaret Monahan Hogan and Lauretta Conklin Frederking, eds., *The American Experiment: Religious Freedom* (University of Portland: Garaventa Center for Catholic Intellectual Life and American Culture, 2008), 105-122.

[79] U. S. Constitution, amend. I.

[80] Much of the discussion concerning legal considerations relies on Bruce Murray, *Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective*; Paula Grant, "The Need for More;" Sekulow and Ash, "Religious Liberty;" as well as Edward F. Mannino, "The Sinking Wall of Separation: The Supreme Court and the Establishment Clause 1947-2005," Mark Cordes, "Religion as Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty," and Saby Goshray "Are You There God? It's Me the Constitution: Searching for the Free Exercise Clause," all in Margaret Monahan Hogan and Lauretta Conklin Frederking, eds., *The American Experiment: Religious Freedom* (University of Portland: Garaventa Center for Catholic Intellectual Life and American Culture, 2008), 39-58, 105-122, 141-160. Their clear explanations and thorough summaries of the legal cases and circumstances surrounding them were invaluable in communicating their significance and application to the issues examined in this project.

[81] Murray, *Religious Liberty*, 140; William Lee Miller, *The First Liberty: Religion and the American Public* (New York: Paragon House, 1985), 228; William Lee Miller, *The First Liberty: America's Foundation in Religious Liberty, Expanded and Updated* (Washington, DC: Georgetown University Press, 2003), 192-193; see also Edward F. Mannino, "The Sinking Wall, 39-57.

[82] Grant, "The Need for (More)," 39, 42.

[83] Ibid.

[84] Ibid., 100.

[85] Ibid., 101 (emphasis in original).

[86] Sekulow and Ash, "Religious Rights," 101.

[87] Ibid., 102; *Zorach v. Clauson* 343 U.S. (1952), 313.

[88] Sekulow and Ash, "Religious Rights," 101; *Locke v. Davey*, 540 U.S. (2004), 712.

[89] Sekulow and Ash, "Religious Rights," 102.

[90] Murray, *Religious Liberty*, 140; Mannino, "The Sinking Wall," 39-41.

[91] Justice Hugo Black, majority opinion, *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947), quoted in Murray, *Religious Liberty*, 140.

[92] Murray, *Religious Liberty*, 140.

[93] Justice Hugo Black, majority opinion, *Engel v. Vitale*, 370 U.S. (1942), 422, 425, 430, 435, quoted in Mannino, "The Sinking Wall," 42.

[94] Mannino, "The Sinking Wall," 42.

[95] Justice Douglas, concurring opinion, *Engel*, 370 U.S. 440, 422, 443, quoted in Mannino, "The Sinking Wall," 42.

[96] Justice Stewart, dissenting opinion, *Engel*, 370 U.S. 445 and 446, quoted in Mannino, "The Sinking Wall," 42-43.

[97] Ibid., 43.

[98] Justice Tom Clark, majority opinion, *Abington School District v. Schempp*, 374 U.S. (1963), 223, 224, and 225, quoted in Mannino, "The Sinking Wall," 43.

[99] Mannino, "The Sinking Wall," 43.

[100] Mannino, "The Sinking Wall," 44.

[101] Justice William Brennan, concurring opinion, *Schempp*, 374 U.S. 240, 267, and 270, quoted in Monnino, "The Sinking Wall," 44.

[102] Justice Stewart, dissenting opinion, *Schempp*, 374 U.S. 309, 312, 313, and 316, quoted in Monnino, "The Sinking Wall," 44.

[103] Grant, "The Need for (More)," 43; Monnino, "The Sinking Wall," 45; Murray, *Religious Liberty*, 143.

[104] Chief Justice Warren Burger, majority opinion, *Lemon v. Kurtzman*, 404 U.S. (1971), 602, quoted in Murray, *Religious Liberty*, 140.

[105] Monnino, "The Sinking Wall," 46.

[106] Murray, *Religious Liberty*, 143.

[107] Monnino, "The Sinking Wall," 48.

[108] Ibid.; Justice O'Connor, concurring opinion, *Wallace v. Jaffree*, 472 U.S. (1985), 68 and 69; Murray, *Religious Liberty*, 144.

[109] Although significant, along with its predecessor, *Lynch v. Donnelly* (1984), it is beyond the scope of this project to discuss the details of *Allegheny* or *Lynch*, except in reference to significant aspects of the opinions made by Justices in them. Basically each case involved holiday displays that included a nativity scene or crèche on public property. In *Lynch*, the constitutionality of the display was upheld and in *Allegheny* it was not. For details, see Murray, *Religious Liberty*, 149-152 or the cases themselves; *Allegheny County v. American Civil Liberties Union*, 492 U.S. (1989); *Lynch v. Donnelly*, 465 U.S. (1984).

[110] Murray, *Religious Liberty*, 144; Justice O'Conner, concurring opinion, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. (1989).

[111] Murray, *Religious Liberty*, 144; Justice Kennedy, dissenting opinion, *Allegheny*, 492 U.S.

[112] Murray, *Religious Liberty*, 144-145.

[113] Grant, "The Need for (More)," 43.

[114] Ibid., 43-44.

[115] Justice O'Conner, concurring opinion, *Jaffree*, 472 U.S.; Murray, *Religious Liberty*, 144-145.

[116] Monnino, "The Sinking Wall," 48.

[117] Chief Justice William Rehnquist, dissenting opinion, *Wallace v. Jaffree*, 472 U.S. (1985), quoted in Murray, *Religious Liberty*, 141.

[118] Monnino, "The Sinking Wall," 48.

[119] *Marsh v. Chambers*, 463 U.S. (1983), 792, quoted in Sekulow and Ash, "Religious Rights," 100.

[120] Ibid., 783, 787-788.

[121] Ibid., quoted in Sekulow and Ash, "Religious Rights," 100.

[122] Sekulow and Ash, "Religious Rights," 100.

[123] Ibid., 101.

[124] Ibid., 101; *Corporation of Presiding Bishop v. Amos* 483 U.S. (1987), 327, 335, quoting *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. (1987), 136, 144-145.

[125] Sekulow and Ash, "Religious Rights," 101.

[126] Ibid.

[127] *Zorach v. Clauson*, 343 U.S. (1952), 306, 312-313, quoted in Sekulow and Ash, "Religious Rights," 101.

[128] *Katcoff v. Marsh*, 582 F. Supp. (E.D.N.Y. 1984), 463, 464; Richard D. Rosen, "*Katcoff v. Marsh* at Twenty-One: The Military Chaplaincy and the Separation of Church and State," *The University of Toledo Law Review* 38, no. 4 (Summer 2007), 1138.

[129] Rosen, "*Katcoff*," 1139.

[130] Ibid.

[131] Rosen, "*Katcoff*," 1140; *Katcoff*, 755 F. 2d, 228, 234, 235, 234; Rosen, in his notes, stating that although the constitutionality of the Army chaplaincy has never been considered by the Supreme Court, gives examples of opinions by Justices Brennan, Goldberg, and Stewart in *Schempp* in which they also acknowledge this tension but also the legitimacy of military chaplains.

[132] Ibid., 1139-1140; *Katcoff*, 755 F. 2nd (2nd Cir. 1985), 223, 232-233, 235; U.S. Constitution, art. I & 8, cl. 11 (congressional power to declare war), cl. 12 (power to raise and support armies), cl. 13 (power to maintain a Navy), cl. 14 (power to make rules and regulations for the governance of the military), cl. 16 (power to provide for the organizing, arming, and disciplining of the militia, and for governing the militia when in federal service); U.S. Constitution, amend. I.

[133] Saby Goshray, “Are You There God?” 141.

[134] Murray, *Religious Liberty*, 155.

[135] Ibid., 147.

[136] Murray, *Religious Liberty*, 155; *Reynolds v. U.S.*, 98 U.S. (1878), 145.

[137] Murray, *Religious Liberty*, 155.

[138] *Reynolds v. U.S.*, 98 U.S. (1878), 145, quoted in Murray, *Religious Liberty*, 155.

[139] Goshray, “Are You There,” 147.

[140] Ibid., 148; *Davis v. Beason*, 133 U.S. (1890), 333.

[141] Goshray, “Are You There,” 148.

[142] *Cantwell v. Connecticut*, 310 U.S. (1940), 296.

[143] Goshray, “Are You There,” 148.

[144] Ibid.; Murray, *Religious Liberty*, 145.

[145] Murray, *Religious Liberty*, 146.

[146] Ibid.; *Sherbert v. Verner*, 374 U.S. (1963), 398.

[147] Murray, *Religious Liberty*, 146; Goshray, “Are You There,” 149; *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. (1990), 872.

[148] Murray, *Religious Liberty*, 146.

[149] Ibid.; *Employment Division v. Smith*, U.S. 660 (1988), certiorari to the Supreme Court of Oregon.

[150] Murray, *Religious Liberty*, 146-147.

[151] Goshray, “Are You There,” 153.

[152] Ibid.; *Smith*, 494 U.S. (1990), 872.

[153] Ibid., 147.

[154] Ibid.

[155] Murray, *Religious Liberty*, 147; Goshray, “Are You There,” 150; Grant, “The Need for (More),” 45.

[156] Murray, *Religious Liberty*, 147-148; U.S. Code, Title 42, Chapter 21B, Religious Freedom Restoration, http://4.law.cornell.edu/uscode/html/uscode42/usc_sup_01_42_10_21B.html.

[157] Murray, *Religious Liberty*, 148; *City of Boerne v. Flores*, (1997), 95-2074.

[158] Ibid.

[159] Murray, *Religious Liberty*, 148.

[160] Ibid.; Rosen, "*Katcoff*," 1143-1144; Pub. L. No. 106-274, 114 Stat. 804 (codified at 42 U.S.C. & 2000cc-1(a)(1)-(2)).

[161] *Cutter v. Wilkinson*, 544 U.S. (2005), 712, as noted in Rosen, "*Katcoff*," note 62.

[162] Rosen, "*Katcoff*," 1144; *Cutter*, 544 U.S., 713.

[163] Steven Goldberg, "*Cutter* and the Preferred Position of the Free Exercise Clause," *William & Mary Bill of Rights Journal* 14, no. 4 (art. 5 2006), 1404; Rosen, "*Katcoff*," 1144.

[164] Goldberg, "*Cutter*," 1402.

[165] Goldberg, "*Cutter*," 1403-1404.

[166] Ibid., 1404-1405; *Warsoldier v. Woodford*, 418 F. 3d (9th Cir. 2005), 989.

[167] Goldberg, "*Cutter*," 1405.

[168] Rosen, "*Katcoff*," 1145; *Cutter*, 544 U.S., 722.

[169] Goldberg, "*Cutter*," 1411; Rosen, "*Katcoff*," 1145.

[170] Ibid.; *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, (2006), 04-1084.

[171] Grant, "The Need for (More)," 45.

[172] Mark W. Cordes, "Religion as Speech," 105.

[173] Ibid., 106.

[174] Ibid.; *Lovell v. City of Griffin*, 303 U.S. (1938), 444.

[175] Ibid.; Ibid., 451-452.

[176] Cordes, "Religion as Speech," 106-107; *West Virginia State Board of Education v. Barnette*, 319 U.S. (1943), 624.

[177] Ibid., 107.

[178] Ibid.

[179] Ibid.

[180] Ibid., 108; *Police Department of Chicago v. Mosley*, 408 U.S. (1972), 92, 95.

[181] Cordes, "Religion as Speech," 108; *Heffron v. International Society for Krishna Consciousness*, 452 U.S. (1981), 640.

[182] Cordes, "Religion as Speech," 108.

[183] Ibid., 108-109; *Widmar v. Vincent*, 454 U.S. (1981), 260, 274-275.

[184] Cordes, "Religion as Speech," 109-110.

[185] Ibid., 110-111.

[186] *Westside Board of Education v. Mergens*, 496 U.S. (1990); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. (1993); *Rosenburger v. Rector and Visitors of the University of Virginia*, 515 U.S. (1995); *Good News Club v. Milford Central School*, 533 U.S. (2001).

[187] Cordes, "Religion as Speech," 111.

[188] Ibid., 114.

[189] *Rosenberger*, 515 U.S., 829, quoted in Cordes, "Religion as Speech," 115.

[190] Cordes, "Religion as Speech," 115; see also *Edwards v. Aquillard*, 482 U.S. (1987), 578; in note 40 of Cordes' article, following the *Edwards* case reference, Cordes also includes the statement that the "Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." He alludes to the fact in his analysis previously (page 115) that this was because the Court sees younger students as more "impressionable."

[191] Cordes, "Religion as Speech," 117.

[192] Grant, "The Need for (More)," 46; *Parker v. Levy*, 417 U.S. (1974), 733.

[193] *Parker v. Levy*, 417 U.S., 737, quoted in Grant, "The Need for (More)," 46.

[194] Ibid., 758.

[195] *Uniform Code of Military Justice* (UCMJ), Arts. 88, 89, 91; Grant, "The Need for (More),"46.

[196] Rules for Courts-Martial 202, 2008 ed.; Grant, "The Need for (More)," 46.

[197] *UCMJ*, Arts. 133, 134; Grant, "The Need for (More)," 46.

[198] Grant, "The Need for (More)," 46-47.

[199] *United States v. Brown*, in *Military Justice Reports*, vol. 45 (1996), 389.

[200] Grant, “The Need for (More),” 47.

[201] Ibid.; David E. Fitzkee and Linell Letendre, “Religion in the Military: Navigating the Channel Between the Clauses,” *Air Force Law Review* 59, no. 207, 38.

[202] US Air Force, *Report of the Headquarters Review Group concerning the Religious Climate at the U.S. Air Force Academy*, 22 June 2005; Grant, “The Need for (More),” 49-50; see also US Air Force, “Interim guidelines Concerning Free Exercise of Religion in the Air Force,” 2005, available at http://www.usafa.af.mil/superintendent/pa/religious.cfm; US Air Force, “Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force,” 2006.

[203] *Brown v. Glines*, 444 U.S. (1980), 348, 360, quoted in Sekulow and Ash, “Religious Rights,” 102.

[204] Sekulow and Ash, “Religious Rights,” 102; 10 U.S.C. & 654 (a)(8)(A) & (B) (2006).

[205] Ibid.

[206] Sekulow and Ash, “Religious Rights,” 103.

[207] Ibid.; Air Force Policy Directive (AFPD) 52-1, *Chaplain Service*, 2006, Introduction.

[208] Air Force Policy Directive (AFPD) 52-1, *Chaplain Service*, 2006, attachment I, quoted in Sekulow and Ash, “Religious Rights,” 103.

[209] Secretary of the Navy Instruction (SONI) 1730.8B, *Accommodation of Religious Practices*, 2008, paras. 1 & 5, quoted in Sekulow and Ash, “Religious Rights,” 103.

[210] Sekulow and Ash, “Religious Rights,” 103.

[211] Ibid.; Army Regulation (AR) 600-20, *Army Command Policy*, 2009, para. 3-3.b.(4).

[212] Sekulow and Ash, “Religious Rights,” 103; Commandant of the Coast Guard Instruction M1730.4B, *Religious Ministries within the Coast Guard*, 1994, para. 5.a.

[213] Ibid.

[214] Grant, “The Need for (More),”51.

[215] Ibid., 49.

[216] Ibid., 50.

[217] Ibid., 50; US Air Force, “Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force,” 2006.

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[227] Todd Starnes, Fox News report, 12 April 2013, Online: http://radio.foxnews.com/toddstarnes/top-stories/pentagon-grilled-about-christians-in-military.html (accessed on 14 April 2013; author also viewed the exchange on Fox News on 13 April 2013).

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[230] Parco and Levy, "Section I: Religious Expression," in *Attitudes Aren't Free*, 12-13; Barry W. Lynn, "Religion in the Military," 15-24; Grant, "The Need for (More)," 39-58; Sekulow and Ash, "Religious Rights," 99-132.

[231] U. S. Joint Chiefs of Staff, *Doctrine for the Armed Forces of the United States*, Joint Publication 1 (Washington, DC: U.S. Joint Chiefs of Staff, May 2, 2007, Incorporating Change 1, March 20, 2009), V-23.

[232] Army Regulation 165-1, *Religious Support: Army Chaplain Corps Activities* (Washington, DC: Headquarters Department of the Army, 3 December 2009), 2.

[233] Military Officer Oath of Office, DA Form 71, July 1999; NGB Form 337, 20101105(EF).

[234] AR 165-1, *Religious Support*, 1.

[235] Army Field Manual (FM) 1-05 (replacing FM 16-1), *Religious Support* (Washington, DC: Headquarters Department of the Army, April 2003), 1-4.

[236] Waldman, *Founding Faith*, 67-71.

[237] Sekulow and Ash, "Religious Rights," 109; in notes 102 and 103, they add: see also, *Lee v. Weisman,* 505 U.S. (1992), 597, noting that people "may take offense at all manner of religious as well as non-religious messages"; and *Americans United v. City of Grand Rapids*, 980 F.2d (1992), at 1553, noting the existence of those who see religious endorsement, "even though a reasonable person, and any minimally informed person, knows that no endorsement is intended."

[238] Sekulow and Ash, "Religious Rights," 110; see also, *Marsh*, 463 U.S., 792.

[239] Ibid., 112; see also *Newdow v. Bush*, 355 F. Supp. 2d (D.D.C. 2005) 286-287.

[240] *Marsh v. Chambers*, 463 U.S. (1983), 793-195

[241] *Lee v. Weisman*, 505 U.S., 589.

[242] Sekulow and Ash, "Religious Rights," 111-112.

[243] Ibid., 118.

[244] Ibid., 108; in note 99, they cite *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. (1981), 707, 714, "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."

[245] Sekulow and Ash, "Religious Rights," 109.

[246] Ibid., 117.

[247] Ibid., 120.

[248] Meacham, *American Gospel*, 5.