



March 14, 2017

Colonel James P. Ryan,
Commanding Officer, 157th Air Refueling Wing
Bldg 100, 302 Newmarket Street
Pease ANGB, NH 03803

Subject: Invocations at National Guard Ceremonies

Dear Colonel Ryan,

By way of introduction, I am Mike Berry, Senior Counsel and Director of Military Affairs for First Liberty Institute. First Liberty Institute is a national legal organization dedicated to defending religious freedom for all Americans. I am a former active duty Marine Corps judge advocate, and now practice as a constitutional law attorney specializing in cases affecting religious freedom within the military.

First Liberty Institute represents the Chaplain Alliance for Religious Liberty (Chaplain Alliance). The Chaplain Alliance is an organization comprising more than 30 ecclesiastical endorsing agencies; those agencies endorse more than 2,600 military chaplains, which is approximately 50% of the current armed forces chaplaincy. A member endorser alerted the Chaplain Alliance to a February 6, 2017 letter you received from the Freedom From Religion Foundation (FFRF) demanding that you cease allowing military chaplains to perform invocations at New Hampshire Air National Guard (NHANG) events.

On behalf of the Chaplain Alliance, I write to emphasize there is no legal requirement for you to give in to the FFRF's demands. Their demands appear to be based on the flawed notion that military chaplains cannot offer invocations at ANG functions. The FFRF's position and legal argument are incorrect. Federal law, military regulations, and court precedents belie the FFRF's specious claims. Uniformed chaplains are clearly permitted, indeed *protected*, when they offer invocations at military functions.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, is a federal law that codifies longstanding religious freedom principles. RFRA forbids the federal government, including the Department of Defense (DoD), from substantially burdening a person's religious exercise absent a demonstrated compelling government interest that is achieved by the least restrictive means. This standard, known as "strict scrutiny," is a high hurdle for the government to clear when it seeks to censor or prohibit religious expression. Moreover, under Section 532 of the FY2014 National Defense Authorization Act, absent an adverse impact on military readiness, unit cohesion, or good order and discipline, the DoD must accommodate individual expressions of religious belief, which undoubtedly include a military chaplain's invocation. Contrary to the FFRF's assertion, there is no exception when such individual expressions occur during military functions.

DoD Instruction (DoDI) 1300.17, “Accommodation of Religious Practices Within the Military Services,” promulgates Section 532 within the armed services. And by adopting RFRA’s strict scrutiny standard within the military, DoDI 1300.17 arguably affords even greater protection than does Section 532. Air Force Instruction 52-1 reflects the legal principles set forth in DoDI 1300.17. The Air Force also publishes a Book of Prayers for its chaplains. The Book of Prayers contains numerous sample prayers that can be used by Air Force chaplains. Notably, the Book of Prayers offers sample prayers for both religious and non-religious military occasions. Unlike the FFRF, the Air Force’s position is that invocations may be offered during non-religious military functions.

Case law also supports the right of military chaplains to offer invocations at military functions, and that such invocations do not constitute DoD establishment of religion. In *Rigdon v. Perry*, a federal court explained that when military chaplains are acting in a religious capacity—such as when conducting a sermon or offering an invocation—they are not acting under color of military authority, and “it is wholly appropriate for them to advance their religious beliefs in that context.”¹ Thus, when military chaplains engage in religious conduct, their conduct is protected under the First Amendment to the Constitution.

In conclusion, the Constitution, federal law, and Department of Defense regulations all support your practice of permitting uniformed chaplains to offer invocations at command functions. Moreover, those legal authorities actually forbid military commanders from censoring or prohibiting such invocations.

Colonel, thank you for your attention to this matter, and for valuing the principles of religious freedom upon which our nation was founded, and which our service members defend. If I may be of assistance, or if you wish to discuss this further, please feel free to contact me. I may be reached at mberry@firstliberty.org.



Michael Berry
Senior Counsel
Director of Military Affairs

Copy to:
Secretary of Defense
Chief, National Guard Bureau
Air Guard Commander, NH National Guard
SJA, 157th Air Refueling Wing, NHANG

¹ *Rigdon v. Perry*, 962 F.Supp. 150, 160-61 (D.D.C. 1997).