



A Leader's Guide to Lawfully Addressing Religion and Spirituality

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Introduction

The First Amendment right for an individual to freely practice the religion of their own choosing is a hallmark of the American psyche.¹ This hallmark sits uneasily alongside the demand that Service members sometimes must subjugate their personal right to exercise certain religious practices for the good of the service.² Federal law places a high burden on the Department of Defense (DoD) to justify any limitation on the religious freedom of Service members,³ and prohibits certain government action with regard to practicing religion.⁴ At the same time, Commanders are charged,

through the assistance of Chaplains and leaders at all echelons, with ensuring the spiritual fitness of their formations.⁵ Balancing this directive while ensuring that leaders do not impinge upon their Soldiers' individual rights is a tricky dynamic, but it can be navigated successfully. This article summarizes the legal underpinnings of religious freedom, the processes, and the test by which religious freedom is limited, and concludes with suggestions of the best practices for addressing religious freedom in the military. Its purpose is to ensure that Commanders and leaders have the information they need to address spirituality and religion with their Soldiers in ways that do not violate the Constitution, Federal law, or DoD and Army policy. This article does not replace the advice of a Commander's staff, but serves as a starting point should a leader be faced with a question about this difficult area and does not have immediate access to a Chaplain or judge advocate.

Part I of this article provides the background of the First Amendment, including specific discussions of the Free Exercise and Establishment Clauses. Part II summarizes the DoD and Army policies and procedures applicable to religious practices in the military. Part III provides practical guidance for leaders in the field who deal with requests for religious accommodation, who provide religious services to Soldiers, or who want to know more about how to address spirituality with their formations.

Part I: Background

The First Amendment to the Constitution of the United States of America, passed in 1787 as part of the Bill of Rights, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁶ The First Amendment contains two complementary rights regarding religion⁷: the right to free exercise of religion (the Free Exercise Clause)⁸ and the prohibition of government actions that favor one religion over another (the Establishment Clause).⁹

The Free Exercise Clause is not absolute despite being woven into the fabric of American society. In fact, it is particularly limited for military Service members.¹⁰ The right of Commanders to infringe upon certain rights of Soldiers for the good of the service is, in fact, deeply rooted in case law.¹¹ The seminal case, *Parker v. Levy*, summarizes the rationale for this:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render within the military that which would be constitutionally impermissible outside it.¹²

This precedent, established in 1974, remained virtually unchallenged until the mid-1990s with the passage of the Religious Freedom Restoration Act (RFRA),¹³ which clearly defines the limits of the government's ability to subjugate Soldiers' religious freedom. Pursuant to RFRA, Commanders may only substantially burden a person's religious exercise if it furthers a compelling government interest and is the least restrictive means of furthering that interest.¹⁴ A Commander "substantially burden[s]" a Service member's religious practice if their action either prevents participation in conduct motivated by a sincerely held belief or places substantial pressure on a Service member to engage in conduct contradictory to a sincerely held belief.¹⁵

The authority of a Commander to infringe on a Service member's religious freedom is not absolute. In certain instances it is quite limited.¹⁶ The Establishment Clause is one such limit; its language and subsequent case law specifically limit government action with regard to religion.¹⁷ While recent Supreme Court decisions leave new ambiguity to be sorted by the lower courts, what remains clear is that public speech by public officials is limited by the Establishment Clause.¹⁸ As public officials, Commanders must take care to ensure speech with regard to religion is not coercive.¹⁹

The courts have identified specific examples of permissible government action with regard to religion.²⁰

According to *United States v. Marsh*, the Establishment Clause cannot be applied in a vacuum; presumably practices that were in use at the time of the passage of the First Amendment are considered acceptable.²¹ The use of religious invocation or prayer to mark the beginning of an important event or ceremony is one such practice.²² Subsequent case law upheld *Marsh*.²³ This case law further articulates that prayer during the ceremonial portion of a government meeting is permissible because it does not "exact financial support of the church, compel religious observance, or control religious doctrine."²⁴

The court in *Katcoff v. Marsh* settled all previous concerns about the intersection of the Free Exercise Clause, Establishment Clause, and the War Powers Clause of the Constitution,²⁵ and their applicability to the U.S. Army and its Chaplain Corps.²⁶ Indeed, the court squarely addressed whether the existence of the Chaplain Corps violated the Free Exercise or Establishment Clauses.²⁷ The court applied this test to the issue: "whether the chaplaincy program is relevant and reasonably necessary for the Army's conduct of our national defense."²⁸ The court held that because the "purpose and effect of the program is to make religion, religious education, counseling and religious facilities available to military personnel" the military chaplaincy is "vital to our Army's functioning," and therefore, reasonably necessary for our national defense.²⁹

Understanding these foundational principles, including the Free Exercise and Establishment Clauses, and RFRA, is necessary to an analysis of their implementation by the DoD and U.S. Army. The applicable policies are firmly rooted in the preceding principles.³⁰ Less clear, and infinitely more difficult to address, is how Commanders can support religion and spirituality without running afoul of the First Amendment. We do know, however, that they must address it.³¹

Part II: Department of Defense and Army Policy on Addressing Religion

The concept that Commanders must care for all aspects of a Service member's fitness is longstanding. However, it was recently encapsulated in a framework known as Total Force Fitness.³² Total Force Fitness consists of nine domains and is a "methodology for understanding, assessing, and maintaining Service members' well-being and sustaining their ability to carry out missions."³³ Spiritual fitness, one domain, is the "ability to adhere to beliefs, principles, or values needed to persevere and prevail in accomplishing missions."³⁴

Spirituality and religion are related but different and are thus treated differently under DoD and Army policy. Commanders must carefully balance attention to spiritual fitness with respect for their subordinates' religious

preference.³⁵ DoD and Army policy on religious liberty and spirituality in general is fully informed by the Free Exercise and Establishment Clauses of the First Amendment and RFRA.³⁶ According to DoD policy:

"Service members have the right to observe the tenets of their religion or to observe no religion at all;"³⁷

"DoD Components will accommodate individual expressions of sincerely held beliefs which do not have an adverse impact on military readiness, unit cohesion, good orders and discipline, or health and safety;"³⁸

"A strong spirit promotes resiliency and enhances one's ability to mitigate adverse responses to stress. Promoting spiritual fitness is a vital component of a [Total Force Fitness] program."³⁹

Likewise, Army policy nests firmly in DoD policy, RFRA, and the First Amendment.⁴⁰ In addition to Soldiers' rights to practice their respective religions or observe no religion at all, Army policy states that it protects the "civil liberties of its personnel to the greatest extent possible, consistent with its military requirements."⁴¹

The Army aims to achieve this balance through its combined approach to religious accommodation and spiritual fitness.⁴² The Army's guidance to Commanders on how to address spirituality is contained in Field Manual (FM) 7-22, *Holistic Health and*

Fitness (H2F).⁴³ FM 7-22, published in 2020, established the Army's system to address five domains of Soldier readiness: physical, mental, sleep, nutrition, and spiritual.⁴⁴ The H2F program defines spirituality as a "sense of connection that gives meaning and purpose to a person's life."⁴⁵ Spirituality is "unique to each individual" and "applies to all people, whether religious and nonreligious . . . and forms the basis of their character."⁴⁶

Part III: Situation-Specific Guidance

FM 7-22 acknowledges the diverse and individualistic sources of spiritual and religious practice, thereby providing Commanders with the ideas, resources, and personnel necessary to address spiritual readiness without impacting the right to religious freedom.⁴⁷ With this guidance, Commanders should not shy away from addressing spirituality or religion, but work energetically to provide their Soldiers a wide variety of options for building their spiritual readiness. In general, if the Commander can articulate how their initiative or event achieves the H2F goal of "build[ing] physical lethality and mental toughness to win quickly and return home healthy," without violating the DoD and Army policies on the exercise of religion and the requirement for religious accommodation, such initiatives will pass legal muster.⁴⁸ To illustrate how to accomplish the daunting task of addressing spirituality without indicating preference for one religion

over another, this article provides a description of resources available to Commanders as well as practical examples.

A. EVALUATING RELIGIOUS ACCOMMODATION REQUESTS

When it comes to providing religious accommodations, Chaplains are an essential resource in helping to determine the religious nature of the request and the sincerity of the religious belief.⁴⁹ Chaplains need to be confident in their role as a principal advisor to the Commander in the religious accommodation process.⁵⁰ Chaplains are tasked to formally interview Soldiers requesting religious accommodation to determine the religious nature of the request and the religious sincerity of the requestor.⁵¹

Determining whether an accommodation request is religious in nature is not as straightforward as it might initially seem. To evaluate whether an accommodation request is truly religious, Chaplains may consider using the following three-prong test to evaluate such requests:⁵² first, whether the religious belief addresses "fundamental and ultimate questions of life;" second, whether the belief system is "comprehensive in nature;" and third, whether the belief system has formally established external visible signs.⁵³ Alternatively, in evaluating whether the request is religious leaders may ask whether the Soldier's "moral, ethical, or religious beliefs about what is right and wrong" is "held with strength of traditional religious convictions."⁵⁴ Finally,

a Soldier's adherence to a "merely personal moral code," is not sufficient to meet the threshold for religious accommodation.⁵⁵

Take as an example a Soldier who requests relaxed grooming standards due to their adherence to the Asatru faith.⁵⁶ In determining whether Asatru is considered a religion, a Chaplain should conduct research to determine whether the Asatru religion answers questions such as what happens to a person after death or what is the purpose of life. A Chaplain also should explore whether the Asatru religion addresses a person's complete identity and how they are to live. Finally, the Chaplain should explore what formal and external signs the religion incorporates into the belief structure. In this example, the Asatru religion addresses the deep and ultimate questions of life; it has a holistic set of teachings for how a person is to live; and, finally, it has formal and external signs that appear to be established by the belief system.⁵⁷

Determining the sincerity of the Soldier's religious belief will invariably be the most probing and consequential part of the interview process. To determine the sincerity of religious belief, the Chaplain should explore three elements. The first element is the motivation of the religious request.⁵⁸ Is the Soldier making this request simply because they want to grow a beard? Or is the motivation fueled by a genuine religious fervor to grow a beard as a means to grow in their spirituality? The second element

to explore is the consistency of how the individual lives out their religious convictions. Perhaps a Soldier wants separate rations due to certain off-limits or forbidden foods being served in a dining facility.⁵⁹ However, outside of wanting to adhere to certain dietary restrictions, the Soldier does not actively participate in religious observances or adhere to other religious teachings. This may not necessarily mean that the Soldier is not sincere in their request, but it may be a sign that the sincerity is not religious in nature. The final element in determining religious sincerity is to explore if the request is from a religious conviction or, conversely, if it arises from a strongly held moral objection that is not religious in nature.⁶⁰ Often moral and ethical beliefs are based on a religious belief system.⁶¹ However, there are moral objections that may be grounded on a political or scientific viewpoint. Chaplains need to be sensitive to this dynamic and be aware that there can be a difference between a moral objection and a religious conviction.

With the implementation of FM 7-22, Commanders and Unit Ministry Teams (UMT) have a renewed responsibility to help improve the spiritual readiness of the Force.⁶² In granting religious accommodations, a Commander does not endorse one religion over another.⁶³ Instead, by granting a religious accommodation request, the Commander helps to support the free exercise of religion, which, in turn, helps to grow and improve the overall health and fitness of their Soldiers.⁶⁴

B. RELIGIOUS DISPLAYS AND PRAYER

As previously discussed, Commanders must be careful to avoid religious coercion.⁶⁵ However, as long as Commanders take care to conduct activities in a manner that “that is consistent with accepted historical practice” in the military and is not coercive, holiday displays and even prayer can be part of the Commander’s plan to address support spiritual readiness.⁶⁶ For example, the month of December is generally a time when many Soldiers celebrate important religious holidays such as Christmas, Hanukkah, or Kwanza. While Commanders should avoid events that only highlight a particular religious remembrance, an event or display that celebrates multiple religions is acceptable.⁶⁷ Common displays or events that are likely acceptable include a Christmas tree lighting ceremony and the display of multiple holiday images, such as a Santa Claus house, reindeer pulling Santa’s sleigh, a nativity scene, a menorah, and a “Season’s Greetings” sign, in the dining facility.⁶⁸ Likewise, prayers offered by a Chaplain during formal, solemn military ceremonies such as a change-of-command, retirement, graduation, or dining-in where prayer or invocation is “deeply embedded” in our military history are likely acceptable.⁶⁹ On the other hand, a prayer led by the Commander at the start of every meeting is likely a violation of the *Establishment clause* because the speech is official, conducted during a mandatory meeting,

and may appear coercive.⁷⁰ A quick review from the command judge advocate can ensure Commanders and their staff stay within legal bounds when planning such events or displays.

C. OPPORTUNITIES FOR DEVELOPING SPIRITUAL READINESS

The publication of FM 7-22, provides Commanders with a host of resources available to address the spiritual readiness of their Soldiers.⁷¹ While the guidance acknowledges that spirituality is highly individualized, it highlights many options Commanders can implement to address this component of readiness while also avoiding the preference of one religion over another.⁷² Such activities could include a day of service, providing time for meditation, providing time and space for individual religious education or prayer, conducting relationship building events such as Strong Bonds, or hosting leader professional development on a certain religion.⁷³ In planning these activities, Commanders are not alone.⁷⁴ They can and should rely on numerous individuals and entities inside and outside of their organizations for assistance and expertise such as the Chaplain and UMT, the Garrison Chaplain’s office, the legal office, the Equal Opportunity Advisor or Office, and the Army Fit website, to name a few.⁷⁵

Conclusion

While at first less experienced Commanders may feel hesitant to address very personal and weighty

issues like religion and spirituality with their formations, it is their duty. As they become more comfortable with this important aspect of their mission, Commanders and leaders should feel empowered to share their own spirituality and proudly exercise their religious beliefs appropriately. Knowing they have the staff, information, and resources to assist them in effectively addressing this important aspect of readiness should ease their concern.

NOTES

- 1 Jan Neuharth, First Amendment Day is an Important Reminder of the Rights We Enjoy—and Must Protect, USA Today (Sept. 23, 2021, 10:00AM), <http://usatoday.com/story/opinion/2021/09/23/first-amendment-rights-must-protect/8377984002/>.
- 2 Reynolds v. United States, 98 U.S. 145, 164 (1878).
- 3 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.
- 4 *Ibid.*
- 5 U.S. Dep't of Army, Field Manual 7-22, Holistic Health and Fitness (1 Oct. 2020) (C1, 8 Oct. 2020) [hereinafter FM 7-22].
- 6 U.S. Const. amend. I.
- 7 Kennedy v. Bremerton Sch. Dist., No. 21-418, 2022 U.S. LEXIS 3218, at *7 (June 27, 2022) (citing Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15 (1947)).
- 8 Cantwell v. *State of Connecticut*, 310 U.S. 296, 303 (1940).
- 9 *Ibid.*
- 10 *Ibid.*
- 11 Parker v. Levy, 417 U.S. 733, 758 (1974).
- 12 *Ibid.* at 759.
- 13 42 U.S.C. §§ 2000bb to -4.
- 14 *Ibid.*
- 15 *Ibid.*
- 16 See Lemon v. Kurtzman, 403 U.S. 602 (1971); Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lee v. Weisman, 505 U.S. 577 (1992); Town of Greece v. Galloway, 572 U.S. 565 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Kennedy v. Bremerton Sch. Dist., No. 21-418, 2022 U.S. LEXIS 3218, at *40 (June 27, 2022).
- 17 See Kennedy v. Bremerton Sch. Dist., No. 21-418, 2022 U.S. LEXIS 3218, at *40 (June 27, 2022).
- 18 See *Ibid.*
- 19 See *Ibid.*
- 20 Marsh v. Chambers, 463 U.S. 783, 790 (1983).
- 21 *Ibid.*
- 22 Town of Greece v. Galloway, 572 U.S. 565, 566–67 (2014).
- 23 *Ibid.*
- 24 *Ibid.*

- 25 U.S. Const. art. I, § 8.
- 26 Katcoff v. Marsh, 755 F.2d 223, 235 (1984).
- 27 *Ibid.*
- 28 *Ibid.*
- 29 *Ibid.*
- 30 U.S. Dep't of Def., Instr. 1300.17, Religious Liberty in the Military Services para. 1.2 (1 Sept. 2020) [hereinafter DoDI 1300.17]; U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 5-6a (24 July 2020) [hereinafter AR 600-20].
- 31 See FM 7-22, *supra* note 5.
- 32 See *generally* Joint Chiefs of Staff, Instr. 3405.01, Chairman's Total Force Fitness Framework (1 Sept. 2011) [hereinafter CJCSI 3405.01].
- 33 *Ibid.* at encl. A, para. 2.
- 34 *Ibid.* at encl. A, para. 3e.
- 35 U.S. Dep't of Army, Reg. 600-63, Army Health Promotion paras. 1-32, 6-2 (14 May 2015) [hereinafter AR 600-63].
- 36 DoDI 1300.17, *supra* note 28, at 4.
- 37 *Ibid.*
- 38 *Ibid.*
- 39 CJCSI 3405.01, *supra* note 30, at encl. a, app. e, para. 5.
- 40 AR 600-20, *supra* note 28.
- 41 *Ibid.*
- 42 See *Ibid.*; see also FM 7-22, *supra* note 5; see also U.S. Dep't of Army, Techs. Pub. 1-05.04, Religious Support and Internal Advisement (23 Mar. 2017) [hereinafter ATP 1-05.04].
- 43 See *generally* FM 7-22, *supra* note 5.
- 44 FM 7-22, *supra* note 5.
- 45 *Ibid.* para. 10-2.
- 46 *Ibid.*
- 47 *Ibid.* paras. 10-10 to -27.
- 48 *Ibid.* at ix.
- 49 See *generally* AR 600-20, *supra* note 28, at app. P; see also FM 7-22, *supra* note 5, para. 10-9.
- 50 See *generally* AR 600-20, *supra* note 28, at app. P.
- 51 *Ibid.*
- 52 Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981) (citing Malnak v. Yogi, 592 F.2d 197, 205 (3d Cir. 1979)).
- 53 *Ibid.*
- 54 U.S. v. Ward, 989 F.2d 1015 (9th Cir. 1992) (citing *Welsh v. U.S.*, 398 U.S. 333, 340 (1970)).
- 55 *Africa*, 662 F.2d at 1034.
- 56 See *generally* Sergeant First Class Erick Studenicka, *Number of Religious Accommodations, Including Beards, Likely to Grow in Nevada Guard Ranks*, Def. Visual Info. Distrib. Serv. (Dec. 19, 2019), <https://www.dvidshub.net/news/356626/number-religious-accommodations-including-beards-likely-grow-nevada-guard-ranks>.
- 57 See *Ibid.*
- 58 See *generally* Bryant et al., *supra* note 50.
- 59 See *generally* ATP 1-05.04, *supra* note 40, app. A-5.
- 60 *Ibid.* app. A-1.
- 61 See *generally* FM 7-22, *supra* note 5, para. 10-10.
- 62 See *generally* *Ibid.*
- 63 *Ibid.* para. 10-5.
- 64 *Ibid.*
- 65 *Ibid.* para. 10-6.
- 66 See *Kennedy*, *supra* note 16 at *40 (June 27, 2022).
- 67 *Ibid.*
- 68 See *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984); see also *County of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989).
- 69 See *Marsh*, *supra* note 19, at 786.
- 70 See *Warnock v. Archer*, 380 F.3d 1076, 1081 (8th Cir. 2004); See also *Kennedy* at *41.
- 71 See FM 7-22, *supra* note 5, paras. 10-9, 10-30 to -37.
- 72 See *Ibid.*
- 73 *Ibid.*
- 74 *Ibid.*
- 75 See *Ibid.* paras. 10-10 to -27.