

Written Statement

of

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on Behalf of

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Submitted to the

Military Personnel Subcommittee
of the
United States House Committee on Armed Services

for the Hearing on

“Religious Accommodations in the Armed Services”

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On behalf of Americans United for Separation of Church and State (Americans United), we submit this written statement for inclusion into the record for the Military Personnel Subcommittee hearing on “Religious Accommodations in the Armed Services.” We thank you for the opportunity to submit this testimony and for your consideration of our views.

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

Americans United fully appreciates the need and value of religious accommodations in the Armed Services. Yet, even as we support religious accommodations, we recognize the equally important and coextensive need to ensure that service members are not subject to coercive religious practices or unwanted proselytizing. Religious freedom means both the right to practice religion and the right to be free from government endorsement and coercion.

Today’s hearing will investigate religious accommodations in the military. We believe that current laws, regulations, and policies are generally effective in this area.

Current Accommodation Policies Are Generally Effective

The Armed Services have long had policies governing the issues of religious accommodations. These policies have generally been effective at balancing service members’ right to observe the tenets of their religion or of no religion at all; the requirements of military readiness, military cohesion, and good order and discipline; and the right of service members to be free from the government endorsement of religion. They have allowed service members of different religious beliefs and none at all, to serve together with respect and dignity.

In most situations where access to religious accommodations is denied, systematic changes and Congressional action are not needed. First, many recent high profile reports that the government has violated the religious exercise rights of service members are factually inaccurate or exaggerated. They range from debunked claims that the military plans to court martial service members who exercise their religion¹ to false claims that service members have been penalized for their views on marriage.² These false allegations are nothing more than political posturing and are both a disservice to the men and women who serve this country and a trivialization of their right to real religious accommodations. None of these questionable anecdotes justify systematic change to current policy.

Many of the other denials of religious accommodations are matters of the failure to enforce current policy rather than a defect in the policy itself. For example, there have been disturbing reports that some service members in same sex relationships have been denied access to the counseling, relationship education, and skills training for married couples that chaplains provide

¹ “Bloggers Say Pentagon May Court-Martial Christian Soldiers: Mostly False,” *available at* <http://www.politifact.com/truth-o-meter/statements/2013/may/06/blog-posting/bloggers-say-pentagon-may-court-martial-christian-/>; “Court-Martialed for Sharing Religious Faith?” *available at* <http://www.factcheck.org/2013/05/court-martialed-for-sharing-religious-faith/>.

² Oriana Pawlyk, “AF: Religious intolerance claim unsubstantiated,” *Military Times*, Oct. 11, 2013, *available at* <http://www.militarytimes.com/article/20131011/NEWS/310110013/AF-Religious-intolerance-claim-unsubstantiated>.

for other married couples.³ Under current military policy, chaplains may refuse to provide these services if prohibited by their endorsing agency; however, these chaplains must coordinate with another chaplain or qualified individual to provide these services in his or her place. But at some installations, the military is providing service members with no chaplain who can perform these services, denying same sex couples this important religious accommodation. Again, this specific concern does not require revising current policy, but rather ensuring that current policy is properly followed.

This is not to say that no systematic changes have been or are currently needed regarding religious accommodations. For example, a 2005 U.S. Air Force Academy report⁴ identified a troubling climate of religious intolerance and proselytizing. The Air Force worked through this problem by adopting new policies and mandating training to create a more welcoming and respectful atmosphere. We remain optimistic that, as additional problems of religious intolerance or endorsement are identified, they too can be resolved by working through them with the military.

Recent and Proposed Policy Changes

Religion in the military has been a hot topic in Congress recently. In the last two years, Congress has debated and adopted several provisions regarding religious accommodations, and the military has taken steps to implement some of the adopted measures.

Often these debates have been initiated by arguments that service members do not have enough opportunity to express, practice, and otherwise act upon their religion in the military. Unfortunately, the discussions often fail to consider the effect that overly permissive rules would have on the mission of the military and on other service members. The military teaches soldiers to respect their leaders and discourages challenging their orders.⁵ By necessity, dissent and debate have no role in the military.⁶ This atmosphere “presents particular dangers of coerced religious activities and the perception of religious endorsement.”⁷

The Religious Accommodation Provision for Services Members in Section 533

In 2012, Congress adopted Section 533, “Protection of Rights of Conscience of Members of the Armed Forces and Chaplains of Such Members,” which created a new law to govern religious accommodations in the military.⁸ In 2013—the very next year and before the 2012 law was even implemented—Congress amended this new standard by adopting Section 532.⁹ As it now reads, the provision requires the military to accommodate religious practice “unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline.”¹⁰ This provision appears to strike a reasonable balance: it recognizes the realities of military service, the importance of accommodating religion, and the need to protect service members from coercive and unwanted proselytization.

³ Joe Gould, “Fort Irwin Backtracks on Denying Retreat to Same-Sex Couple,” *Army Times*, available at <http://www.armytimes.com/article/20131122/NEWS/311220025/Fort-Irwin-backtracks-denying-retreat-same-sex-couple>.

⁴ U.S. Air Force, The Report for the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy (June 22, 2005).

⁵ William J Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 Wis. L. Rev. 1493, 1525.

⁶ *Id.*

⁷ *Id.* at 1527-28.

⁸ Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, Section 533.

⁹ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, Section 532.

¹⁰ *Id.* at Sec. 332.

Just last week, the Department of Defense (DOD) issued a new instruction to implement this language.¹¹ Response to the language relating to Section 532 from organizations that argued for this new “conscience provision” was generally positive. For example, the Family Research Council said that the “intent” of 533 “was to protect service members’ freedom to practice and express their faith” and that the new instruction is “an important step forward in the effort to strengthen religious liberty protections in the military.”¹²

Even though Congress has amended military policy in this area twice in the last two years and the groups that argued for its adoption are satisfied with the policy, there has already been discussion about changing this provision again this year. These proposals include language that would demand the accommodation of religious activity even at the cost of unit cohesion, good order, and discipline. Congress should not entertain these changes, as they would negatively affect unit cohesion and military goals.

Furthermore, changing this policy before allowing the military to actually effectuate it would be unwise. Rewriting the statutory language each year adds more confusion than clarity to the matter. And, it would be premature for Congress to act before the Inspector General of the DOD completes the congressionally mandated investigation regarding the implementation of the provision.¹³

Military Chaplains

Providing service members with military chaplains is one of the most prominent and important ways in which the military accommodates the religious practice of service members. Because of the nature of the military, service members without access to military chaplains might otherwise be denied the ability to practice their religion. But, also because of the nature of the military, it is important to ensure that chaplains do not subject service members to unwanted proselytizing or coercion to participate in religious services or activities. The role of a chaplain is to serve and facilitate a soldier’s voluntary and desired religious practice. It is not to proselytize to or force religion onto service members. Chaplaincy is meant to support the faith of the service members, not the faith of the chaplain.

Military chaplains serve the dual role of providing worship services for their faith group and facilitating and serving the more diverse religious population in the military. Each service member has an equal right to practice his or her religion, yet the vast religious diversity in the military (nearly one-third of all members identify as non-Christian¹⁴) means that it is likely that a service member’s assigned chaplain will not be of his or her exact faith community. Thus, military chaplains must agree that they will “serve a religiously diverse population,”¹⁵ “function in a pluralistic environment,” and “support directly and indirectly the free exercise of religion by all members of the Military Service, their family members, and other persons authorized to be served by the military chaplaincies.”¹⁶ Allowing chaplains to pick and choose who to serve is not only degrading to those whom the chaplain refuses to serve, but also denies them the

¹¹ Department of Defense Instruction No. 1300.17: Accommodation of Religious Practices Within the Military Services, (Jan. 22, 2014), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf>.

¹² Press Release Family Research Council, FRC Cautiously Optimistic on DOD’s Instruction on Religious Expression (Jan. 23, 2014), *available at* <http://www.frc.org/newsroom/frc-cautiously-optimistic-on-dods-instruction-on-religious-expression>.

¹³ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66.

¹⁴ Religious Diversity in the U.S. Military, Military Leadership Diversity Commission, Issue Paper No. 22, June 2010.

¹⁵ Department of Defense Instruction No. 1304.19: Appointment of Chaplains for the Military Departments, Sec. 4.2 (April 23, 2007).

¹⁶ Department of Defense Instruction No. 1304.28: Guidance for the Appointment of Chaplains for the Military Departments, Sec. 6.1.2, (Jan. 19, 2012).

opportunity to access religious services. Furthermore, such behavior threatens unit cohesion and good order.

This is not to suggest that military chaplains have no religious freedom rights of their own. The First Amendment and federal law offer them protection. And just last year, Congress passed a law making clear that chaplains cannot be required to “perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain.”¹⁷ Furthermore, current military policy allows chaplains to refuse to act in a way that violates their endorsing agency’s rules of conduct. But when chaplains cannot perform certain services, they are expected to work cooperatively with other chaplains to ensure that the religious needs of these soldiers are met.

Recognizing this important dual role, military chaplains have fostered a reputation of putting the needs of their troops above themselves. The trust and respect what they’ve earned is based on the fact that they dutifully fulfill their special responsibilities without seeking to enlarge their own role or advance their own rights at the expense of others.

Unfortunately, there are efforts to disrupt the chaplain/service member relationship by allowing individual chaplains to proselytize and engage in sectarian activities ahead of the interests, rights, and needs of soldiers they are there to serve. This not only violates the Establishment Clause, but also threatens the unity and cohesion necessary for military effectiveness.

Sectarian Prayer at Public Meetings

The most obvious threat is the current efforts to allow chaplains to give sectarian prayers at official military events and ceremonies. Under current law and regulations, military chaplains are permitted to pray in a manner fitting their individual religious tradition in the worship services they lead for armed services members. But public prayers at compulsory events are different. Clergy do not have the right to proselytize to a captive military audience. Nor does requiring these prayers to be nonsectarian and inclusive burden the chaplains’ religion, as chaplains can decline any invitation to give the prayer at these public events. But allowing such prayers would violate the constitutional rights of the service members whose attendance is required at these events. Service members have the right to attend such meetings, events, and ceremonies without unwanted proselytizing and coerced religious practices. Furthermore, requiring the prayers to be inclusive—rather than sectarian—respects military values: It respects the diverse religious views of our service members and facilitates unit cohesion.

Religious Diversity of the Chaplain Corps

Lack of diversity is another issue currently facing the Chaplain Corps. Although chaplains are required to serve all service members regardless of religion, the military should make efforts to provide a more diverse clergy corps in order to increase the possibility that a service member will have access to a chaplain of his or her own religion. As explained above, chaplains also oversee worship services. Increasing the diversity of chaplains would also increase the opportunities for those of minority faiths to engage in worship services or receive fellowship from a chaplain sharing their own faith.

Grooming and Appearance

Part of the new DOD Instruction implementing Section 532, discussed above, also included a process to allow service members to request accommodations for grooming and appearance

¹⁷ Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, Sec. 533.

requirements.¹⁸ According to the U.S. Commission on Civil Rights, the previous policy could “result in the unnecessary exclusion of Sikh Americans and Americans of other religious faiths from military service based on their religious beliefs manifested in their dress and grooming.”¹⁹ Others have voiced concern that the prior policy, in part, led to a shortage of Jewish chaplains in the military.²⁰ Accordingly, many have reacted with appreciation that a uniform policy was adopted. Yet many, including Americans United, are disappointed that too many obstacles still remain for these service members.²¹

The formalized process remains lengthy and, as each request will be decided upon a case-by-case basis, uncertain. It is also problematic that service members must apply for an accommodation upon each new assignment, transfer of duty stations, or other significant change in circumstances, including deployment.²² Also, the instruction states that those who make the request must “refrain . . . from beginning unauthorized grooming and appearance practices, [or] wearing unauthorized apparel . . . until the request is approved.”²³ But most service members needing such an accommodation cannot refrain from their religious practice while waiting for approval.

In the end, this policy will still fail to properly and practically accommodate many service members who need an appearance and grooming accommodation, preventing them from serving their country. The DOD should address these concerns so that Sikhs, observant Jews, and other adherents of minority faiths can serve their nation.

Conclusion

As explained above, ensuring religious freedom for service members is vitally important. The military must permit service members to exercise their religion yet also protect them from unwanted proselytizing and religious coercion. Many of the most vocal calls for increased accommodations need not be addressed by Congress at this moment. Instead, recent changes should be allowed to be given effect. Many of the other matters are likely to be resolved by the military itself. To be clear, there are some areas that do still need to be addressed by the military—protecting service members from religious coercion and proselytizing, ensuring that current policies are enforced, increasing the diversity of the Chaplain Corps, and improving policies regarding religious accommodations for grooming and appearance. But further efforts to expanding the newly adopted conscience clause and or allow chaplains to give sectarian prayers at meetings should be rejected.

¹⁸ Department of Defense Instruction No. 1300.17, *supra* note 11.

¹⁹ Letter from the U.S. Commission on Civil Rights to Secretary of Defense, Chuck Hagel, Dec. 3, 2013, *available at* http://www.usccr.gov/pubs/Letter_Sikh-Military-Service.pdf.

²⁰ Chris Carroll, “Pentagon Eases Rules on Waivers for Religious Grooming,” *Stars and Stripes*, Jan. 22, 2014, *available at* <http://www.stripes.com/news/pentagon-eases-rules-on-waivers-for-religious-grooming-1.263435>.

²¹ See e.g., Press Release, Sikh Coalition, Sikh Coalition Press Release (Jan. 22, 2013), *available at* <http://www.sikhcoalition.org>.

²² Department of Defense Instruction No. 1300.17, *supra* note 11.

²³ *Id.*