



**Written Statement of Liberty Institute**

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***RELIGIOUS ACCOMMODATION IN THE ARMED FORCES***

**Submitted to the House Armed Services Committee  
Subcommittee on Military Personnel**

**November 19, 2014**

To Chairman Wilson, Ranking Member Davis, and Committee Members:

On behalf of Liberty Institute, thank you for the privilege of presenting testimony regarding religious accommodation in the armed forces. This important issue is a pillar of Liberty Institute's mission.

Liberty Institute is the largest legal organization dedicated to restoring religious liberty in America's churches, schools, the public arena, and within our military. Within the military, Liberty Institute represents service members, veterans, and veterans support organizations. Our clients include The American Legion, the Veterans of Foreign Wars, the Military Order of the Purple Heart, not to mention individual service member and veterans.

For as long as America has had a military, religion and faith have played integral roles in it. Since before the founding of our nation, American civil and military leadership have taken deliberate steps to meet the religious needs of service members, and to prevent it from becoming a purely secular entity. Thus, religious accommodation in the armed forces has both a historic and legal precedent. This foundation is explained further in the attached article: "*The Role of Religion in the United States Armed Forces.*"

Despite this firm foundation, the American military—coincident with American culture in general—has become increasingly secular during the past several decades. The result is that many service members perceive hostility against overt religious expression within the military. Unfortunately, this perception has now become a sad reality. This is evidenced by an alarming increase in instances of religious hostility over the past few years alone.

Liberty Institute currently represents service members who have experienced hostility, and in some cases discipline, because of their religious beliefs. In each case, our clients—each with years of decorated and honorable service to their credit—simply tried to serve their nation while remaining true to the tenets of their faith. These service members experienced uncertainty, fear, hostility or outright denial of the right to freely exercise their religious beliefs. Of the many freedoms that our service members voluntarily relinquish upon entering the military, religious freedom is not one. The following examples, nevertheless, illustrate a growing trend of hostility towards religious freedom in the armed forces.

Liberty Institute represents an active duty Airman with over nineteen years of dedicated service, who was relieved of his duties and involuntarily removed from his unit because he did not agree with his commander's opinion that any religious or moral opposition to same-sex marriage violated Air Force and Department of Defense (DOD) policy. To be clear, the commander initiated the conversation and asked our client if he agreed with her, to which he respectfully declined to answer. Nevertheless, she relieved him of his duties and removed him, placing his military retirement and honorable service in jeopardy. To make matters worse, when our client submitted a formal complaint, the Air Force responded by reading our client his Article 31(b) rights—the military's version of

*Miranda* rights— and accused him of a crime. At the conclusion of its investigation, the Air Force took no action and stated it is Air Force policy that, although religious belief is constitutionally protected, religious actions and speech are distinct from belief and may be punished. In other words, it is Air Force policy that Airmen are free to hold whatever religious beliefs they wish, but they are not free to act or speak in accordance with their sincerely-held religious beliefs. Liberty Institute obtained a copy of the Air Force policy memorandum<sup>1</sup> that establishes this strained interpretation of the law. Such a policy violates federal law (the Religious Freedom Restoration Act of 1993) and the Constitution. Moreover, this policy is apparently now ubiquitous within the Air Force.

In March 2014, the United States Air Force Academy made national headlines when a Bible verse was removed from a white board outside a Cadet's living quarters. Liberty Institute attorneys met with Academy officials immediately following the incident in an attempt to ascertain the facts and the Air Force Academy's policy on religious expression. Academy officials claimed the Cadet removed the Bible verse after his fellow Cadets "counseled" him. An Academy official explained, however, that had the Cadet not removed the Bible verse, Academy officials likely would have ordered him to remove it. We objected that, in accordance with DOD Instruction 1300.17, and federal law, simply writing a Bible verse on a dorm room white board is a protected form of religious exercise. Much to our surprise, the Academy official responded that he "[did] not believe the DOD meant to provide policy on 'religious exercise' in [DOD] Instruction 1300.17 on anything other than apparel, grooming, and body art."

The Academy official based this interpretation on Air Force Instruction 1-1, Paragraph 2.11, which purportedly requires government "neutrality" towards religion. Although government neutrality may be an appropriate objective, it is the manner in which Paragraph 2.11 is implemented which causes many constitutional issues. Namely, the Air Force interprets Paragraph 2.11 such that any Airman—including Cadets—who holds a leadership position, may not overtly express their religious beliefs because doing so would amount to "coercion" in violation of Paragraph 2.11. This strained interpretation of the law resulted in the opinion that a Cadet writing a Bible verse on a white board would impermissibly coerce other Cadets, or make them feel that the Air Force preferred a particular religion over theirs. Such an opinion is contrary to the Constitution, federal law, military regulations, and common sense. The Academy's position, nevertheless, is consistent with the Air Force policy memorandum discussed above. The result is that the Air Force's incorrect interpretation of the law restricts religious freedom in an unnecessary and unlawful manner.

Although it may represent a disproportionate share of news coverage, incidents of religious hostility are not limited to the United States Air Force. Liberty Institute also represents active duty United States Army Soldiers who experienced religious hostility.

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<sup>1</sup> OpJAGAF 2013-3 of March 20, 2013.

In one case, we represent an active duty officer who, in an e-mail that was kept within his unit, raised questions and concerns about a new Army policy extending special privileges and benefits to homosexual Soldiers for which heterosexual Soldiers are ineligible. Our client—a decorated combat veteran—asked whether he, as a commanding officer, would be required to publicly endorse same-sex marriages within his unit, thereby violating his religious beliefs. Instead of answering his questions and working with him to resolve his moral dilemma, the Army suspended his security clearance and initiated an investigation into his conduct. Liberty Institute mounted a vigorous defense of this Soldier, and he was eventually exonerated. But the damage to his professional reputation, not to mention his confidence in the Army's commitment to its Soldiers, was done.

In another case, we represent an active duty Soldier who attended a mandatory training event during which an Army equal opportunity instructor equated Christians with hate groups. Liberty Institute investigated and discovered that all equal opportunity instructors within the Department of Defense are trained at the Defense Equal Opportunity Management Institute (DEOMI). We obtained copies of DEOMI's training materials and were shocked to discover that DEOMI instructors are taught to provide the following training to service members with respect to extremism in the military:

The standard hate message has not changed, but it has been packaged differently. Modern extremist groups run the gamut from the politically astute and subtle to the openly violent.

Nowadays, instead of dressing in sheets or publicly espousing hate messages, many extremists will talk of individual liberties, states' rights, and how to make the world a better place.

At a time of turmoil and instability, during which our nation faces many external threats, DEOMI's message is inappropriate and offensive to those who swear an oath to protect and defend our Constitution because they believe in "individual liberties" and "making the world a better place."

In each of these incidents, the military interpreted and used existing laws, regulations, or policies to justify its hostility towards religious freedom. As we reflect on our recent Veterans Day observance, we honor the selfless service and sacrifice of our nation's armed forces. Our military continues to willingly sacrifice many freedoms in service to our nation; but not religious freedom. Today, sadly, America's service members of faith—any faith—are less able to freely express their sincerely held religious beliefs than at any time in our history. As a result, our men and women in uniform are losing the very constitutional freedoms they swore an oath to protect. And despite what some critics may claim, these incidents are not isolated. There is a real and growing threat that our service members may lose the First Amendment right to freely exercise their religious beliefs.

Each year Liberty Institute conducts a survey of religious hostility in America.<sup>2</sup> We have successfully used this survey to rebuff critics who argue that there is no threat to religious liberty in America, and that any reported instances are anecdotal or exaggerated.

Prior to 2014, Liberty Institute did not have a separate category for instances of religious hostility that directly affect our service members and veterans. But in the past few years alone we observed an alarming spike in such instances. Clearly, instances of religious hostility against the military—including our veterans—have increased in frequency and severity. In full disclosure, we do not represent each instance that is captured in the survey. Nevertheless, we respectfully invite the Committee's attention to Section IV of the Survey in order to provide an accurate representation of the facts necessary to safeguard the Constitutional rights of our service members.

In light of these incidents, we commend the Committee for its tireless work on this vital issue. As a result of provisions within recent editions of the National Defense Authorization Act, the DOD responded by substantially amending DOD Instruction 1300.17. On its face, the Instruction appears to address some of the past deficiencies with respect to service members' religious liberties. It is critical, however, that the DOD follows this promising start by ensuring that all service members are truly free to exercise their religious beliefs without fear, intimidation, threat, or punishment.

Our clients frequently complain that, despite the existence of laws, regulations, and policies that purport to protect religious expression, there remains a culture of fear among service members. That culture can only be changed from the top. Service members respond to strong leadership. Military leaders at all levels—from Generals in the Pentagon to drill instructors at basic training—must make protecting religious freedom and rights of conscience a priority. Our service members deserve better than lip service paid to the sacrifices they continue to make on behalf of all Americans. Therefore, we respectfully recommend that the Committee consider and evaluate implementing a requirement that service members in key leadership positions, such as commanders, judge advocates, and senior enlisted advisors, undergo mandatory, periodic training designed to ensure that such leaders understand, appreciate, and respect the role of religious liberty within the armed forces.

In conclusion, Liberty Institute encourages the Subcommittee to hold the DOD accountable to the Constitutional requirement of religious freedom in the military. We must ensure that this bedrock principal of American freedom is not only protected, but cherished.

Thank you for your valuable time and consideration.

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<sup>2</sup> An unabridged copy of our Survey and an Executive Summary are available at: <http://www.libertyinstitute.org/pages/survey-of-religious-hostilities>



**The Role of Religion in the United States Armed Forces**  
by Michael Berry<sup>1</sup>

***Abstract***

*Attempts to secularize America’s military have existed for as long as America has had a military. Amid increasing diversity, some question the role that religion should, or may permissibly play, in the military. This paper attempts to address the role of religion in the United States Armed Forces from the historic and legal bases.*

**By the Numbers - Religious Diversity in America’s Military<sup>2</sup>**

In 2009, the Department of Defense conducted a Religious Identification and Practices Survey (RIPS) as Part B of the Defense Equal Opportunity Climate Survey (DEOCS). The RIPS was submitted to 14,769 service members, of whom 6,384 elected to participate. The RIPS revealed no statistically significant variations in race, ethnicity, age, gender, or military rank. And of those who completed the RIPS, only 0.25 percent did not provide valid responses regarding religious affiliation.

The RIPS reveals what appears to be a gradual trend in the United States towards greater percentages of the population reporting no religious affiliation. This is particularly true among younger adults, of whom the military contains in disproportionately greater numbers than society in general. This is consistent with the data reported by two other, well-respected surveys: the American Religious Identification Survey (ARIS)<sup>3</sup>, and the U.S. Religious Landscape Survey<sup>4</sup>.

Overall, the No Religious Preference (NRP) population comprises approximately one quarter (25.50 percent) of RIPS participants. Nevertheless, service members who claim some form of Christian identity continue to comprise the largest population (65.84 percent). Within Christian denominational groups, Catholics (20.11 percent) and Baptists (17.56 percent) comprise the largest populations within the military. In fact, no other category claims even a double-digit percentage. The chart below provides a graphical representation of this data:

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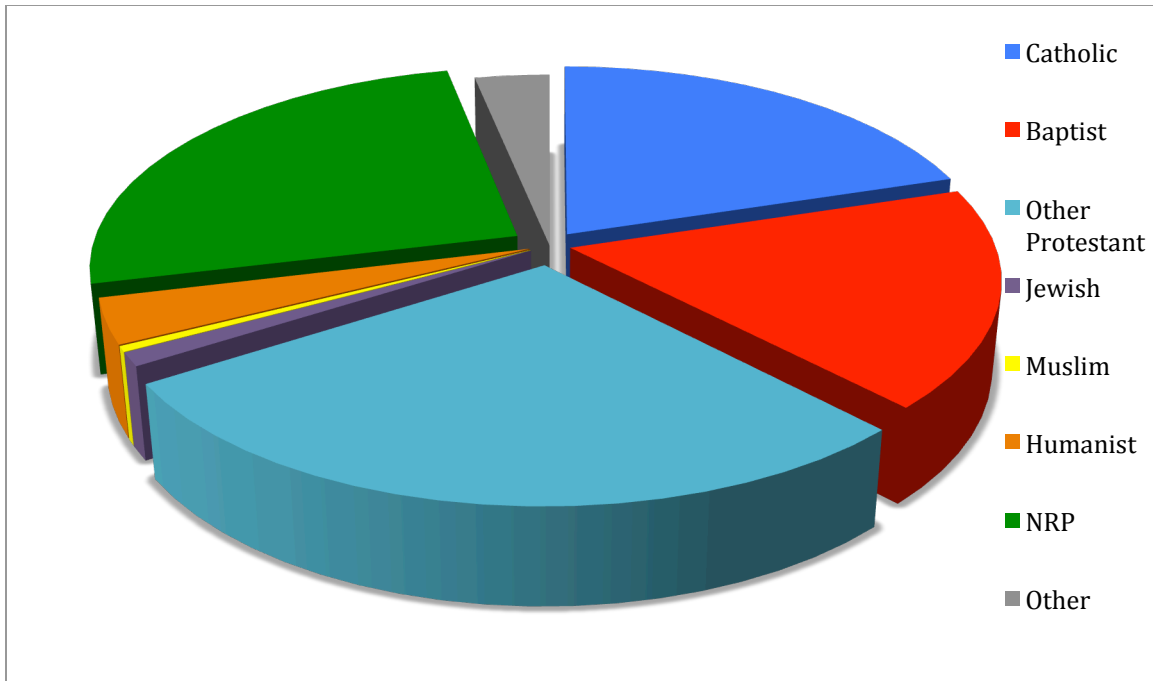
<sup>1</sup> Senior Counsel and Director of Military Affairs, Liberty Institute.

<sup>2</sup> Issue Paper #22 (June 2010), *Religious Diversity in the U.S. Military*, Military Leadership Diversity Commission.

<sup>3</sup> Kosmin & Keysar, 2008.

<sup>4</sup> Pew Forum on Religion in Public Life, 2008.

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The RIPS also captured other important data on religion within the military. On the question of the importance of religion in one’s life, a substantial majority claimed that religion is either “important” or “very important.” Moreover, the RIPS reveals that age and rank may factor into the role religion plays. Older service members, who are typically also higher in rank, are more likely to claim a religious affiliation or preference, as well as placing more importance on religion in their lives. A corollary to this is that those in positions of leadership must prepare themselves to lead more religiously diverse populations—to include NRPs—into the twenty-first century.

Despite this increased diversity, without a doubt America’s military continues to remain a force that places a high value on the role of religion in life. This is not a new phenomenon. Indeed, there exists a robust historical framework for religion and religious expression within the United States military.

### **The Historical Foundations of Religion in the Military**

Since the United States’ founding, American civil and military leadership have taken deliberate steps to meet the religious needs of the military and to prevent it from becoming a purely secular entity. The founders were no strangers to government provision of religious support. For example, in 1789 the first federal Congress passed a law providing for the payment of legislative chaplains.<sup>5</sup> Nearly two centuries later, the

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<sup>5</sup> *Journal of the First Session of the Senate of the United States of America* (Washington: Gales and Seaton, 1820), p. 67, August 28, 1789. See also *The Public Statutes at Large* (Boston: Little & Brown, 1845), Vol. I, pp. 70-71, September 22, 1789, “An Act for allowing compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses (c).”

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Supreme Court upheld the constitutionality of those legislative chaplains, concluding that it “is not . . . an establishment of religion,” but rather “a tolerable acknowledgement of beliefs widely held among the people of this country.”<sup>6</sup> Today, in continuance of the first Congress’ policy, the government directly funds the salaries, activities, and operations of more than 4,500 military chaplains.<sup>7</sup> Despite periodic legal challenges, the Supreme 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.”<sup>8</sup> This includes military chaplains.

It is important to note that, while paid chaplains may constitute an official acceptance of, or authorization for, the presence of organized religion in military life, chaplains are the personification—not the limits—of such religious expression. In other words, if the government pays chaplains to perform religious exercises, it may also approve other forms of religious expression that are distinct from a formal chaplaincy, including service members’ religious expression.

Perhaps no individual had a greater influence in shaping our nation’s armed forces than George Washington, its first Commander-in-Chief. He made known his convictions on the importance of religion within the military early in his career while serving as a young Colonel during the French & Indian War (1753-1763). Throughout that time, he repeatedly requested religious support for his troops,<sup>9</sup> explaining:

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<sup>6</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>7</sup> As of June 2006, there were 1,432 Army chaplains; 825 Navy chaplains, and 602 Air Force chaplains, for a total of 2,859 regular duty chaplains. Additionally, there are 433 chaplains in the Army Reserve National Guard, 500 chaplains in the U. S. Army Reserves, 237 chaplains in the U. S. Navy Reserves, 254 in the Air National Guard, and 316 in the U. S. Air Force Reserves, for a total of 1740 reserve chaplains. This makes a combined 4,599 federally-funded chaplains in the regular and reserve military. From information provided from the office of then-U. S. Congressman Bobby Jindal (LA) on September 28, 2006.

<sup>8</sup> *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

<sup>9</sup> Washington made at least six separate pleas for chaplains, including five times to Virginia Governor Robert Dinwiddie and once to Virginia Governor John Blair. These occasions included to Governor Dinwiddie: George Washington, *The Writings of George Washington*, John C. Fitzpatrick, editor (Washington, D. C.: Government Printing Office, 1931), Vol. I, p. 470, September 23, 1756; Vol. I, p. 498, November 9, 1756; Vol. I, p. 510, November 24, 1756; Vol. II, p. 33, April 29, 1757; Vol. II, p. 56, June 12, 1757; and to Governor Blair: Vol. II, p. 178, April 17, 1758. He also wrote a letter to John Robinson, speaker of the House of Burgesses from 1738-1766, on this issue: Vol. I, p. 505, to John Robinson on November 9, 1756.



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*Common decency, Sir, in a camp calls for the services of a divine, and which ought not to be dispensed with, altho' the world should be so uncharitable as to think us void of religion.*<sup>10</sup>

Washington's British superiors refused each of his requests. But Washington believed so firmly that religious exercises and activities were essential to the well-being of his troops that he periodically undertook to perform those duties himself, including reading Scriptures, offering prayers, and conducting funeral services.<sup>11</sup>

Future presidents and legislatures followed Washington's lead, laying a solid foundation for religious expression in the military. After the Battles of Lexington, Concord, and Bunker Hill, it became evident that reconciliation with Great Britain was unlikely. In response, Congress officially established the Continental Army, and explicitly recommended that "all officers and soldiers diligently to attend Divine Service."<sup>12</sup> Similarly, Congress instructed America's fledgling navy that "commanders of the ships of the Thirteen United Colonies are to take care that Divine Service be performed twice a day on board, and a sermon be preached on Sundays."<sup>13</sup>

America's second Commander-in-Chief, John Adams, was no less insistent that religious expression be promoted in the military. Known as "The Father of the American Navy," Adams' presidency saw the U.S. Navy grow from its humble origins, as an organization comprised largely of privateers<sup>14</sup>, into a formidable fighting force capable of defending the nation. During the Navy's ascendancy under his watch, Adams instructed his Secretary of the Navy, Benjamin Stoddert, on the importance of a Navy chaplaincy:

*I know not whether the commanders of our ships have given much attention to this subject [chaplains], but in my humble opinion, we shall be very unskillful politicians as well as bad Christians and unwise men if we neglect this important office in our infant navy.*<sup>15</sup>

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<sup>10</sup> George Washington, *The Writings of George Washington*, John C. Fitzpatrick, editor (Washington, D.C.: Government Printing Office, 1931), Vol. II, p. 178, to John Blair on April 17, 1758.

<sup>11</sup> See, e.g., Jared Sparks, *The Writings of George Washington* (Boston: Russell, Odiorne, & Metcalf, 1834), Vol. 2, p. 54; E. C. M'Guire, *The Religious Opinions and Character of Washington* (New York: Harper & Brothers, 1836), p. 136; Washington Irving, *Life of George Washington* (New York: G. P. Putnam & Co., 1855), Vol. I, pp. 128-129, 201; C. M. Kirkland, *Memoirs of Washington* (New York: D. Appleton & Company, 1857), p. 155; Hon. J. T. Headley, *The Illustrated Life of Washington* (New York: G. & F. Bill, 1859), p. 60; etc.

<sup>12</sup> *Journals of the Continental Congress* (Washington, D.C.: Government Printing Office, 1905), Vol. II, p. 112, June 30, 1775.

<sup>13</sup> *Journals of the Continental Congress* (Washington, D.C.: Government Printing Office, 1905), Vol. III, pp. 378, November 28, 1775.

<sup>14</sup> A private citizen authorized by the government to serve aboard military naval vessels.

<sup>15</sup> John Adams, *The Works of John Adams*, Charles Francis Adams, editor (Boston: Little, Brown and Company, 1853), Vol. VIII, pp. 661-662, to B. Stoddert on July 3, 1799.

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Congress responded favorably to President Adams’ desire by establishing and providing for naval chaplains, and re-issuing the naval regulations it established during the Revolutionary War, requiring that Divine Service be performed twice each day aboard all naval vessels, and that a sermon be preached each Sunday.<sup>16</sup>

With this foundation firmly established, the tradition of religious expression within the military carried well into the twentieth century. For example, shortly after taking office, and during the military build-up preceding World War II, President Franklin Roosevelt declared:

*I want every father and every mother who has a son in the service to know – again, from what I have seen with my own eyes – that the men in the Army, Navy, and Marine Corps are receiving today the best possible training, equipment, and medical care. And we will never fail to provide for the spiritual needs of our officers and men.*<sup>17</sup>

During World War II, President Roosevelt apparently became even more committed to preserving the spiritual fitness of the military. So committed was Roosevelt, in fact, that he directed, at government expense, the printing and distribution of the Bible to troops along with his exhortation that “I take pleasure in commending the reading of the Bible to all who serve in the Armed Forces of the United States.”<sup>18</sup>

Following World War II, with the emergence of communism as the preeminent threat to American and western European democracies, the battle for ideological superiority commenced. President Harry Truman, wanting assurances that American service members were prepared to combat communism, convened a commission to examine the role of chaplains and spiritual faith in the military. The commission reported:

**One of the fundamental differences dividing this world today lies in the field of ideas. One side of the world, to which we belong, holds to the idea of a moral law which is based on religious convictions and teachings. The fundamental principles which give our democratic ideas their intellectual and emotional vigor are rooted in the religions which most of us have been taught. Our religious convictions continue to give our democratic faith a very large measure of its strength. The**

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<sup>16</sup> *The Public Statutes at Large* (Boston: Charles C. Little and James Brown, 1845), Vol. II, p. 45, “An Act for the better government of the navy of the United States,” April 23, 1800, Art. II.

<sup>17</sup> Franklin D. Roosevelt, “Fireside Chat,” *The American Presidency Project*, October 12, 1942.

<sup>18</sup> *The New Testament of Our Lord and Savior Jesus Christ, Prepared for Use of Protestant Personnel of the Army of the United States* (Washington, DC: US Government Printing Office, 1942), letter by Franklin Roosevelt inside front cover.

other side of the conflict has organized its idea upon a rejection of moral law and individual dignity that is utterly repugnant to any of our religions. Indeed, it has been necessary for the totalitarians to attack and stifle religion because such faith represents the antithesis of everything they teach. **It follows, therefore, that if we expect our Armed Forces to be physically prepared, we must also expect them to be ideologically prepared. A program of adequate religious opportunities for service personnel provides an essential way for strengthening their fundamental beliefs in democracy and, therefore, strengthening their effectiveness as an instrument of our democratic form of government.**<sup>19</sup>

The commission's report was not unfounded. During and after World War II, the U.S. Army surveyed thousands of soldiers about their attitudes toward military service. In 1949, the U.S. Army's Research Branch, Information and Education Division, produced a three-volume record of the survey's results.<sup>20</sup> In Volume II, *The American Soldier, Combat and Its Aftermath*, the U.S. Army surveyed its officers and enlisted service members about the importance of prayer. Among a list of options that included "thinking that you couldn't let the other men down," and "thinking that you had to finish the job in order to get home again," World War II veterans most frequently identified prayer as their source of motivation during combat. It is therefore reasonable to conclude that a permissive religious climate was essential to America's combat efficacy during World War II.

The preceding anecdotes are but a sample of the hundreds of historical examples establishing a clear and unambiguous message: the practice of permitting, encouraging, and at times requiring, religious expression within the armed forces was instituted by those who first won America's independence. And, despite multiple challenges, it has continued uninterrupted since then.

### **Legal Challenges to Religious Expression in the Military**

Legal challenges to the constitutionality of religious expression within the military may take various forms. But the substance of the argument is generally similar: because service members are representatives and agents of the federal government, service member religious expression necessarily implies governmental endorsement of religion, thereby violating the Establishment Clause of the First Amendment. And although courts have repeatedly rejected this argument, as discussed below, the unique

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<sup>19</sup> *The Military Chaplaincy: A Report to the President by the President's Committee on Religion and Welfare in the Armed Forces*. October 1, 1950 (Washington, D. C.: 1951)[emphasis added].

<sup>20</sup> Stouffer, Samuel A., et al. *Studies in Social Psychology in World War II*. Princeton University Press (1949).

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nature of the military and its mission<sup>21</sup> means that courts often apply the First Amendment to service members differently than in other contexts. This is because, in contrast to civilian society, there is less individual autonomy in the military. Obedience to orders, good order, and discipline are vital to a military force that is capable of fighting and winning wars. The United States Supreme Court repeated this on multiple occasions:

The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service is the subordination of the desires and interests of the individual to the needs of the service. . . . [W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community.<sup>22</sup>

And:

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 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 permissible within the military that which would be constitutionally impermissible outside it.<sup>23</sup>

Nevertheless, even the military's mission to fight and win wars, which necessitates obedience to authority, good order, and discipline, does not absolve it from ensuring the constitutional right to religious expression. In fact, one court stated that the military not only *may* accommodate religious expression, but it *must*.

In 1985, the United States Court of Appeals for the Second Circuit decided the case of *Katcoff v. Marsh*.<sup>24</sup> In *Katcoff*, two Harvard Law School students challenged the constitutionality of the U.S. Army's chaplaincy, arguing that government provision and funding of chaplains in order to provide for religious practice violated the Establishment Clause. The court rejected that argument, reasoning that, because of the rigors of military life, a service member's ability to freely practice their religion would be stifled unless the military provided chaplains.<sup>25</sup> Importantly, the court held that the Constitution "*obligates* Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is

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<sup>21</sup> See *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.”).

<sup>22</sup> *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

<sup>23</sup> *Parker*, 417 U.S. at 758.

<sup>24</sup> *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).

<sup>25</sup> *Id.* at 234.

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not available to them.”<sup>26</sup> The principle *Katcoff* exemplifies is now embodied in official DoD policy. Joint Publication 1-05, Religious Affairs in Joint Operations, states:

U.S. military chaplains are a unique manifestation of the nation’s commitment to the values of freedom of conscience and free exercise of religion proclaimed in her founding documents . . . . Uniformed chaplaincies are essential in fulfilling the government’s, and especially the Department of Defense’s, responsibilities to all members of the Armed Forces of the United States.<sup>27</sup>

In other words, without a military chaplaincy, Congress would be unable to ensure service members’ rights under the Free Exercise clause.

American service members assigned to austere environs or forward-deployed experience this reality every day. They are unable to freely exercise their religion by virtue of their military service. Generally speaking, a service member assigned to an air base in Europe or Japan, or to a remote outpost in the Middle East, cannot attend services at his or her church, synagogue, mosque, etc. Thus, military chaplains provide an invaluable service that our forefathers understood to be a bulwark of liberty—military chaplains facilitate the free exercise of religion as guaranteed by the First Amendment. But the challenges to the chaplaincy and chaplains’ religious expression did not stop with *Katcoff*.

In the 1990’s, Congress considered a legislative override to President Clinton’s veto of the Partial-Birth Abortion Ban Act. Seeking to present a unified voice in support of the congressional override, the Catholic Church in the United States engaged in a “Project Life Postcard Campaign,” which began in 1996. The campaign consisted of Catholic priests throughout the country—including the Archdiocese for Military Services—preaching to their parishioners against the “partial-birth abortion” procedure. Priests encouraged parishioners to sign postcards urging their elected representatives to vote to override President Clinton’s veto.

In response, the Judge Advocate General of the Air Force—the highest-ranking attorney in the Air Force—issued an opinion letter prohibiting participation in the Postcard Campaign. The Army and the Navy<sup>28</sup> subsequently issued similar guidance to their chaplains.

Father Rigdon and Rabbi Kaye, a Roman Catholic priest and Jewish rabbi, respectively, were U.S. Air Force chaplains. Believing that partial-birth abortion was a significant issue to their denominations and congregations, both chaplains wanted to take part in the Postcard Campaign. But the Air Force prohibited them from doing so. In 1996,

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<sup>26</sup> *Katcoff*, 755 F.2d at 234 [emphasis added].

<sup>27</sup> JP 1-05, at I-1.

<sup>28</sup> The U.S. Marine Corps does not have an independent chaplains corps. The U.S. Navy provides chaplains for the U.S. Marine Corps.

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Father Rigdon and Rabbi Kaye sued the Secretary of Defense, alleging that the military’s prohibition on military chaplains encouraging their congregants to contact Congress in favor of the Partial-Birth Abortion Ban Act violated the Religious Freedom Restoration Act.<sup>29</sup> In 1997, the United States District Court for the District of Columbia ruled in favor of the chaplains.

The court’s rationale was straightforward:

When chaplains are conducting worship . . . they are acting in their religious capacity, not as representatives of the military or . . . under the color of military authority . . . [M]ilitary chaplains do not invoke the official imprimatur of the military when they give a sermon; they are acting in a religious capacity, and therefore, it is wholly appropriate for them to advance their religious beliefs in that context.<sup>30</sup>

Thus, not only does the First Amendment’s Free Exercise Clause require the provision and funding of military chaplains, it also prohibits censorship of their speech when performed in their religious capacity. When chaplains perform their religious duties—whether it be delivering the Sacraments, preaching from the pulpit, or counseling the penitent—they enjoy enhanced First Amendment protection compared to their military colleagues.

### **Military Restrictions on Religious Expression**

As *Katcoff* and *Rigdon* demonstrate, religious expression in the military does not run afoul of the First Amendment to the Constitution simply because it amounts to government acceptance or approval of such religious expression. *Rigdon*, however, did not define the limits on military proscription of a chaplain’s non-religious speech. Nor did the court disturb the Supreme Court’s holding in *Parker*, which arguably grants the military greater authority to curb non-religious speech.<sup>31</sup>

Because the fundamental concept of the “needs of the service” being greater than the “desires and interests of the individual” is central to how courts view service members’ religious liberties, the right to religious expression in the military is not without limitation. The Department of Defense and each of the five military service branches have policies that govern how the military must accommodate the religious needs of service members. The notion that military commanders retain the authority and discretion to maintain good order and discipline, military readiness, and mission capability, are embedded in those policies.

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<sup>29</sup> *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997).

<sup>30</sup> *Id.* at 160-61 (internal quotations and citations omitted).

<sup>31</sup> *Parker* involved an Army medical specialist who, in protest against the Vietnam War, encouraged Soldiers to refuse to deploy to Vietnam for political reasons.

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For example, the U.S. Army policy states “the Army will approve requests for accommodation of religious practices unless accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, discipline, safety, and/or health.”<sup>32</sup>

The U.S. Navy and Marine Corps policy states the “Department of the Navy 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.”<sup>33</sup>

The U.S. Air Force policy is perhaps the most restrictive of the service branches on this subject. It states “leaders at all levels must balance constitutional protections for an individual’s free exercise of religion or other personal beliefs and the constitutional prohibition against government establishment of religion.”<sup>34</sup> Paradoxically, the same regulation also states that “all Airmen are able to choose to practice their particular religion” and that Airmen “should confidently practice [their] own beliefs.”<sup>35</sup> But even then, an Airman’s “right to practice [their] beliefs does not excuse [them] from complying with directives, instructions, and lawful orders . . . .”<sup>36</sup>

Clearly, the right to engage in religious expression in the military is not unfettered. Military commanders retain substantial discretion in leading, training, and regulating the conduct of their subordinates. This even extends to expressive conduct.<sup>37</sup>

### Limitations on Military Authority to Censor Expressive Conduct

Although *Greer v. Spock* upheld the authority of military officials to restrict speech in furtherance of military objectives, it did not grant *carte blanche* to the military.<sup>38</sup> Indeed, a military commander who engages in censorship in an arbitrary and capricious manner, even under the guise of military necessity, may find him or herself on the losing end of a lawsuit. Such was the case in *Nieto v. Flatau*.<sup>39</sup>

Jesse Nieto’s son, Marc Nieto, was an American Sailor killed in the Islamic terrorist attack on the U.S.S. Cole in 2000. Mr. Nieto, a retired U.S. Marine, worked as a civilian contractor at Marine Corps Base Camp Lejeune, North Carolina. In response to

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<sup>32</sup> AR 600-20 of March 18, 2008, ¶ 5-6a.

<sup>33</sup> SECNAVINST 1730.8B of October 2, 2008.

<sup>34</sup> AFI 1-1 of August 7, 2012 at ¶ 2.11.

<sup>35</sup> *Id.* at ¶ 2.12.1.

<sup>36</sup> *Id.* at ¶ 2.12.2.

<sup>37</sup> See *Greer v. Spock*, 424 U.S. 828 (1976) (holding that military ban on partisan political activity is consistent with military objectives and does not violate First Amendment).

<sup>38</sup> *Greer*, 424 U.S. at 839 (concluding that policy was “objectively and evenhandedly applied”).

<sup>39</sup> *Nieto v. Flatau*, 715 F.Supp. 2d 650 (E.D. N.C. 2010).

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his son’s death, Mr. Nieto began displaying various decals on his vehicle to honor his son’s memory, and to express his views criticizing Islam and terrorism.

In 2008, Camp Lejeune officials began receiving complaints that Mr. Nieto’s decals were offensive. Colonel Richard Flatau, Jr., the base commander, responded by ordering Mr. Nieto to remove his decals, citing Camp Lejeune regulations prohibiting “extremist, indecent, sexist, or racist messages on . . . motor vehicles in any format.”<sup>40</sup> When Mr. Nieto refused to remove the decals from his vehicle, Camp Lejeune officials ordered him to remove his vehicle from Camp Lejeune, and banned him from the base and all other federal installations until he complied. Mr. Nieto sued, arguing that Colonel Flatau applied the base regulation against him in an arbitrary and capricious manner, and that he engaged in viewpoint discrimination.<sup>41</sup>

The court agreed with Mr. Nieto, holding that because Camp Lejeune officials permitted some decals to be displayed, they could not arbitrarily pick and choose those decals that were not permitted simply because some may find their message offensive.<sup>42</sup> Specifically, pro-Islam messages were permitted, while anti-Islam messages were not. Importantly, the court stated “[w]hile the military may have greater leeway in restricting offensive material in furtherance of securing order and discipline among its troops, it may not do so in a manner that allows one message while prohibiting the messages of those who can reasonably be expected to respond.”<sup>43</sup> This form of censorship is referred to as viewpoint discrimination, and it is unconstitutional.<sup>44</sup>

Thus, even when a military regulation authorizes a commander to prohibit certain forms of speech in order to maintain good order and discipline, commanders may not engage in viewpoint discrimination against religious expression.

### **Challenging Alleged Constitutional Violations by the Military**

Inevitably, the question arises: What recourse or remedy is available to a service member whose constitutional rights are violated by the military? It is a question courts have yet to address in a comprehensive and satisfactory manner. The unfortunate result is the lingering misconception that *no* recourse is available. This subsection attempts to dispel that myth.

In 1986, the Supreme Court decided the case of *Goldman v. Weinberger*.<sup>45</sup> In *Goldman*, the Court held that the U.S. Air Force did not violate the First Amendment rights of an Orthodox Jew and ordained rabbi who served in the Air Force by prohibiting

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<sup>40</sup> *Nieto*, 715 F.Supp. 2d. at 652.

<sup>41</sup> *Id.* at 656.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 656.

<sup>44</sup> *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

<sup>45</sup> *Goldman, supra.*



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him from wearing his yarmulke while indoors and on duty. The Court held that the regulation at issue reasonably and even-handedly regulated attire in a manner that accomplished the military’s need for uniformity and discipline.<sup>46</sup> Although Mr. Goldman did not prevail on the substance of his constitutional claim, his case is notable because it stands for the proposition that service members *can* sue the federal government for violating an individual’s constitutional rights.

Just three years earlier, and in contrast to *Goldman*, the Supreme Court decided *Chappell v. Wallace*,<sup>47</sup> in which it held that enlisted service members could not sue to recover damages from superior officers for constitutional violations in the course of military service. The Court’s rationale was that, because of the unique and special nature of the military, Congress created a separate system of justice for service members under the Uniform Code of Military Justice (UCMJ).<sup>48</sup> Were the Court to craft a judicial remedy exposing officers to personal liability to those whom they command, it could severely undermine the special nature of military life. Moreover, because Congress—to whom the Constitution delegates control over the armed forces—had not provided a cause of action and remedy for constitutional violations by individual officers, any judicially created remedy would be inconsistent with Congress’ authority in military matters.<sup>49</sup> In other words, the *Chappell* Court held there is no military analog to a *Bivens*<sup>50</sup> action, meaning enlisted service members may not sue their superiors for constitutional violations. Subsequent Congressional action, however, renders continued reliance on *Chappell* misplaced.

Ten years after the Supreme Court decided *Chappell*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).<sup>51</sup> Although a subsequent decision limited RFRA’s reach to only the federal government,<sup>52</sup> RFRA nevertheless prohibits “a government” from substantially burdening a person’s free exercise of religion unless it can demonstrate a compelling interest that is implemented in the least restrictive way. RFRA creates a cause of action against “a government” that is unable to satisfy this standard. By its own terms, RFRA defines “a government” as including “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . .”<sup>53</sup> Thus, post-*Chappell*, Congress *did* create a cause of action for constitutional violations by individuals. Accordingly, *Chappell*’s validity is questionable, at best. And although it may be difficult to prevail against an individual

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<sup>46</sup> *Goldman*, 475 U.S. at 510.

<sup>47</sup> *Chappell v. Wallace*, 462 U.S. 296 (1983).

<sup>48</sup> *Id.* at 302-04.

<sup>49</sup> *Id.* at 304.

<sup>50</sup> See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (providing money damages remedy for injuries resulting when federal officials violate an individual’s constitutional rights).

<sup>51</sup> 42 U.S.C. §§ 2000bb – bb-4.

<sup>52</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>53</sup> 42 U.S.C. § 2000bb-2(1).

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military officer on a constitutional violation claim—for example, the officer may claim qualified immunity—it is clear that RFRA creates a cause of action for such claims.

Therefore, service members who are victims of constitutional violations *can*, in fact, sue the United States, the responsible individual, or both.

### **Conclusion**

American service members voluntarily surrender many freedoms and liberties upon entering the military. Religious freedom, however, is not one of them. Religion and faith have played integral roles in America’s military since before our founding. Today, service members continue to enjoy broad, robust First Amendment rights. Service members are free to engage in religious expression in a manner consistent with their faith. The authority and discretion of military officials to curb such expression is not unfettered. And those who find themselves the victims of First Amendment violations may allege constitutional claims against those responsible.

# **CURRICULUM VITAE**

## **MICHAEL D. BERRY**

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### **ADDRESS**

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### **PROFESSIONAL HISTORY**

#### **Liberty Institute**, Senior Counsel, Director of Military Affairs (2013 – present)

- Responsible attorney for matters affecting religious liberty within the military, including service members, veterans, and military support organizations.
- Frequent commentator, television, and radio guest, having appeared dozens of times in media outlets such as Time Magazine, Fox News, Breitbart, Houston Chronicle, and Dallas Morning-News.
- Public speaker with dozens of speaking engagements at high-profile national events.
- Responsible for overseeing Liberty Institute internship program.
- Responsible for case intake and management process.

#### **United States Marine Corps**, Active Duty (2006 – 2013), Reserve (2013 – present)

##### **Appellate Defense Attorney**, (2009 – 2013)

- Counsel of record for over 100 clients appealing their federal felony convictions, including murder, rape, espionage, and war crimes.
- Orally argued thirteen cases before military appellate courts.
- Counsel of record in numerous, high-profile military cases, including *United States v. Medina*, and *United States v. Castellano*.
- Only attorney in department to litigate national security cases requiring TS/SCI clearances.
- Supervisory attorney for a team of 30 defense attorneys in more than 200 appellate cases.
- Adjunct Professor of Law at the United States Naval Academy.
- Responsible attorney for training junior attorneys at military installations nationwide.

##### **Civil and Administrative Law Attorney** (2008-2009)

- Primary legal advisor to the Commanding Officer of the fourth largest installation in the Marine Corps for all civil, ethical, fiscal, and administrative law matters.
- Supervised more than 20 pre-litigation claims and investigations in cases involving potential litigation against the United States.
- Initial review officer for all high-profile investigations including aviation mishaps.

##### **Battalion Landing Team Judge Advocate** (2007-2008)

- Hand-selected to serve as the principal legal advisor to the Commanding Officer of a reinforced Marine Corps infantry battalion consisting of more than 1200 personnel.
- Subject-matter expert on complex legal matters of multi-national significance including the Rules of Engagement, law of war, international law, fiscal law, criminal law, and administrative law.
- Appointed as the Federal Claims Commissioner for southern district of Helmand Province, Afghanistan, to oversee compensation payments for collateral damage due to coalition operations.
- Responsible attorney for investigation into the death of a U.S. Marine officer.

**Federal Prosecutor (2007)**

- Represented the United States in approximately 15 federal criminal cases including rape, sexual assault, and child pornography.

**Estate Planning and Family Law Attorney (2006 – 2007)**

- Supervised the estate planning and family law office for the fourth largest installation in the Marine Corps.
- Provided services for over 1600 estate-planning clients.
- Represented over 160 clients in domestic relations, adoption, immigration and consumer protection cases.
- Managed and led the implementation of a new case-management database for the fourth largest installation in the Marine Corps.
- Under my leadership, our office received the ABA Award for Legal Assistance to Military Personnel.

**Blackstone Fellow – Alliance Defending Freedom, Intern (2003)**

- Provided legal research and legislative support to the public policy division of the Massachusetts Family Institute.

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**PROFESSIONAL AWARDS AND DECORATIONS**

Navy-Marine Corps Commendation Medal, with Gold Star in lieu of second award

Navy Unit Commendation Medal

Afghanistan Campaign Medal

Global War on Terror Service Medal

National Defense Service Medal

North Atlantic Treaty Organization-International Security Assistance Force Medal

Navy-Marine Corps Sea Service Deployment Ribbon

Rifle Expert Badge, second award

Pistol Expert Badge, second award

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**LICENSES, ADMISSIONS, AND CLEARANCES**

Active license, in good standing, to practice law in the following jurisdictions:

- United States Court of Appeals for the Armed Forces
- United States Court of Appeals for the Ninth Circuit
- United States District Court for the Northern District of Texas
- United States District Court for the Southern District of Texas
- United States Navy-Marine Corps Court of Criminal Appeals
- State of Texas
- State of Michigan

Security clearance:

- Top Secret with access to Sensitive Compartmented Information (TS/SCI)

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**EDUCATION****J.D - The Ohio State University Moritz College of Law, Columbus, OH (2005)**

- CALI Award for Excellence (Highest Grade in Class) – History of American Law and Society
- Academic Promise Scholarship Recipient
- President, Christian Legal Society, Ohio State Student Chapter
- Blackstone Fellowship

**B.B.A. - Information and Operations Management - Texas A&M University, College Station, TX (1999)**

- College of Business Distinguished Student
- Dean's List
- Air Force ROTC Scholarship Recipient

**DISCLOSURE FORM FOR WITNESSES  
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION**

**INSTRUCTION TO WITNESSES:** Rule 11, clause 2(g)(5), of the Rules of the U.S. House of Representatives for the 113<sup>th</sup> Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Committee on Armed Services in complying with the House rule. Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number) will be made publicly available in electronic form not later than one day after the witness's appearance before the committee.

Witness name: Michael Berry

Capacity in which appearing: (check one)

Individual

Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: Liberty Institute

**FISCAL YEAR 2013**

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
N/A			

**FISCAL YEAR 2012**

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
N/A			

**FISCAL YEAR 2011**

Federal grant(s)/ contracts	federal agency	dollar value	subject(s) of contract or grant
N/A			

**Federal Contract Information:** If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information:

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2013): N/A ;  
 Fiscal year 2012: N/A ;  
 Fiscal year 2011: N/A .

Federal agencies with which federal contracts are held:

Current fiscal year (2013): N/A ;  
 Fiscal year 2012: N/A ;  
 Fiscal year 2011: N/A .

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2013): N/A ;  
 Fiscal year 2012: N/A ;  
 Fiscal year 2011: N/A .

Aggregate dollar value of federal contracts held:

Current fiscal year (2013): N/A ;  
 Fiscal year 2012: N/A ;  
 Fiscal year 2011: N/A .

**Federal Grant Information:** If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

Number of grants (including subgrants) with the federal government:

Current fiscal year (2013): N/A ;  
Fiscal year 2012: N/A ;  
Fiscal year 2011: N/A .

Federal agencies with which federal grants are held:

Current fiscal year (2013): N/A ;  
Fiscal year 2012: N/A ;  
Fiscal year 2011: N/A .

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2013): N/A ;  
Fiscal year 2012: N/A ;  
Fiscal year 2011: N/A .

Aggregate dollar value of federal grants held:

Current fiscal year (2013): N/A ;  
Fiscal year 2012: N/A ;  
Fiscal year 2011: N/A .