

Written Statement

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, 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 for 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. Key to this discussion is an understanding of the military’s unique atmosphere.

First, under the command structure of the military, instructors, officers, and upper class cadets have virtually absolute command authority over their students and subordinates, creating a unique potential for undue pressure on an individual to conform in order not to jeopardize his or her military career. The military teaches soldiers to respect their leaders and discourages challenging their orders.¹ By necessity, dissent and debate have no role in the military.² This atmosphere “presents particular dangers of coerced religious activities and the perception of religious endorsement.”³ Thus, it is of particular importance that the military protect service members—particularly those of minority faiths and non-theists—from unwanted pressure to engage in certain religious activities or adopt particular religious beliefs.

Second, the military has a clear and prevailing interest in maintaining military readiness, cohesion, good order, and discipline. Indeed, failure to maintain any of these factors could be the difference between life and death. Decisions concerning religious freedom and accommodations in the military, therefore, cannot be made without consideration of how they will affect these goals.

¹ William J Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplin-Led Prayers at Mandatory Army Events*, 2006 Wis. L. Rev. 1493, 1525 (2006).

² *Id.*

³ *Id.* at 1527-28.

Religious Freedom for Service Members

The Armed Services have long had policies governing the issues of religious accommodations. These policies have generally balanced 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 been designed to allow service members of different religious beliefs and none at all, to serve together with respect and dignity.

Congress revised these policies in both the FY2012 and FY2013 National Defense Reauthorization Acts (NDAA). In the FY2012 NDAA, 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.⁴ In the FY2013 NDAA—which was actually adopted the very same year as the FY2012 and before law was even implemented—Congress amended a new standard.⁵ 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."⁶

In early 2014, the Department of Defense adopted instructions to implement this language⁷ and it is currently engaged in the congressionally mandated inspection regarding enforcement of these new policies. The Air Force revised its policy on the matter just this month.⁸

At this point, Congressional action is unnecessary and even unwise. Rewriting the statutory language each year adds more confusion than clarity to the matter. Furthermore, 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.⁹

Plus, these provisions strike a sufficient balance: they recognize the realities of military service, the importance of accommodating religion, and the need to protect service members from coercive and unwanted proselytization. Most often, violations of religious freedom arise from failure to enforce this policy rather than a defect in the policy itself. Reaching the end result, however, is not always simple, and, unfortunately, these incidents are frequently exaggerated, misreported, and politicized¹⁰ by those outside the military. Indeed, Mark Welsh, the Air Force

⁴ Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §533 (a) (2013) (FY2013 NDAA).

⁵ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §532 (2013) (FY2014 NDAA).

⁶ *Id.* at §332.

⁷ Department of Defense Instruction No. 1300.17: Accommodation of Religious Practices within the Military Services (Jan. 22, 2014), <http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf>; Department of Defense Instruction No. 1304.28: Guidance for the Appointment of Chaplains for the Military Departments, (March 20, 2014), http://www.dtic.mil/whs/directives/corres/pdf/130428_2004_ch3.pdf.

⁸ The U.S. Air Force, *Air Force Updates AF 101* (Nov. 10, 2014)

<http://www.af.mil/News/ArticleDisplay/tabid/223/Article/554096/air-force-updates-af-instruction-1-1.aspx>.

⁹ FY2013 NDAA, §533.

¹⁰ *E.g.*, Becky Bowers, *Bloggers Say Pentagon May Court-Martial Christian Soldiers: Mostly False*, POLITIFACT.COM (May 6, 2013), <http://www.politifact.com/truth-o-meter/article/2013/may/06/pentagon-court-martialing-christian-soldiers/>; Jesse DuBois and D'Angelo Gore, *Court-Martialed for Sharing Religious Faith?*, FACTCHECK.ORG (May

Chief of Staff, testified before Congress: “The single biggest frustration I've had in this job is the perception that somehow there is religious persecution inside the United States Air Force. It is not true. We have incidents like everybody has incidents.”¹¹

This is not to say that there are no legitimate concerns about the religious freedom in the military. Indeed, there are. The record of religious exercise violations, however, do not support the false narrative recently advanced that Christians are persecuted in the military.¹² Instead, those who suffer religious liberty violations are usually service members who adhere to minority faiths, are non-theists, or have no religious affiliation.

One does not have to look far to see the unique challenges facing service members as they seek accommodations or even just equal treatment. For example, it took more than a decade and a lawsuit for the military to recognize the pentacle as an “emblem of belief” permitted on military headstones for Wiccan service members.¹³ The process to obtain an accommodation for religious headgear or neat beards can still require years of legal maneuvering for some¹⁴ and can completely preclude others from serving altogether.¹⁵ Even once obtained, each accommodation for headgear and garb is merely temporary.¹⁶

In addition, the atmosphere of the military often dissuades these service members from even requesting an accommodation. For example, as recently as September, the Air Force’s formal policy prohibited atheist airman from reenlisting by forcing all enlistees to swear an oath including the phrase, “so help me God.”¹⁷ Of course, requiring an airman to recite a religious

10, 2013), <http://www.factcheck.org/2013/05/court-martialed-for-sharing-religious-faith/>; Oriana Pawlyk, *AF: Religious Intolerance Claim Unsubstantiated*, MILITARY TIMES (Oct. 11, 2013), <http://www.militarytimes.com/article/20131011/NEWS/310110013/AF-Religious-intolerance-claim-unsubstantiated>.

¹¹ Fiscal Year 2015 National Defense Authorization Budget Request from the Department of the Air Force: Hearing on H.R. 4435 Before the H. Armed Servs. Comm., 113th Cong. (2014) (statement of Gen. Mark A. Welsh III, Chief of Staff, U.S. Air Force).

¹² See e.g., Penny Star, *Christians Face Culture of Fear, Intimidation in the U.S. Military Today*, CNS News.com (Nov. 11, 2013), <http://www.cnsnews.com/news/article/penny-starr/christians-face-culture-fear-intimidation-us-military-today>; Elisabeth Meinecke, *TH Magazine: Persecution of Christians...in America*, Townhall.com (Aug. 16, 2013), <http://townhall.com/tipsheet/elisabethmeinecke/2013/08/16/th-magazine-persecution-of-christians--in-america-n1662288>.

¹³ *Circle Sanctuary v. Secretary of Veterans Affairs*, 222 Fed. Appx. 981 (Fed. Cir. 2007).

¹⁴ James Dao, *Taking On Rules to Ease Sikhs’ Path to the Army*, N.Y. TIMES (Jul. 7, 2013), http://www.nytimes.com/2013/07/08/us/taking-on-rules-so-other-sikhs-join-the-army.html?_r=0 (granting case-by-case accommodations for Sikh service members to wear turbans and beards); Mark D. Faram, *Bearded Rabbi Sworn in as Army Chaplain*, ARMY TIMES (Dec. 9, 2011), <http://www.armytimes.com/article/20111209/NEWS/112090310/> (Orthodox Jewish chaplain allowed to keep beard).

¹⁵ Frank Eltman, *NY Sikh Student Says Army Rules Bar Him from ROTC*, ABC NEWS (Nov. 14, 2014) [HTTP://ABCNEWS.GO.COM/US/WIRESTORY/NY-SIKH-STUDENT-ARMY-RULES-BAR-ROTC-26910997](http://abcnews.go.com/US/WIRESTORY/NY-SIKH-STUDENT-ARMY-RULES-BAR-ROTC-26910997).

¹⁶ Department of Defense Instruction No. 1300.17, *supra* note 7.

¹⁷ See, e.g., Abby Ohlheiser, *Humanist Group: Air Force Airman Denied Reenlistment Because He Refused to Say ‘So Help Me God’*, WASH. POST., Sept. 5, 2014, <http://www.washingtonpost.com/news/checkpoint/wp/2014/09/05/humanist-group-air-force-airman-denied-reenlistment-because-he-refused-to-say-so-help-me-god/>;

oath in order to reenlist violates three provisions of the U.S. Constitution: Article VI, which prohibits religious tests; the Establishment Clause, which prohibits the government from establishing religion; and the Free Exercise Clause, which prohibits the government from restricting the free exercise of religion. The policy, at best, coerced non-theists into taking a religious oath with which they disagree, and at worst, barred all non-theists from the military. The policy was a blatant constitutional violation and, thus, it was not a surprise that the Air Force reversed its policy after the threat of a lawsuit. But, the message sent by the adoption of the policy—that non-theists are disfavored if not fully unwelcome—will endure.

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, 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-Christian¹⁸) 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,"¹⁹ "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."²⁰ 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 opportunity to access religious services. Furthermore, such behavior threatens military readiness, unit cohesion, and good order.

Recognizing this important dual role, military chaplains have fostered a reputation of putting the needs of their troops above themselves. The trust and respect that they have earned is

Stephen Losey, *Group: Airman Denied Reenlistment for Refusing To Say 'So Help Me God'*, AIRFORCE TIMES (Sept. 4, 2014), <http://www.airforcetimes.com/article/20140904/NEWS05/309040066/Group-Airman-denied-reenlistment-refusing-say-help-me-God>.

¹⁸ Religious Diversity in the U.S. Military, Military Leadership Diversity Commission, Issue Paper No. 22, June 2010.

¹⁹ Department of Defense Instruction No. 1304.19: Appointment of Chaplains for the Military Departments, Sec. 4.2 (April 23, 2007).

²⁰ Department of Defense Instruction No. 1304.28: Guidance for the Appointment of Chaplains for the Military Departments, Sec. 6.1.2 (Jan. 19, 2012).

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.

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 clarifying 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.”²¹

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.

Unfortunately, there are efforts to disrupt the chaplain/service member relationship. Some are advocating for allowing individual chaplains to proselytize and engage in sectarian activities to the detriment of the interests, rights, and needs of soldiers they are there to serve. Others are advocating for allowing chaplains to deny services to those who have different religious views, which would not only discriminate against certain service members and deny them their Free Exercise rights, but also threaten the unity and cohesion necessary for military effectiveness.

For example, the House version of the FY2015 NDAA contains a provision that would 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—reflects military values: It respects the diverse religious views of our service members and facilitates unit cohesion.

Another issue currently facing the military chaplaincy is whether the military should recognize humanist chaplains. Dr. Jason Heap, a humanist celebrant certified by the Humanist Society, recently applied to be a chaplain but was rejected. Dr. Heap is fully qualified to be a chaplain. He has earned theology degrees, has served as a licensed minister of the First Baptist Church of LaGrange, TX, and had conducted services and delivered sermons at Christian churches for nine years. But, unlike other military chaplains currently serving, he does not believe in God. Instead, he “believes in a system of ethical principles that are as central and guiding as the

²¹ FY2013 NDAA §533; Department of Defense Instruction No. 1304.28, *supra*, note 17.

moral precepts developed in religious traditions that believe in a god or gods.”²² The fact that he fully met all of the qualifications of a military chaplain appears to have been outweighed by the fact that he does not believe in God and his certifying organization is non-theistic. The rejection of his application should be overturned and the military should admit him and other qualified humanist chaplains.

A significant number of service men and women are non-theists, and they often seek access to the same counseling sought by theists, such as counseling on matters of life and death. A humanist chaplain would serve the same function for humanists as other chaplains currently serve for people who adhere to their faith. Further, Jason Heap’s education qualifies him to serve people of faith in the same way that other chaplains are fit—and required—to serve non-theists and other individuals who adhere to different faiths than their own. There is no legitimate reason—other than religious discrimination—for the military to deny this humanist chaplain recognition.

Conclusion

As explained above, ensuring religious freedom for service members is vitally important. The military must permit service members to exercise their religion and also protect them from unwanted proselytizing and religious coercion. Although there is no need for Congressional interference at this point, the military should take steps to make service members who are of minority faiths and non-theists feel more welcome in the military and ensure that they are able to exercise their religion and be free of religious coercion.

²² Complaint *Heap v. Hagel*, 1:14-CV-1490-JCC-TCB (E. D. Va., Nov. 5, 2014).