



FREEDOM FROM RELIGION FOUNDATION

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November 5, 2008

The Honorable Dr Robert M Gates
Secretary of Defense
Department of Defense
1400 Defense Pentagon
Washington DC 20301-1400

COPY

Dear Mr. Secretary:

I am writing on behalf of a concerned U.S. Army non-commissioned officer to alert you to serious church-state violations occurring in current military operations in Iraq. The Freedom From Religion Foundation (FFRF) is a nonprofit organization based in Madison, Wisconsin, which works to protect the constitutional principle of separation of church and state and represents the views of nonbelievers. FFRF has nearly 13,000 members nationwide, including members of our armed forces.

It is our understanding and information that since the 3rd Expeditionary Sustainment Command (hereinafter 3rd ESC) arrived for duty in Iraq in June 2008, the chaplains assigned to this unit have conducted mandatory prayer and Bible readings as part of daily shift change briefings. Our complainant informs us that there are at least three chaplains— at least two Army chaplains and one Air Force chaplain— participating in these prayer sessions and they take turns giving the invocations. As the 3rd ESC works in twelve-hour shifts, these mandatory Bible readings and prayers occur at least twice a day. Our complainant informs us that prior to the 3rd ESC's arrival in country, if prayer by a chaplain was conducted during these briefings it was to pay tribute to their deceased comrades. However, for the last five months, since the 3rd ESC took over from the 316th SC(E), the prayers have consistently referenced Christianity, specifically invoking Jesus Christ. Our complainant provided us with an example of a recent prayer: "Lord Jesus, give us the strength to trust in your will. Help us live this day according to your holy word." Additionally, the chaplains' prayers are rarely, if ever, nondenominational. Our complainant informs us that they are continually read verses from the Bible, particularly Psalms and Proverbs, which are followed by a prayer. On Sundays' shift change briefings, our complainant informs us the prayer and Bible readings are similar to a whole sermon.

The current practice of offering official chaplain-led prayers during mandatory nonreligious shift change briefings violates the Establishment Clause of the First Amendment. The chaplains' actions during these routine staff meetings effectively send the message that the U.S. military endorses religion. Moreover, such actions not only prefer religion over nonreligion, but also favor Christianity over other religious faiths. In addition, holding Bible readings and prayers during mandatory briefings unlawfully compels religious and nonreligious personnel to participate in religious exercises.

First and foremost, it is unconstitutional for the U.S. military to enact or support any policy that advances, promotes or endorses a religion. Generally, to be constitutionally permissible, this prayer “must have a secular purpose; the primary effect of the prayer must be one that neither advances nor inhibits religion; and finally, the prayer must not foster an excessive government entanglement with religion.” *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003)(striking down meal-time prayer at the Virginia Military Institute as violative of the Establishment Clause); *See also Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)(holding constitutional only government action that has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion). In this case, the chaplain’s prayer during routine shift change briefings has the primary effect of endorsing and promoting a religion. It unequivocally sends a message that the U.S. Army “endorses the religious expressions embodied in the prayer.” *Mellen*, 755 F.3d at 374.

Furthermore, the context in which the prayer occurs would lead “ ‘an objective observer, acquainted with the [prayer to] perceive it as a state endorsement...’ ” *Id.* (alterations added)(quoting *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The shift change briefings are essentially routine staff meetings. The court in *Warnock v. Archer*, 380 F.3d 1076 (8th Cir. 2004), held prayer before public school teacher staff meetings unconstitutional because routine prayer in an official, mandatory meeting decisively conveyed the message that the government endorsed religion. In *Sante Fe Indep. Sch. Dist. v. Doe*, the Supreme Court struck down a school policy that authorized students to vote on whether to hold a prayer at high school football games. 530 U.S. at 297-98. The Court considered the context in which the public prayer was being offered. It stated the prayer was “delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.” *Id.* at 307. Similarly here, the Bible readings and prayer occur at regularly scheduled shift change briefings. The prayer is offered in front of military personnel dressed in duty uniforms at the Joint Operations Center, which would purport to be U.S. government property. Certainly, an objective observer would find this practice to be military-sponsored prayer. Thus, because the government is effectively endorsing religion through this daily practice, the military is violating the Establishment Clause.

Second, the type of prayer being held at the 3rd ESC briefings does not fall into the narrow exception of constitutionally permissible government-sponsored prayer laid out by the Supreme Court. *See Marsh v. Chambers*, 463 U.S. 783 (1983)(ruling that the Nebraska legislature’s history and tradition of opening with a prayer by a paid chaplain was constitutional). Federal courts have emphasized that some government-sponsored prayers are constitutionally permissible only because they are nonsectarian, nondenominational and do not invoke a particular faith or deity. *See, e.g., Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004)(holding that the Establishment Clause was violated when the town council opened sessions with prayer containing references to Jesus Christ); *Coles ex rel. Coles v. Cleveland Bd. Of Educ.*, 171 F.3d 369 (6th Cir. 1999)(striking down school board’s practice of opening meetings with prayer because the prayers contained repeated references to Jesus Christ and the Bible).

The U.S. Army, even if it has a history of opening routine military meetings with prayer, still is violating the Establishment Clause. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), the Supreme Court found that, even if history and custom had saved nonsectarian legislative prayer, “history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.” Additionally, the Court reiterated, “not even the ‘unique history’ of legislative prayer, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.” *Id.* The Court continued, “The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had ‘removed all references to Christ.’ ” *Id.* The chaplains’ prayers at the 3rd ESC briefings are unconstitutional because they continually reference a particular religion, Christianity, and invoke a specific deity, Jesus Christ. Even if the chaplains were to remove all references to Christ, it is still doubtful his prayer would pass constitutional muster. The *Mellen* court stated that “even if nondenominational, the Establishment Clause prohibits a state from promoting religion by authoring and promoting prayer for its citizens.” 327 F.3d at 375.

Third, the government cannot compel or coerce military personnel to attend or participate in religious exercises or worship. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 578 (1992) (“at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way in which ‘establishes a [state] religion or religious faith, or tends to do so.’ ”); *Anderson v. Laird*, 466 F.2d 283, 285 (D.C. Cir. 1972) (“Attendance at religious exercises is an activity which under the Establishment Clause a government may never compel.”). The court in *Anderson* continued, “[f]reedom from governmental imposition of religious activity is a core value protected by the Establishment Clause ... a government may not require an individual to engage in religious practices or be present at religious exercises.” *Id.* at 291. While the U.S. military may provide chaplains to serve the religious needs of military personnel who wish to use them, the government cannot require its personnel to engage in religious activity. *See Katcoff v. Marsh*, 755 F.2d 223 (2nd Cir. 1985). Government-sponsored prayer is never constitutional when it is used to “...proselytize or advance any one, or to disparage any other faith or belief.” *Marsh*, 492 U.S. at 794.

The potential for governmental coercion is strong in this case. Given that the chain of command, particularly in foreign military operations, presents an inherently coercive atmosphere, daily prayer at shift change briefings is unconstitutional. Soldiers are required to attend these briefings in order to prepare for their shifts. They should not be compelled to participate in or listen quietly to government-sponsored prayer before reporting for duty, nor when they are “on the clock.”

Finally, it is our understanding and information that upon complaining about this daily prayer practice, our complainant was advised by Lieutenant Colonel Chaplain Harrison that he may request to be excused from the meetings. Furthermore, our complainant informs us that Lieutenant Colonel Chaplain Harrison told our complainant that he was not forced to join the Army and should just accept the prayer before the meetings.

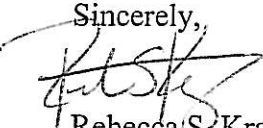
It is inconsequential that our complainant could be excused from these briefings because the prayers are unconstitutional. In *Anderson v. Laird*, the court stated, “[i]t is of no importance that certain cadets and midshipmen may be excused from attendance for conscientiously held beliefs.” 466 F.2d at 293. Similarly here, it does not matter that our complainant may be excused from the briefings. Moreover, courts have rejected the notion that voluntary enlistment excuses the constitutional violation. See *Anderson*, 466 F.2d at 293 (“It is certainly true that in this case attendance at the academies is not mandatory. However, the Supreme Court’s decision in *Torcaso v. Watkins* turns on its holding that the government may not attach unconstitutional conditions to the award of public employment. An individual’s voluntary assumption of an employment or educational relationship with the government is not a waiver of First Amendment rights.”); See also *Mellen*, 327 F.3d at 372 (“...VMI cannot avoid Establishment Clause problems by simply asserting that a cadet’s attendance at supper and his or her participation in the supper prayer are ‘voluntary.’”). Certainly, our complainant’s assumption of service to his country should not be predicated on unconstitutional conditions such as being subjected to daily prayer at briefings.

As you are likely aware, the U.S. Air Force issued Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force in February 2006 (hereinafter Guidelines). These Guidelines state that the U.S. Air Force will “remain officially neutral regarding religious beliefs, neither officially endorsing nor disapproving any faith belief or absence of belief.” The Guidelines further state “public prayer should not ... usually be a part of routine official business.” As stated previously, at least one of the participating chaplains is from the Air Force. Given that the Air Force chaplain is participating not only in the prayer and Bible readings, but also allegedly giving an entire sermon on Sunday mornings, the chaplain is directly violating adopted rules.

We respectfully request that you commence an investigation into these claims immediately and remedy the constitutional violations occurring in the 3rd ESC. We would appreciate hearing from you at your earliest convenience regarding the steps the Department of Defense is taking to ensure the constitutional rights of our soldiers are being upheld. Additionally, we would respectfully encourage the Department of Defense to issue guidelines or directives similar to those of the U.S. Air Force to all branches of our armed forces.

Thank you in advance for your time and attention to this matter.

Sincerely,



Rebecca S. Kratz

Staff Attorney