

## Putting Fire & Brimstone on Ice: The Restriction of Chaplain Speech During Religious Worship Services

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*While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.<sup>1</sup>*

### I. Introduction

It is early Monday morning and you have just settled into your desk with a fresh cup of coffee to start checking your e-mail. Suddenly, the commander swings by your office and tells you that he has an “issue” he wants to hand off to you “real quick.” He is concerned about what some of the chaplains are saying during worship services. At mass on Sunday, the commander heard the Catholic chaplain read a letter from the bishop addressing the new federal health care law; the letter said that the law denies Catholics their religious freedom, was a “blow to a freedom that you have fought to defend and for which you have seen your buddies fall in battle,” and that “we [Catholics] cannot—we will not—comply with this unjust law,”<sup>2</sup> and the parishioners should contact Congress about legislation to reverse it. The commander said that having the chaplain talk about disobeying laws worried him.

Next, the commander tells you that he has also received complaints that another chaplain is telling his congregation that they have to “witness” to their fellow Soldiers and tell them that they will “burn in hell” if they do not accept Jesus Christ as their Savior. Soldiers who attend these services are now constantly attempting to convert their fellow Soldiers, on and off duty.<sup>3</sup> Finally, the commander tells you he heard that one chaplain gave an anti-homosexual sermon, where the chaplain said, “all the gays and lesbians should be rounded up and put behind a large electrical fence and given food and supplies, but they would all die out because they could not reproduce.”<sup>4</sup> The commander says these are all “hot button” issues and that he is worried about the impact they will have on the command. As he quickly leaves your office, he tells you to get back to him and let him know how he can stop the chaplains from saying these things during their services. As you slowly put down your coffee, you realize that today is not going to go as you planned.

Can military authorities restrict what a chaplain says during a religious worship service without violating the First Amendment’s free speech and free exercise protections? Although citizens do not abandon their constitutional rights at the recruiting station door, the differences between the civilian and military communities warrant a different application of those protections. Because of the military’s need to ensure mission accomplishment and maintain good order and discipline, the restriction of chaplain speech during worship services will not violate the free speech and free exercise protections of the First Amendment if the speech is determined to be a danger to mission accomplishment or good order and discipline.

This article explores the circumstances in which the military may restrict chaplain speech during religious

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<sup>1</sup> Parker v. Levy, 417 U.S. 733, 758 (1974).

<sup>2</sup> Terrence P. Jeffery, *Archbishop to U.S. Troops: Obamacare Reg ‘Is a Blow to a Freedom . . . for Which You Have Seen Your Buddies Fall in Battle’* (Feb. 6, 2012), <http://cnsnews.com/news/article/archbishop-us-troops-obamacare-reg-blow-freedomfor-which-you-have-seen-your-buddies>. On 26 January 2012, Archbishop Broglio, the archbishop for the Archdiocese of Military Services, United States of America, issued a letter to be read by all Catholic military chaplains during their next Sunday service. After learning of the letter, the Chief of Chaplains (Army) directed that the letter was not to be read at mass, stating that the letter had not been coordinated with his office, and, later, that they were concerned that the letter contained language “that could be misunderstood in a military environment.” In a compromise, the letter was read at mass, without the “will not . . . comply with this unjust law” language. A full paper copy of the letter was offered for distribution at the conclusion of the services. The Army was the only service that made any objection to the letter. Archbishop Broglio’s letter can be found at <http://www.milarch.org/site/apps/nlnet/content2.aspx?c=dwJXKGOUIJaG&b=7656203&ct=11609821>.

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<sup>3</sup> See HEADQUARTERS, U. S. AIR FORCE, REPORT, THE REPORT OF THE HEADQUARTERS REVIEW GROUP CONCERNING THE RELIGIOUS CLIMATE AT THE U.S. AIR FORCE ACADEMY 11, 46 (22 June 2005) (This scenario is derived from The Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy.).

<sup>4</sup> Steve Lyttle & Joe DePriest, *Catawba Pastor’s Anti-Gay Sermon Sets Off a Firestorm* (May 23, 2012), <http://www.charlotteobserver.com/2012/05/23/3259057/pastors-anti-gay-sermon-spurs.html#storylink=cpy> (This scenario is based on a sermon given by the Reverend Charles Worley of Providence Road Baptist Church, Maiden, North Carolina. A video of the sermon can be found at <http://www.charlotteobserver.com/2012/05/22/3259096/local-pastor-calls-for-death-of.html>).

worship ceremonies.<sup>5</sup> First, this article assesses how different legal standards developed, in both the civilian and military contexts, to determine what is protected and unprotected speech under the First Amendment. Then, the article examines the differences between how free exercise protections are applied to military personnel versus their civilian counterparts. Next, the article describes the effect of the 1993 Restoration of Religious Freedom Act, and its subsequent application, on the normal judicial deference given to military authority concerning the application of First Amendment protections to military personnel. Finally, having laid out the standards governing the First Amendment protections afforded to a chaplain's speech during a religious service, the article applies those standards to the scenarios posed above to determine whether the restriction of that speech would pass constitutional scrutiny.

## II. Protected Versus Unprotected Speech

The right to free speech is not absolute and not all speech is protected by the First Amendment. Fighting words, libel, obscenity, and words of incitement that represent a clear and present danger do not receive the full protection of the First Amendment.<sup>6</sup> The leading Supreme Court decision addressing speech that is unprotected because it poses a clear and present danger is *Schenck v. United States*.<sup>7</sup>

Schenck was the general secretary of the Socialist Party who was convicted under the Espionage Act of 1917 for interfering with recruiting and enlistment activities and attempting to cause insubordination in the military.<sup>8</sup> Schenck mailed pamphlets to men recently drafted that equated the draft to unlawful imprisonment and urged the men not to report to induction.<sup>9</sup> In denying Schenck's appeal for a new trial on the grounds that his conviction violated his right to free speech, Justice Holmes responded for the Court that

[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . [t]he question in every case is whether the words used are used in such

circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>10</sup>

The *Schenck* opinion does not provide a clear judicial standard to determine when speech is a clear and present danger, but it does advise that "the character of every act depends upon the circumstances in which it is done."<sup>11</sup> This idea establishes the framework that enables the same words to be protected when uttered by a private citizen on a public street corner but unprotected when spoken by a member of the military.

### A. Unprotected Speech in the Civilian Environment

What constituted unprotected speech in the civilian context was clarified by *Brandenburg v. Ohio*.<sup>12</sup> Brandenburg was a member of the Ku Klux Klan who invited a local television reporter to attend a Klan rally and cross burning. The reporter filmed Brandenburg making several speeches about avenging what he perceived as the government's continued suppression of the white race.<sup>13</sup> After the footage was broadcast, Brandenburg was charged and convicted under an Ohio criminal statute that prohibited advocating violence as a means of political reform. In reversing his conviction on free speech grounds, the Supreme Court clarified *Schenck's* clear and present danger standard, stating that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of a law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>14</sup>

### B. Unprotected Speech in the Military

After *Brandenburg*, it was clear that for speech to be unprotected as a "clear and present danger" it must be more than mere advocacy—it had to be the verbal equivalent of lighting a match that would inevitably ignite violence. In *United States v. Priest*,<sup>15</sup> the U.S. Court of Military Appeals (COMA) applied *Brandenburg* to free speech challenges in the military, and did so in the combustible atmosphere of the Vietnam War. Priest was a Navy enlisted man charged with

<sup>5</sup> For a discussion of other military religious issues—such as accommodating Soldiers' desire to wear religious apparel, religious invocations at ceremonies and staff meetings, and excessive proselytizing of one Soldier by another—and a framework for analyzing religious issues in the Army, see Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, ARMY LAW., Nov. 1998, at 1, 17.

<sup>6</sup> Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 917 (2009).

<sup>7</sup> 249 U.S. 247 (1919).

<sup>8</sup> *Id.* at 247.

<sup>9</sup> *Id.* at 248.

<sup>10</sup> *Id.* at 249.

<sup>11</sup> *Id.*

<sup>12</sup> 395 U.S. 444 (1969).

<sup>13</sup> *Id.* at 444–47.

<sup>14</sup> *Id.* at 447.

<sup>15</sup> 45 C.M.R. 338 (C.M.A. 1972).

several violations of Article 134, Uniform Code of Military Justice, for printing and distributing pamphlets outside the Pentagon that contained disloyal statements.<sup>16</sup> In affirming Priest's conviction, the court set out to define the limits on free speech within the military.<sup>17</sup> The court examined *Brandenburg's* tolerance of contemptuous speech and the advocacy of violent change and deemed it unworkable within the military environment. While civil government could still function in the face of such speech, provided it was not a likely precursor to anarchy, military considerations tilted the scale in favor of stricter limits.<sup>18</sup> The court found:

While *Brandenburg v. Ohio* [citation omitted] apparently provides the current test for the civil community in forbidding the punishment of the mere advocacy of unconstitutional change, the danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained. As we have said before, the right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country.<sup>19</sup>

The court then affirmed that the "clear and present danger" standard from *Schenck* governed the limits of free speech within the military and that the court's inquiry in this case was "whether the gravity of the effect of the accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction."<sup>20</sup> Denying collateral relief in this case five years later, the U.S. Court of Appeals for the District of Columbia rearticulated this test, stating:

the *Schenck* case counsels that it must evaluate the potential of the words themselves to erode loyalty, discipline, and morale, in light of the context in which they are uttered, to determine the

likely effect of the words on military efficiency . . . .

The government does not have the burden of showing a causal relationship between Priest's newsletter and specific examples of weakened loyalty, discipline or morale; the question for the court-martial is whether there is a clear tendency of this type of speech to diminish them.<sup>21</sup>

Two years after COMA issued its opinion in *Priest*, the Supreme Court decided to weigh in on the issue of free speech limits within the military. In affirming an officer's Article 133 and Article 134 convictions in *Parker v. Levy*,<sup>22</sup> the Court adopted the COMA's reasoning in *Priest*, also rejecting the *Brandenburg* standard of "imminence." The Court found that CPT Levy's speech, urging African-American soldiers to disobey orders to deploy to Vietnam, "was unprotected under the most expansive notions of the first amendment"<sup>23</sup> and that

while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.<sup>24</sup>

The U.S. Court of Appeals for the Armed Forces (CAAF) further delineated free speech limits within the military in *United States v. Brown*<sup>25</sup> and *United States v. Wilcox*.<sup>26</sup> In *Brown*, a group of Louisiana National Guard troops were mobilized to Fort Hood during Operation Desert Storm and were upset over their living and working conditions. They complained to several local media outlets and arranged private bus transportation back to Louisiana.<sup>27</sup> In denying *Brown's* challenge that his conviction under 10

<sup>16</sup> *Id.* at 340–42 (The pamphlets contained instructions on how servicemen could receive assistance in deserting to Canada, included a recipe for gunpowder, and included statements threatening violence to end the war in Vietnam.).

<sup>17</sup> *Id.* at 344.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 344–45.

<sup>21</sup> *Priest v. Sec'y of the Navy*, 570 F.2d 1013, 1018 (D.C. Cir. 1977).

<sup>22</sup> 417 U.S. 733 (1974).

<sup>23</sup> *Id.* at 761.

<sup>24</sup> *Id.* at 758.

<sup>25</sup> 45 M.J. 389 (C.A.A.F. 1996).

<sup>26</sup> 66 M.J. 442 (C.A.A.F. 2008).

<sup>27</sup> *Brown*, 45 M.J. at 392–93.

U.S.C. § 976<sup>28</sup> violated his First Amendment freedoms of association and speech, the CAAF offered the most concise standard for unprotected speech in the military. Citing *Priest*, the CAAF stated that the “test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to the loyalty, discipline, mission or morale of the troops [citation omitted]. This is a lower standard than requiring an ‘intent to incite’ or an ‘imminent’ danger.”<sup>29</sup> This articulation of the test unambiguously removes any intent requirement on the part of the speaker.<sup>30</sup> A speaker does not have to intend his speech to endanger good order and discipline for it to do so and be restricted by proper military authority.

In contrast to these cases, the CAAF reversed an Article 134 conviction in *United States v. Wilcox*,<sup>31</sup> partly on the grounds that the speech at issue was not unprotected dangerous speech. Unlike the unprotected speech in *Parker*, *Priest*, and *Brown*, which was directed at servicemembers, the speech in *Wilcox* consisted of racist and white supremacist comments on the defendant’s private online profiles and statements unknowingly made to an undercover CID agent in a private online chat room. The CAAF found that because there was “no evidence that any of the Appellant’s statements were directed at military members or ever reached his unit,” the speech posed no danger to the military mission or to good order and discipline.<sup>32</sup>

### C. Does a Chaplain Have a Special Status for Free Speech?

The Army recognizes that chaplains have a “dual functionality”: they serve as religious leaders and as religious support staff officers.<sup>33</sup> But does this dual status give them a greater right to free speech than other servicemembers? In *Rigdon v. Perry*,<sup>34</sup> several chaplains brought suit against the Secretary of Defense challenging directives issued by the various services prohibiting military chaplains from participating in the Project Life Postcard

Campaign, a program of the Catholic church that encouraged parishioners to send postcards to their Senators urging them to override President Clinton’s veto of the ban of partial birth abortions, claiming the directives violated their right to free speech.<sup>35</sup> The prohibition against the chaplains’ participation in the program was based on the Defense Department’s belief that to do so would violate Department of Defense Directive (DoDD) 1344.10, which prohibits servicemembers from using their authority or influence to solicit votes for a particular candidate or issue.<sup>36</sup>

In rejecting the DoD’s argument, the district court found that this “indirect” solicitation was not the sort of activity targeted by the DoD directive and that chaplains “conducting worship . . . surrounded by all the accouterments of religion . . . are acting in their religious capacity, not as representatives of the military . . .”<sup>37</sup> At this point, it becomes very important to distinguish between what the *Rigdon* decision stands for, and what it does not. *Rigdon* stands for the idea that when a chaplain speaks during a religious service, he is not speaking from a position of government authority. This means that a chaplain’s speech during religious services is not subject to the same restrictions that normally govern a government employee’s speech during the performance of his official duties.<sup>38</sup> However, what the *Rigdon* ruling does not do is create a free expression forum where a chaplain has the same free speech rights as a private citizen.<sup>39</sup> Although a chaplain may not be speaking from a position of military authority during a religious service, a chaplain is still a servicemember and his speech will be viewed through a *Parker* lens to determine if it is unprotected dangerous speech. Speech is unprotected and dangerous if it interferes with or prevents the orderly accomplishment of the mission, or presents a clear danger to loyalty, discipline, mission, or morale of the troops. It does not cease to be so simply because it is spoken from the pulpit.

The law governing unprotected speech in the military is fairly settled and has been consistently applied by the courts.

<sup>28</sup> 10 U.S.C. § 976 (2006) (prohibiting the formation of, or membership in, any type of military labor organization; also prohibiting the organization of any type of strike, march, or demonstration).

<sup>29</sup> *Brown*, 45 M.J. at 395.

<sup>30</sup> Cf. *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972) (quoting *United States v. Schenck*, 39 S. Ct. 247, 249 (1919)) (“If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime.”).

<sup>31</sup> 66 M.J. 442 (2008).

<sup>32</sup> *Id.* at 450.

<sup>33</sup> U. S. DEP’T OF ARMY, REG. 165-1 ARMY CHAPLAIN CORPS ACTIVITIES para. 3-1b (3 Dec. 2009) [hereinafter AR 165-1].

<sup>34</sup> 962 F. Supp. 150 (D.C. Cir 1997).

<sup>35</sup> *Id.* at 152. The chaplains also argued that restricting them from participation in the campaign was a violation of the Religious Freedom Restoration Act (RFRA) and their right of Free Exercise—those claims will be discussed later in this article.

<sup>36</sup> *Id.*; U.S. DEP’T OF DEF., DIR. 1344.10 POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES para. 4.1.2.2 (19 Feb. 2008).

<sup>37</sup> *Rigdon*, 962 F. Supp. at 150–60.

<sup>38</sup> Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 138 (Fall 2007).

<sup>39</sup> *Id.*; see also David E. Fitzkee & Captain Linell A. Letendre, *Religion In the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F.L. REV. 1, 33 (2007), contra Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167 (2007) (in establishing chaplaincy, military created forums for religious expression in which it cannot impose content or viewpoint requirements).

A servicemember's speech is unprotected dangerous speech and subject to restriction when it is directed at other servicemembers;<sup>40</sup> and is of the type of speech with the propensity to diminish loyalty, discipline, mission, and morale;<sup>41</sup> presents a clear danger to loyalty, discipline, mission, or morale of the troops;<sup>42</sup> or interferes with or prevents the orderly accomplishment of the mission.

### III. Free Exercise

A person's right to freely exercise his religious beliefs, often intertwined with issues of free speech, is also strongly protected by the First Amendment. Although the freedom to believe is absolute, the freedom to act in accordance with one's belief, like the right to free speech, is not absolute and may be subject to government restriction.<sup>43</sup> In stark contrast to the clarity of what is unprotected speech in the military, congressional action and judicial inconsistency have left the issue of free exercise protections within the military in a state of ambiguity.

#### A. Free Exercise in the Civilian Context

As the jurisprudence surrounding the Free Exercise Clause developed, the unconstitutional restriction of religious conduct typically manifested itself in one of two forms: a burden is placed on a religious practice through the application of a generally applicable law, or a law restricting certain conduct because of its religious motivation. *Employment Division v. Smith* and *Church of the Lukumi Babalu Aye v. City of Hialeah* illustrate these situations.

The plaintiffs in *Employment Division v. Smith* challenged the denial of their unemployment benefits because they were terminated from their jobs at a drug rehabilitation center for misconduct, specifically, for ingesting peyote, a Schedule I controlled substance.<sup>44</sup> The plaintiffs, both members of the Native American Church, argued that they had ingested the peyote for sacramental purposes at a religious ceremony and that denying their unemployment claim because of their adherence to a religious requirement violated their free exercise rights under the First Amendment.<sup>45</sup> In denying the free exercise claim, the Court declined to apply a strict scrutiny standard,

<sup>40</sup> *United States v. Wilcox*, 66 M.J. 442, 450 (2008).

<sup>41</sup> *Priest v. Sec'y of the Navy*, 570 F.2d 1013 (D.C. Cir. 1977).

<sup>42</sup> *United States v. Brown*, 45 M.J. 389, 392-93 (1996).

<sup>43</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

<sup>44</sup> *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 874 (1990).

<sup>45</sup> *Id.*

holding instead that a neutral and generally applicable law that burdens a religious practice does not require a compelling government interest.<sup>46</sup> In contrast, specifically intended to restrict a religious practice or suppress a particular religious group are reviewed under strict scrutiny and can only be lawful if they advance a compelling government interest and are narrowly tailored.<sup>47</sup>

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the City, in response to the Church taking up residency within the City, passed a series of ordinances that effectively prohibited ritual animal sacrifice, a central tenet of the Santeria faith practiced by the Church.<sup>48</sup> Although the ordinances did not prohibit religious conduct on their face, the Court found that their collective effect, and the legislative history surrounding their creation, left little doubt that their true intent was to specifically suppress Santeria animal sacrifice. Therefore, the ordinances could only be upheld if they were narrowly tailored to advance a compelling government interest.<sup>49</sup> The court held that they were not.<sup>50</sup>

#### B. Free Exercise within the Military

The Supreme Court has explored the boundaries of the First Amendment's protection of a servicemember's right to the free exercise of religion in only one case: *Goldman v. Weinberger*.<sup>51</sup> Goldman challenged the Air Force's uniform regulation that prohibited the wear of headgear while indoors, which thus forbade Goldman to wear a yarmulke as required by his Orthodox Judaism.<sup>52</sup> In affirming the Air Force's enforcement of its regulation and denying Goldman's First Amendment claim, the Court reaffirmed its view that "the military is, by necessity, a specialized society separate from civilian society."<sup>53</sup> Justice Rehnquist, delivering the opinion of the Court, stated that:

<sup>46</sup> *Id.* at 883.

<sup>47</sup> *Id.*

<sup>48</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527-28 (1993).

<sup>49</sup> *Id.* at 533-46.

<sup>50</sup> *Id.* at 546. The city argued that the ordinances were enacted to protect the public health and to prevent cruelty to animals. Considering these interests, the Court noted the ordinances were entirely under-inclusive, leaving the non-religious killing of animals within the city untouched. *Id.*

<sup>51</sup> 475 U.S. 503 (1986).

<sup>52</sup> *Id.* at 504-05. Air Force Regulation (AFR) 35-10 did not specifically prohibit the wearing of a yarmulke, it simply prohibited the wearing any (and all) headgear while indoors. Although not dispositive in the case, it was noted that Goldman had previously worn his yarmulke within the base hospital for years without incident and that it was first treated as a uniform violation shortly after he testified for a defendant in a court-martial. *Id.*

<sup>53</sup> *Id.* at 508 (quoting *United States v. Parker*, 417 U.S. 733, 743 (1974)).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. 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 [citations omitted]. The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.”

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment [citation omitted] . . . . In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.<sup>54</sup>

The Court rejected Goldman’s argument that strict scrutiny should be the standard of review in his case. It did not, however, clarify the standard of review it was using. The dissenting opinions of Justices Brennan and O’Connor took the majority to task for this.<sup>55</sup>

It is also unclear whether the judicial deference shown in that case extends to all military actions that infringe on a servicemember’s free exercise rights, or only to regulations and orders that are “reasonable and evenhanded[.]”<sup>56</sup> the equivalent of a “neutral and generally applicable” law, like Oregon’s criminal law that prevailed in the *Smith* case.<sup>57</sup> The reasoning in *Goldman* suggests that the Court will apply this deference broadly. The rationale it gave for deference to military judgment, particularly in the area of maintaining good order and discipline, is that courts are “ill-equipped to determine the impact upon discipline that any particular

intrusion upon military authority might have.”<sup>58</sup> When military authorities are executing their responsibility to enact military policy, as directed by the executive and legislative branches, judicial deference to the military should be at its greatest. This reasoning holds even when the order in question is neither neutral nor generally applicable.

### C. Reaction to *Goldman* and *Smith*

Neither *Goldman* nor *Smith* registered well with Congress. Within a year of the *Goldman* decision, Congress directed the military to enact policies to accommodate the individual religious practices of servicemembers, including the wear of religious clothing and religious items, dietary issues, and religious days of observation.<sup>59</sup> The DoD issued a policy directing commanders to grant religious accommodation requests unless doing so would “have an adverse impact on military readiness, unit cohesion, standards or discipline.”<sup>60</sup> Army regulations contain similar language.<sup>61</sup>

Congress also acted to compensate for *Smith* by enacting the Religious Freedom Restoration Act (RFRA) in 1993, stating that “[the] [g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . if [the government] demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.”<sup>62</sup> Although the RFRA was eventually ruled unconstitutional as applied to the states,<sup>63</sup> it remains binding on the federal government and both the Senate and House reports on the legislation made clear that there was no military exception. However, while Congress wanted future free exercise claims in the military to receive a meaningful strict scrutiny review, Congress still

<sup>54</sup> *Id.* at 507 (citation omitted).

<sup>55</sup> *Id.* at 506.

<sup>56</sup> *Id.* at 510.

<sup>57</sup> See *Hartmann v. Stone*, 68 F.3d 973, 985 (6th Cir. 1995) (“those religiously offensive regulations to which the Court has deferred [as in *Goldman*] appear to have always been, on their face, neutral and generally applicable”).

<sup>58</sup> *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)) (In *Chappell*, the Court dismissed a Sailor’s *Bivens* suit against his superior officer for alleged constitutional violations—based on the special nature of the military, the suit could not stand.)

<sup>59</sup> *Fitzkee & Linell*, *supra* note 39 at 64.

<sup>60</sup> U.S. DEP’T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (10 Feb. 2009).

<sup>61</sup> AR 165-1, *supra* note 33, para. 2-1c (“Commanders will approve Soldiers’ requests for accommodation of specific religious practices whenever possible, subject to the limits of military necessity”); U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-6 (18 Mar. 2008) (laying out what constitutes “military necessity” in this context in some detail, and requiring commanders to respond to accommodation requests in writing) [hereinafter AR 600-20]; see also Benjamin, *supra* note 5, at 10–11.

<sup>62</sup> 42 U.S.C. § 2000bb-1 (2006).

<sup>63</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

intended for the courts to maintain judicial deference to the military. In addressing this issue, the House stated:

[the] examination of such regulations in light of a higher standard does not mean the expertise and authority of military . . . officials will be necessarily undermined. The Committee recognizes that religious liberty claims in the context of . . . the military present far different problems . . . than they do in civilian settings . . . . [M]aintaining discipline in our armed forces, [is] recognized as [a] governmental interest[] of the highest order.<sup>64</sup>

The Senate felt the same way, although its language regarding the continued viability of *Goldman's* judicial deference was more direct:

Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test. The committee is confident that the bill will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security. The courts have always recognized the compelling nature of the military's interest in these objectives in the regulations of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill.<sup>65</sup>

#### D. Application of *Goldman's* Deference Under RFRA's Scrutiny

The Sixth Circuit took on this issue in 1995 in *Hartmann v. Stone*. This case examined an Army regulation that prohibited a Family Child Care (FCC)<sup>66</sup> provider from conducting any religious practices during the in-home daycare program.<sup>67</sup> The plaintiffs—parents who wished for

their children to engage in such practices—claimed this violated their free exercise rights under both the First Amendment and the RFRA. The Sixth Circuit declined to address the RFRA claim because the challenged regulation specifically prohibited religious conduct on its face, and the regulation was “not neutral and generally applicable.”<sup>68</sup> (This reasoning is curious. Although the RFRA was passed in direct response to the Supreme Court's ruling in *Smith*, which was about the religious impact of a neutral and generally applicable criminal statute, nothing in the RFRA's text or legislative history limits its application to such cases.)<sup>69</sup>

The Sixth Circuit instead focused on the First Amendment claim, and the amount of deference due to the Army. It reviewed the regulation under strict scrutiny, requiring that the law be narrowly tailored to advance a compelling governmental interest.<sup>70</sup> The court did not view *Parker v. Levy* deference (i.e., recognizing the military as a “specialized society” with disciplinary needs) as part of the “compelling governmental interest” test. Instead, it viewed this deference “as a separate option open to the military to justify its regulation,” stating that “once we conclude that [a] regulation would fail the normal constitutional test we still must determine whether, in the face of what is normally a constitutional violation, the court must defer to military judgment.”<sup>71</sup>

In accordance with this view, the Sixth Circuit first reviewed the Army regulation under strict scrutiny and found that it violated the First Amendment's Free Exercise Clause. The Army claimed that the regulation was designed to prevent itself from seeming to endorse or become closely entangled with religion. However, the family care providers it covered were not employed or paid by the government; the contractual relationship was between parents and providers, and the Army simply regulated the transactions. Thus, the Army had no interest in keeping those transactions irreligious.<sup>72</sup> Turning next to the question of deference, the court recognized that the unique nature of the military's

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<sup>68</sup> *Id.* at 978.

<sup>69</sup> The court explained its reasoning as follows: The RFRA was designed to undo the Supreme Court's holdings in *Smith* and *Babalu Aye*. Those cases involved facially neutral laws that incidentally burdened religion. “The Supreme court never intended *Smith* and *Lukumi Babalu Aye* to affect the methodology of dealing with those laws or rules that directly burden religion because they are not neutrally and generally applicable. . . .” *Id.* Since the regulation in *Hartmann* was not neutral—it specifically targeted religious practice, though not specific sects—the court reasoned that it was beyond the scope of the harm Congress was trying to correct, so that the RFRA would not apply. *Id.* However, as noted below, the court used the same “strict scrutiny” analysis as if the RFRA had applied.

<sup>70</sup> *Id.* at 979 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

<sup>71</sup> *Id.* at 983 n.7.

<sup>72</sup> *Id.* at 985.

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<sup>64</sup> H.R. REP. NO. 103-88 (1993).

<sup>65</sup> S. REP. NO. 103-111, at 11 (1993).

<sup>66</sup> Under the Army's Family Child Care (FCC) program, after undergoing training and certification, military family members are authorized to provide child as independent contractors from Government owned housing on a military installation. The program allows the Army to prevent unregulated child care services on installations, to relieve the burden on its Child Development Centers (CDC), and to take advantage of cost savings on CDC infrastructure. See U.S. DEP'T OF ARMY, REG. 608-10, CHILD DEVELOPMENT SERVICES ch. 6 (15 July 1997).

<sup>67</sup> *Hartmann v. Stone*, 68 F.3d 973, 975 (6th Cir. 1995).

function “has required courts to defer to Army judgment on many aspects of internal operations, including the proper scope of uniformity, discipline and morale,” but went on to find that, in prohibiting the religious conduct of non-servicemembers in their homes, “the Army has wandered far afield,” and that “[i]t stands not in an area where the link to its combat mission is clear, it does not even stand in an area where the link is attenuated but nonetheless discernible.”<sup>73</sup> The court held the regulation to be unconstitutional.

The Federal District Court for the District of Columbia was the next to stride onto the sticky wicket in *Ridgon v. Perry*, in which military leaders had warned chaplains not to encourage their parishioners to participate in the “Project Life Postcard Campaign” because it allegedly violated DoD policy.<sup>74</sup> As noted above, the court found that the campaign did not violate the policies against lobbying and political activity while on duty. Although that ruling settled the issue, the court went further and addressed the free exercise and RFRA issues. Assuming *arguendo* that the DoD political activity and lobbying restriction did prohibit the chaplains from taking part in the campaign, the district court found that prohibiting participation in the Postcard Campaign would be censorship of the chaplains’ preaching and create a substantial burden on the free exercise of their religion.

The court acknowledged that the military had a compelling interest in preventing potential political conflicts from developing among the ranks and affecting good order and discipline, and in maintaining “a politically disinterested military.” However, the district court did not agree that restricting this particular call to action in a chaplain’s sermon would advance such an interest.<sup>75</sup> The court noted that the chaplains were not (as far as the evidence showed) planning to ask their congregants to proselytize among other servicemembers for the postcard campaign, implying that such conduct might have infringed on the government’s compelling interest.<sup>76</sup> Although it did not reference the *Goldman* decision, the district court did briefly mention the deference normally afforded to the military concerning speech and its potential effect on good order and discipline. However, because the government did not provide any evidence of how this conduct “would in any way enhance a potential for ‘political conflicts’ . . . let alone create a clear

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<sup>73</sup> *Id.* at 984–85.

<sup>74</sup> *Ridgon v. Perry*, 962 F. Supp. 150, 152 (D.D.C. 1997).

<sup>75</sup> *Id.* at 161–62. The court noted that the chaplains were not (as far as the evidence showed) planning to ask their congregants to proselytize among other servicemembers for the postcard campaign, implying that such conduct might have infringed on the government’s compelling interest.

<sup>76</sup> *Id.*; see also Benjamin, *supra* note 5, at 17 (noting that chaplains should avoid proselytizing Soldiers to avoid establishment clause issues).

danger to the loyalty, discipline or morale of the troops,”<sup>77</sup> deference to military judgment was not warranted.

#### E. The Question of Deference—Importing Clarity from RFRA Application in Federal Prisons

While *Ridgon* and *Hartmann* offer some useful guidance as to how much a commander may restrict religion, they do not establish a logical or coherent model for applying *Parker v. Levy* deference to restrictions on religion in RFRA cases. *Hartmann* in particular makes deference a separate step of the analysis, to be applied only *after* the Government has failed to establish that its action was the least restrictive way to advance a compelling governmental interest. *Ridgon* found that the Government’s restriction did not further its compelling interests—and did not explicitly address deference at all. A better model is to be found in RFRA cases arising in prison litigation.

Prison authorities, like military ones, receive a degree of deference based on the need for good order and discipline in the institutions they supervise.<sup>78</sup> In enacting the RFRA, Congress treated the military and prisons in a similar manner. While Congress did not exempt either institution from RFRA claims, it also expected courts to continue their deferential treatment of military judgments and prison determinations concerning what was necessary in maintaining good order, discipline, and security.<sup>79</sup> The federal circuit courts that have dealt with prisoners’ RFRA claims have logically harmonized the two mandates. They have done this by explicitly applying deference when

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<sup>77</sup> *Id.*

<sup>78</sup> “[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. ‘Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.’” *Bell v. Wolfish*, 441 U.S. 520, 545–46 (1979) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

<sup>79</sup> H.R. REP. NO. 103-88 (1993) (“Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of prisoners and military personnel under the compelling governmental interest test. . . . The Committee recognizes that religious liberty claims in the context of prisons and the military present far different problems for the operations of those institutions than they do in civilian settings. Ensuring the safety and orderliness of penological institutions, as well as maintaining discipline in our armed forces, have been recognized as governmental interests of the highest order”); S. REP. NO. 103-111, at 10, 12 (1993) (“The committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation’s prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline. . . . The courts have always recognized the compelling nature of the military’s interest in [good order, discipline, and security] . . . Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill.”).

conducting the “least restrictive means” portion of strict scrutiny analysis.<sup>80</sup> Essentially, the courts have agreed that once prison officials provide sufficient justification that a policy which burdens a prisoner’s free exercise right is the least restrictive means of maintaining order and discipline, then “the courts must defer to the expertise judgment of prison officials.”<sup>81</sup> While not expounding upon what they would consider as sufficient justification, the circuit courts were clear in that they would not accept “conclusionary statements and post hoc rationalizations.”<sup>82</sup>

Making deference an explicit part of the strict scrutiny analysis makes more sense than making it a separate analysis as in *Hartmann* or something not mentioned as in *Rigdon*. The courts should use this approach in military free speech-free exercise cases. In the meantime, existing case law can still help the judge advocate advise his commander as to how far he may go in restricting the advice of his religious support staff officers.

#### IV. Application

Revisiting the three hypothetical situations proposed in this article’s introduction—assume the commander wants to order each of the three chaplains to refrain from giving similar sermons again. Will the orders survive a constitutional challenge?

##### A. Free Speech Challenge to the Commander’s Order

As previously stated, a servicemember’s speech is unprotected dangerous speech, and subject to restriction, when the speech is directed at other servicemembers and it is the type of speech with the propensity to diminish loyalty, discipline, mission, and morale; presents a clear danger to loyalty, discipline, mission, or morale of the troops; or interferes with or prevents the orderly accomplishment of the mission. In the introduction’s hypotheticals, all three sermons were given at chapels located on a military installation and were certainly directed at servicemembers. Whether the sermons are unprotected dangerous speech depends on whether they fall within one of the proscribed categories. A simple way to answer this question is to compare the sermons to the speech that has already been found to be unprotected dangerous speech.

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<sup>80</sup> *Hoeveraar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005); *Hamilton v. Schriro*, 74 F.3d 1545, 1554 (8th Cir. 2003); *Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir. 1997); *Mack v. O’Leary*, 80 F.3d 1175, 1179 (6th Cir. 1997), *vacated on other grounds*, 522 U.S. 801 (RFRA not applicable to the states); *May v. Baldwin*, 109 F.3d 557, 564 (9th Cir. 1997)).

<sup>81</sup> *Hoeveraar*, 422 F.3d at 370.

<sup>82</sup> *Hamilton*, 74 F.3d at 1554 n.10; *May*, 109 F.3d at 564 (prison officials cannot satisfy the demands of the RFRA with mere assertions of unfulfilled security objectives).

##### 1. The Bishop’s Letter

When compared to the language in the *Priest*, *Parker*, *Brown*, and *Wilcox* cases, is there unprotected dangerous speech in the bishop’s letter? The issue of the chaplain requesting the parishioners to contact their congressional representative can be quickly dispensed with—this is not unprotected or dangerous as noted in *Rigdon*. Servicemembers have a statutory right to contact individual members of Congress<sup>83</sup> and a chaplain asking them to exercise that right, in a religious service they are voluntarily attending in which he does not speak for the government, is not affecting morale, discipline, or mission accomplishment. The same cannot be so easily said about the rest of the chaplain’s letter.

This letter implicates both *Parker* and *Brown*. Captain Parker argued that, because their rights were being denied through racial discrimination in the United States, African-American Soldiers should refuse to go to Vietnam. *Brown* involved mobilized National Guard troops advocating and organizing to leave their mobilization site and return home because of their belief that their treatment and living conditions were unjust. The speech in the bishop’s letter is similar to the speech in *Parker* and *Brown* in that it advocates disobeying the law in response to perceived unjust treatment, casting the perceived wrong as being more egregious in light of the listener’s military service. Specifically, the bishop’s letter argues that while Catholic servicemembers were fighting to protect their constitutional freedoms, one of those very freedoms was being curtailed by the passage of the new federal health care law.

Although the bishop’s letter, unlike the speech in *Parker* and *Brown*, is encouraging Catholic servicemembers to disobey a federal law instead of a military order, this is just as harmful to discipline. Civilian control of the armed forces is fundamental to a democratic society, and encouraging Soldiers to disobey civilian laws—especially when giving a specifically military justification for it—undermines this fundamental component of discipline.<sup>84</sup> While the chaplain’s speech is not a criminal “disloyal statement” like the ones prosecuted in *Priest*, it could easily be determined that speech claiming that, while servicemembers were fighting and dying for the rights of others, their own rights were being restricted by the government, is speech that has the propensity to diminish their loyalty, discipline, mission,

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<sup>83</sup> 10 U.S.C. § 1034(a) (2006).

<sup>84</sup> *See United States v. Hardy*, 46 M.J. 67, 74 (C.A.A.F. 1997) (refusing to require a “jury nullification” instruction because it “would provide court members with an authoritative basis to determine that service members need not obey unpopular, but lawful, orders from either their civilian or military superiors. To permit such action would be antithetical both to the fundamental principle of civilian control of the armed forces in a democratic society and to the discipline that is essential to the successful conduct of military operations.”).

and morale. The commander can restrict this letter without violating the chaplain's free speech rights.

## 2. *Proselytization and the Internment Sermon*

The speech in these two sermons is unlike the unprotected dangerous speech in *Priest*, *Parker*, or *Brown* in that it does not encourage disobedience of military authority. Instead, the speech in these sermons does something different; it encourages the development of conditions that allows servicemembers with distinguishing characteristics to be disparaged and treated differently.

The military knows firsthand that there is a direct link between the disparate treatment of servicemembers and good order and discipline, unit morale, and mission accomplishment. During the Vietnam War, racial tensions between black and white servicemembers were an ever present impediment to good order and discipline, unit morale, and ultimately, mission accomplishment. During the conflict in Vietnam, racial tensions reached a boiling point, even spilling over into full blown race riots.<sup>85</sup> More recently, Fort Bragg and the 82d Airborne Division experienced the impact that intolerance can have on mission accomplishment in 1995, when three of its members, who were white supremacists, murdered two black civilians in Fayetteville, North Carolina.<sup>86</sup> The Army's equal opportunity and extremist activities policies reflects the understanding that there is a link between speech that disparages other servicemembers based on their race, color, gender, religion or national origin, and unprotected speech that presents a clear danger to the loyalty, discipline, or morale of military personnel.<sup>87</sup>

To be clear, speech that decries certain practices or beliefs as immoral or sinful is not the same as extremist speech or speech that disparages other servicemembers because of their race, gender, religion national origin, or any other basis. This is a difference in kind, not in degree. Condemning the belief or practice is different from vilifying the believer or practitioner. As in *Priest*, it is not necessary for the commander to show that the chaplain's speech actually caused any incidents of diminished loyalty, discipline, morale, or mission accomplishment for it to be unprotected dangerous speech; simply that his speech is of

the type with the "clear tendency" to cause these secondary effects. Considering the observed secondary effects that disparaging speech can have on a unit, the critical question regarding these sermons is whether this is the type of speech that has the potential to disparage servicemembers of different faiths and servicemembers who are homosexual, and the answer in both cases is "yes."

In the case of the "proselytize and damnation" sermon, the command has already experienced a negative impact from the chaplain's speech; the command has received complaints from Soldiers claiming that they are being harassed by the members of his congregation. The sermon on homosexuality goes to the extreme of questioning the worth and right of homosexuals to exist as people—including homosexual Soldiers with whom the congregants are serving or may be serving in the future.<sup>88</sup> A commander could hear these sermons and determine that they present a clear and present danger to the loyalty, discipline, mission, or morale of the command. The commander can restrict these sermons without violating the chaplains' free speech rights.

## B. Free Exercise Challenge to the Commander's Orders

The analysis to determine if the order to the chaplains violates their free exercise rights begins with determining whether that the commander's order has placed a burden on their exercise of religion. It does. Preventing a congregant from receiving a religious publication containing religious speech substantially burdens his free exercise rights;<sup>89</sup> directly ordering a preacher not to engage in religious speech can only be a greater burden.<sup>90</sup> The commander's order still does not violate the free exercise rights of either the chaplain or his congregation if it is the least restrictive way to advance the military's compelling interest of maintaining order, discipline, morale, and mission accomplishment. It is.

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<sup>88</sup> "Religious groups may try to use religion as a sword to trump other important values. In the past, some religious groups have requested to purchase, use, or display 'religious' literature that was anti-Semitic, anti-Catholic, or degrading to women. As a command/leadership matter, commanders should deny requests for this type of literature. . . . Neither free speech, nor free exercise rights override the commander's obligation to maintain good order and discipline and to effectuate army equal opportunity values." Benjamin, *supra* note 5, at 18 n.140.

<sup>89</sup> *Clema v. Jones*, 745 F. Supp. 2d 1171, 1188 (N.D. Okla. 2010) (when prisoner was not allowed to receive several issues of a religious publication due to their contents, his free exercise rights were burdened; but the government's action was upheld because it supported the penological interest of maintaining security, since the materials in question contained "gang-related material or other material that creates an unsafe prison environment").

<sup>90</sup> See *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (government action, which "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs," placed a burden on the free exercise of religion).

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<sup>85</sup> FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT 40-41 (2001) (race riot at Camp Baxter, Da Nang, in 1970); Captain Denise M. Burke, *Changing Times and New Challenges: The Vietnam War*, 26 THE REPORTER 120, 124 (1999) (race riot at Travis Air Force Base, California, in 1971).

<sup>86</sup> Major Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1, 30 (1999) (Incidents of extremism in the military, although limited, can have a disproportionate impact in a force comprised of more one-third minority servicemembers.).

<sup>87</sup> AR 600-20, *supra* note 61, para. 4-12, ch. 6.

The commander is not broadly prohibiting speech or regulating sermons. He is simply ordering that his chaplains' sermons not disparage other servicemembers based on their religion or sexual orientation, or encourage the disobedience of any lawful order or state or federal law. As previously discussed, the threat to the unit that the commander is trying to combat is disparaging comments and disobedience, which is why the commander's order targets those specific aspects of the chaplains' sermons. The commander's order does not prohibit a chaplain from expressing his religion's view of homosexual conduct as immoral or sinful or prohibit a chaplain from expressing a religiously based objection to a state or federal law. It does not prohibit "witnessing" or proselytization per se, though it does prohibit chaplains from imposing a religious duty on their congregants to witness to their fellow Soldiers.

The military does not have to "encourage debate or tolerate protest," and giving Soldiers the option of deciding what authority to obey or ignore, or deciding who they will or will not serve with based on religious beliefs or sexual orientation, would undermine the "instinctive obedience, unity, commitment, and esprit de corps"<sup>91</sup> that is necessary for a military organization to function. So would pressuring Soldiers to pressure other Soldiers to adopt their religious views. The proposed order is narrowly tailored to meet a compelling governmental interest and is lawful.

In advising the commander on these issues, the judge advocate should also memorialize the factual issues and legal analysis in writing before the commander issues the order, even if only in a memorandum for record. This will be useful if the order is contested at higher levels of command, or years later in litigation.

## V. Conclusion

Whenever a commander takes an action that has an impact on a Soldier's First Amendment rights, whether actual or perceived, emotions and opinions run high. They will certainly do so if a commander finds himself ordering a chaplain not to say specific things during a religious service. However, the command can still do so, provided his action is strongly anchored to a reasoned military determination that the questionable chaplain speech will damage the command's morale and good order and discipline, or will disrupt mission accomplishment.

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<sup>91</sup> *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).