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Introduction

The freedom to speak and to freely exercise one's religion are two central guarantees of the First Amendment of the US Constitution. Military members retain these foundational rights,[1] which the courts broadly protect. But there are characteristics of the military—including its rank structure and the need for good order and discipline essential to accomplishing the military's crucial mission—that justify constraints on the religious speech of all military members beyond what would be constitutionally tolerable in the civilian context. Moreover, additional constraints are imposed on military leaders' religious speech by virtue of their rank and position. This article addresses what military leaders[2] need to know about rights and limitations on religious speech,[3] both their subordinates' and their own. After examining the freedom of religious speech and three constitutional limitations, the article highlights three selected religious speech issues: proselytizing, official prayer, and religious displays. It concludes by providing leaders ten guiding principles on religious speech.[4]

It is crucial that military leaders understand and respect the scope of religious speech rights. Honoring the constitutional rights of subordinates is inherently the "right thing to do" in a society and military governed by the rule of law, particularly when all military leaders take an oath to support the Constitution. Infringing subordinates' rights—for example, by the leader's own improper religious speech or by failing to allow subordinates to exercise their religious rights—may adversely affect the unit's ability to execute its mission. Ours is a military characterized by many kinds of diversity, including religious beliefs. Effective leaders leverage that diversity by bringing together the backgrounds, skills, perspectives, and talents of the members in a way that maximizes the unit's ability to perform. Members whose religious rights and beliefs are not honored may feel alienated and marginalized. If a superior's

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religious speech has created a climate of perceived favoritism toward subordinates who share the superior's beliefs, subordinates with different beliefs might reasonably question whether they will get a fair shake when it comes time for performance reports and other opportunities. All of this can affect their morale and contribution to the team effort.

Failure to understand the rights and limits concerning religious speech can adversely affect the mission in other important ways. It can result in internal investigations into allegations of violations or even lawsuits against the military, both of which entail substantial time, effort, and distraction from the mission. These investigations and lawsuits also may result in adverse media attention, which can undermine public confidence and support of the military. At its worst, failure to understand the parameters of permissible religious speech can jeopardize the United States' strategic interests abroad, for example, by providing fodder for our enemies' claims that we are engaged in a holy war against Islam. These lapses, occasioned by religious speech that exceeds permissible limits, can also harm the stature of leaders. Unfortunately, examples of these leadership lapses abound.[5] This article aspires to help reduce the number of future examples.

Religious Speech and the Free Speech Clause

The Free Speech Clause of the First Amendment prohibits the government,[6] including the military, from "abridging the freedom of speech." Speech is construed broadly and includes both oral and written speech, as well as expressive conduct and displays when intended to convey a message that is likely to be understood.[7] Religious speech is certainly included.

As a bedrock constitutional right, freedom of speech has enjoyed great protection from the courts, particularly when the government suppresses speech because it does not like its content. Courts subject such "content-based" regulation of speech to "strict scrutiny," the most rigorous standard of judicial review. Under this scrutiny, the content-based governmental action is presumptively invalid unless the government can prove both a compelling interest in limiting that speech and that the means of suppression is necessary to achieve that interest.[8]

What this means for leaders is that they should not single out religious speech for special limitation just because it is religious. If some personal conversations are permitted in the workplace during duty hours (e.g., pertaining to sports or social events), leaders cannot place religion off-limits. The same is true regarding religious displays in the barracks: if personal nonreligious items are permitted to be displayed in rooms, religious items must be permitted to the same extent. Otherwise, the discrimination against religious speech would be content-based and would almost certainly not survive scrutiny by the courts or by military investigators looking into a complaint.[9]

The government has much more latitude in constraining speech when the limitations are "content-neutral." These are incidental limitations on speech which may arise when the government regulates for some other legitimate

purpose. For example, all branches of the military have uniform and grooming or appearance regulations furthering legitimate interests in uniformity, cohesion, and esprit-de-corps. These regulations may have the ancillary effect of limiting religious speech (broadly construed): military members may not wear nonconforming religiously-motivated clothing, headgear, facial hair, or jewelry while in uniform. Similarly, if the military prohibits use of extraneous quotes or materials in e-mails, that prohibition would apply also to religious quotes in e-mails. In these examples, military members' religious speech has been limited, but permissibly so. In "nonpublic forums" such as military bases, courts have upheld such incidental limitations on speech as long as there is a valid reason for the regulation.[10] Courts will give great deference to the military's determination that the underlying regulation has a legitimate purpose.[11] Thus, content-neutral regulations are one limitation on all military members' religious speech rights.

The second limitation on religious speech is grounded in the judicially-created concept of "unprotected speech." The Supreme Court has recognized several narrow categories of speech that serve no First Amendment purpose and which the government can therefore limit, prohibit, or punish, even on the basis of content. The most significant category of unprotected speech for military members, recognized by the Supreme Court in the 1974 leading case of Parker v. Levy, is speech that may "undermine the effectiveness of response to command."[12] The United States Court of Appeals for the Armed Forces, the highest military appellate court, has interpreted that phrase to mean speech that "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops."[13] Again, courts are likely to give some deference to the military's determination that speech adversely affects the military. Thus, if military members are prosecuted for their speech under the Uniform Code of Military Justice—for example, under Article 133 (conduct unbecoming an officer) or Article 134 (conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces)—the First Amendment's freedom of speech will not provide them a shield for their speech if it meets the definition of unprotected speech.

This category of unprotected speech applies to religious speech that falls within its scope. Much religious speech will be protected, however, because it will not endanger the mission, loyalty, discipline, or morale so as to become "unprotected speech." But when religious speech crosses that line, leaders can take action against the speaker; consultation with their judge advocate general (JAG) is recommended. For example, an exhortation by a religiously motivated pacifist military member to refuse to fight would be actionable.

Religious Speech and the Free Exercise Clause

The Free Exercise Clause prohibits the government from impermissibly burdening the free exercise of religion. In contrast to the Free Speech Clause, which protects primarily speech, the Free Exercise Clause protects primarily

religiously motivated conduct,[14] such as worship, dietary restrictions, ceremonies, and other practices. The clauses can become blurred because courts have expanded "speech" to include conduct (when intended and likely to convey a message) and have said that the free exercise of religion includes the right to profess religious beliefs.[15]

The Supreme Court has reviewed free exercise challenges using substantially the same analysis as when reviewing content-neutral restrictions on free speech in a nonpublic forum: laws limiting the free exercise of religion are permissible as long as they are "religion-neutral" and are otherwise valid (i.e., they rationally relate to some permissible governmental purpose).[16] Religion-based laws—those specifically targeting religious conduct—would be subject to the same strict scrutiny that content-based laws—those aimed to suppress a particular message—are.[17] Leaders should thus avoid targeting religious practices, just as they avoid singling out religious speech for disfavored treatment.

The leading example of the constitutional approach the Supreme Court has taken regarding military religion-neutral limitations on the free exercise of religion is Goldman v. Weinberger,[18] decided in 1986. Captain Goldman—an Air Force doctor, Orthodox Jew, and ordained rabbi—regularly wore a yarmulke in uniform indoors, which violated an Air Force uniform regulation. When his commander ordered him to comply with the regulation under threat of court-martial, Goldman sued the Secretary of Defense. He claimed that his First Amendment free exercise rights entitled him to wear the yarmulke, despite the regulation. The Supreme Court disagreed and upheld the religion-neutral regulation as it applied to Captain Goldman. The Court held that the regulation, which essentially permitted wearing religious items in uniform only when they were not visible, was reasonably related to the military's legitimate interest in uniformity.[19] This relaxed standard of judicial review gave great deference to the military's determination of the importance of uniformity.

Four years after Goldman, the Supreme Court applied this relaxed standard of judicial review of religion-neutral laws that impact the free exercise of religion in the civilian context.[20] Congress, however, was dissatisfied with the relatively little protection the Supreme Court gave to the free exercise of religion in this later civilian case. It, therefore, enacted the Religious Freedom Restoration Act of 1993,[21] supplanting Goldman and the later civilian case.[22] This statute requires courts to use strict scrutiny—the same, most-demanding standard courts use to review laws that target particular protected speech or religious practices—even for neutral laws that only incidentally burden the free exercise of religion. Thus, when a religion-neutral federal law,[23] which includes military regulations and orders, substantially burdens the exercise of religion, the government must demonstrate that the law furthers a compelling governmental interest and is the least restrictive way of furthering that interest. Essentially, the government must prove that it has a compelling reason why it cannot grant a religious exception to the generally applicable law.[24] This is a much higher standard of review than for content-neutral restrictions on speech, so it becomes very important to distinguish speech from exercise, even when the Supreme

Court has sometimes blurred the distinction. The difficulty and importance of the distinction underscores the need for leaders to consult with the JAG before taking action that limits a subordinate's religious speech or exercise.

Religious Speech and the Establishment Clause

The First Amendment's Establishment Clause provides additional individual protection for religious speech and exercise by prohibiting the government from making any "law respecting an establishment of religion." This clause complements individuals' religious speech and practice rights by limiting what the government, including military members acting in an official capacity, can do to promote religion. The Establishment Clause thus is the third limitation on religious speech. For military leaders, who in many circumstances are acting as representatives of the government, this is the most important limitation on their own right of religious speech. For this reason, we will examine in some detail the Supreme Court's interpretation of the Establishment Clause.

The overriding principle of the Establishment Clause is government neutrality toward religion: government must take no action that either favors one religion over another or favors religion generally over nonreligion.[25] The seminal Supreme Court case interpreting the Establishment Clause is Lemon v. Kurtzman,[26] in which the Court articulated three requirements that the challenged governmental action must meet in order to satisfy the Establishment Clause. First, the governmental action at issue must have a nonreligious purpose. Second, the primary effect of the governmental action cannot advance (or inhibit) religion. Third, the governmental action cannot result in excessive government entanglement with religion.[27] In the religious speech context, the "effect" and (to a lesser extent) "purpose" prongs are the most important.

In deciding whether governmental action (especially prayer) violates Lemon's "effect" prong, courts sometimes look to whether the government is coercing people "to support or participate in religion or its exercise."[28] For example, an appellate court struck down Virginia Military Institute's evening meal prayer due to its coercive nature in the military context.[29] Military leaders must be extremely cautious that they do not use their rank and position to coerce subordinates.

Short of coercion, religious speech can also violate Lemon's "effect" prong if it appears to the reasonable and informed observer that the government is endorsing religion by "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[30] Religious speech by a military leader can thus violate the Establishment Clause when it reasonably appears that the leader, acting in an official capacity for the military, is promoting religion. A similar but broader prohibition appears in the Joint Ethics Regulation, which prohibits governmental personnel from using their position, title, or authority in a way that reasonably could imply that the government endorses the employee's personal activities.[31]

Military installations have chaplains' programs to enable military members to freely exercise their religion. Those programs may include worship,

religious studies, invited speakers, spiritual retreats, concerts, plays, prayer meetings, and prayer breakfasts. To avoid the appearance that military leaders in their official capacity are endorsing or coercing religion, they should leave the advertisement and administration of these programs to the chaplains.[32] The chaplains' role and their position outside the normal chain of command allow them to even-handedly advertise these opportunities without the potential for perceptions of selective endorsement or coercion that may exist if military leaders advertise the programs. Of course, leaders maintain the right to freely exercise their religion and therefore may attend and participate in these programs, just as other military members may. As they do so, however, leaders should avoid roles in these functions that create the impression of official endorsement or coercion of religion. Thus, leaders should not accept an invitation for a role that appears to have been offered primarily because of their rank or position.

The Establishment Clause limits governmental action, but not private religious speech. There is often no clear line of demarcation. In deciding whether a military member's speech is private or is as a representative of the government, broad factors such as the status of the speaker, the status of the listener, and the context and characteristics of the speech itself should be considered. In the context of religious speech, many of the same factors that indicate the speech is official also indicate that the speech is coercive, thereby violating the Establishment Clause. There is no single litmus test, so it is important to look to all the circumstances. Relevant questions include the following:

- What is the rank and position of the speaker? The higher the rank and the greater the position, the more likely it is that the speaker will be seen to be speaking for the military rather than personally. (Think commanders and general officers.)
- What is the rank, position, age, and experience of the listener? Lower rank and position and youth and inexperience make the listener more likely to view the speaker as speaking officially and make the listener more susceptible to coercion.
- Is the speaker in a position of authority over the listener? The more influence the speaker has over the listener, the more likely the speech is seen to be official and coercive.
- Did the speech occur in uniform? If so, this is one factor suggesting the speech is official.
- Did the speech occur during duty time? If so, this again is a factor suggesting the speech is official. But religious speech that occurs during a break may be seen as personal.
- Were listeners voluntarily present? If listeners are summoned to a meeting, the ensuing religious speech is likely to be seen as official.
- Who initiated the religious speech? If a subordinate asks a superior about the superior's personal faith, the subordinate likely understands that the superior is speaking personally.

- Was the speech planned and formal or extemporaneous and casual? If planned, and the speaker is introduced by his rank and position, this may reasonably indicate official speech.
- How extensive (length and religious content) or repeated is the religious speech? The greater the extent and frequency of the speaker's religious message, the more likely the speech is to be perceived as official.
- What is the rest of the context for the religious speech? If other matters being discussed by the leader are all official, the religious speech may be more likely viewed as official too.
- Did the speaker indicate during the speech that the religious speech is personal? Use of the first-person "I" favors private speech.
- Do the circumstances otherwise indicate that the religious speech is personal? For example, a comment to a subordinate facing a personal adversity that "I'll keep you and your family in my prayers" is likely to be seen as the speaker's personal comment.
- Is the speech being made by military members in the course of their official duties? If so, the speech is likely to be viewed as official. Thus, providers of various services that military members are entitled to receive (e.g., medical, dental, legal, recreational) should not initiate religious speech with their customers.

Again, military leaders should consult with their JAG before taking action against subordinates whose speech crosses the ill-defined Establishment Clause line. JAGs can provide advice on whether the line has been crossed and, if so, what action would be appropriate (often simple informal counseling). Another reason to consult with the JAG is that if the subordinate's speech has not crossed the line, the leader who tries to limit the subordinate's religious speech likely is violating that subordinate's free speech rights. This is an example of the inherent tension existing between the Establishment Clause and the Free Exercise Clause (and, for religious speech, the Free Speech Clause), which are framed broadly and are complementary in their purpose of guaranteeing freedom of religion: by attempting to respect one clause, the government may offend the other.

Military leaders deciding whether to engage in their own religious speech, particularly in the workplace, are well advised to err on the side of caution. The Establishment Clause line can be blurry, particularly as it pertains to religious speech. Little is to be gained by leaders getting as close to that line as they can. In fact, leaders who want to get as close to that line as possible ought to ask themselves why they want to do so. Recall that one of the prongs of the Lemon test is that the governmental action at issue must have a nonreligious purpose. Leaders acting in an official capacity who have the purpose of promoting their religious faith in others are acting for a constitutionally impermissible purpose. Moreover, will such "pushing of the envelope" be in the best interest of the unit?

Staying well away from the Establishment Clause line amounts to leaders voluntarily giving up some religious speech rights they would otherwise

have. Military members accept diminished constitutional rights—as part of the "service before self" ethos—in other contexts as well. Examples include the right to free speech (where military members' speech may be unprotected when the same speech by a civilian would be protected) and the right against unreasonable search and seizure (where military members are subject to more intrusions on their privacy, such as inspections and urinalyses, than would be permissible in the civilian context, due to the decreased expectation of privacy that military members have). If all military leaders voluntarily stayed well away from the Establishment Clause line, the military would have fewer problems with being accused of promoting religion.

Two important points bear emphasis here. First, leaders should not suggest to subordinates that they "voluntarily" relinquish some of their religious speech rights. Such a suggestion by a superior may impermissibly infringe on the subordinates' free speech and free exercise rights and ironically may violate the Establishment Clause by the superior not being officially neutral toward religion. Second, this is not to suggest that leaders abandon religious speech in their private capacity. Religion is a tremendous source of strength, inspiration, wisdom, peace, and purpose for many people, and religious speech is a vital component of the practice of religion. The admonition here is for leaders to keep their personal religious speech and practice separate from their official positions, and to find a way to reconcile their religion with their responsibilities as leaders.

Selected Religious Speech Issues for Leaders

This section provides an overview of potentially thorny issues concerning three forms of religious speech leaders may encounter in the workplace: proselytizing, prayer, and religious displays. It does so by applying to these issues the principles previously discussed. We start with the understanding that each of the forms of speech is constitutionally protected unless it (1) violates a content- or religion-neutral law, (2) is unprotected speech under the circumstances due to its adverse effect on the mission, or (3) violates the Establishment Clause by being reasonably viewed as the government advancing, favoring, endorsing, or coercing a specific religion or religion generally.

Proselytizing in the Workplace

Proselytizing[33] in the workplace can become a sensitive issue for leaders for two related reasons. First, some major world religions—notably Christianity, the largest religion in the United States and the military[34]—encourage their members to convert nonbelievers to their faith.[35] Second, others who do not wish to be proselytized may complain to superiors about other military members doing so.

How should leaders respond to such complaints? First, leaders (and those complaining) must recognize that the First Amendment protects proselytizing and does not require a speaker to stop speaking merely because others do not like the message. Of the three possible bases upon which to limit religious

speech, the two most likely to apply to proselytizing are limitations based on unprotected speech or the Establishment Clause. The proselytizing might occur in peer-to-peer discussions where the listener does not want to hear the religious speech and realistically cannot avoid it because of working or living conditions. The listener first should be advised to make clear to the speaker his or her desire not to hear more proselytizing and if necessary to avoid voluntary association with the speaker. If disassociation is not possible because of working or living conditions, and the speaker does not respect the listener's desire not to hear more, leaders can take appropriate action if the proselytizing is affecting mission accomplishment or morale, as the proselytizing has become unprotected speech.

Proselytizing violates the Establishment Clause if military members are misusing their official position to advance, favor, endorse, or coerce religion. This might apply to members of the chain of command proselytizing subordinates on duty or to service providers proselytizing customers while providing a service. Leaders acting in an official capacity must be very sensitive to this limitation. Consistent with staying well away from the Establishment Clause line, they should refrain from proselytizing to subordinates in any arguably duty-related situation unless the subordinate has specifically requested it.

Prayer in the Workplace

Prayer is protected speech, so leaders should allow their subordinates to exercise their free speech and free exercise rights to pray, even in the workplace, unless there is a constitutionally permissible reason not to. Leaders retain the right to pray as well, but once again the Establishment Clause limits that right when it reasonably appears that the leader is acting in an official capacity.

The issue arises most commonly in the context of public prayer at official military functions or ceremonies, such as dining-ins or graduations. Both the "purpose" and "effect" prongs of the Lemon test are problematic here. The purpose prong requires a nonreligious purpose for the governmental action. Can there be such a purpose for having a prayer at an official military function?[36] Leaders considering having a prayer at an official function ought to scrutinize their reason for wanting to do so. If the purpose is to respect the free exercise rights of those who wish to pray (for example, before a meal at a dining in), that purpose is equally served by allowing a constitutionally safe "moment of silence."[37] The "effect" prong is also likely to be problematic for prayer at official functions (particularly those where attendance is mandatory or "encouraged"), as the prayer reasonably may be viewed as the government advancing, favoring, endorsing, or even coercing religion.

Despite these concerns,[38] the military has not banned government-led prayer at official functions. If leaders insist on having prayer (vice a moment of silence) at these official functions, leaders should not lead the prayer themselves but should leave this to the chaplains. Their education, training, and experience praying nonsectarian prayers at such functions, as well as their position outside

the chain of command, reduce the chance of Establishment Clause violations. At routine events—such as meetings, staff calls, and meals—leaders should not invite prayer, even if led by chaplains. Such prayers are almost certain to violate the Establishment Clause.[39]

Retirement ceremonies are often a hybrid of official and private functions. If there is a clear time cut-off between the two portions of the ceremony, the prayer should be in the private time. If the two portions are intertwined, the master of ceremonies might announce before the prayer that it is at the request of the retiree.[40]

Religious Displays in the Workplace

We have already touched on subordinates' private religious displays in their barracks rooms: these displays are likely to be protected. On the other hand, in common areas (such as in common office space or on the common grounds of a military installation), truly religious displays are prohibited because they reasonably appear to advance or endorse religion, although some displays that normally have religious meaning (e.g., a crèche) are permissible when interspersed with other secular celebrations of the season.[41] The JAG can provide advice concerning these displays in common areas.

Religious displays such as religious art, symbols, or books in an individual's work area (e.g., the office) present a tougher issue, because that "personal" workspace likely is visited for official purposes by other military members such as coworkers or customers. Thus, the individual's free speech and free exercise rights will be tempered by Establishment Clause considerations. Displays must not be so prominent as to make it reasonably appear that their purpose or effect is governmental promotion of religion. Military members should place their religious displays such that they are visible to themselves, but are not prominently "in the face" of others who come into that workspace. Leaders must be particularly sensitive to this issue, given that subordinates may often be present in their workspace.

Conclusion

Leaders must understand and respect the free speech (and related free exercise) rights that military members enjoy. They must also understand the limitations on those rights. Those limitations may be grounded in the Free Speech Clause itself (content neutral laws and "unprotected" speech) or in the Establishment Clause. By virtue of their rank and position, leaders need to be particularly sensitive to how the Establishment Clause limits their speech. By way of summary, here are principles that should guide all military leaders.

Principles Concerning Subordinates' Religious Speech

- Respect subordinates' religious speech rights protected by the First Amendment.

- Take appropriate action regarding subordinates' religious speech when that speech is adversely affecting mission accomplishment, loyalty, discipline, or morale (i.e., is "unprotected"), when it is contrary to content- and religion-neutral laws, or when subordinates violate the Establishment Clause by acting in their official capacity to advance, favor, or endorse a particular religion or religion generally.
- Consult with JAG before taking action against subordinates based on their religious speech.

Principles Concerning Leaders' Own Religious Speech

- Recognize that as leaders their religious speech rights are particularly limited by the Establishment Clause.
- Be neutral toward religion. Do not make statements favoring (or disfavoring) or endorsing one religion over another, or religion generally over the absence of religion.
- Ask themselves the purpose of their religious speech or display. If its purpose is to advance a religion (or religion generally), leaders should stop themselves.
- Ask themselves the likely effect of their religious speech or display. If it is likely to be fairly viewed as the government advancing, favoring, endorsing, or coercing religion, leaders should stop themselves.
- Consider substituting moments of silence for prayer at official military functions. If leaders elect to go with the prayer at special functions, entrust it to chaplains. Avoid prayer at routine meetings.
- Not try to push the envelope in this area. If in doubt, refrain from speaking.
- Consult with the JAG as necessary.

Adherence to these principles will help leaders avoid violating the Constitution and can prevent adverse consequences—including a negative effect on the unit, its mission, and possibly even US strategic interests—that may result from such violations. Military members, the unit, and the nation will be better for it.

Notes

1. U.S. Department of Defense, *Handling Dissident and Protest Activities Among Members of the Armed Forces*, Department of Defense Instruction 1325.06 (Washington, DC: U.S. Department of Defense, November 27, 2009, paragraph 3b; U.S. Chief of Staff of the Air Force General Norton A. Schwartz, "Maintaining Government Neutrality Regarding Religion," memorandum for All Major Command, Field Operating Agency, and Direct Reporting Unit Commanders, Washington, DC, September 1, 2011, http://www.militaryreligiousfreedom.org/docs/gen_schwartz_letter_religion_neutralilty.pdf (accessed November 1, 2011); U.S. Secretary of the Air Force Michael W. Wynne and U. S. Chief of Staff of the Air Force General T. Michael Moseley, "Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force," Memorandum for All Major Commands, Field Operating Agency, and Direct Reporting Unit Commanders, Washington, DC, February 9, 2006, http://pcamna.org/chaplainministries/RevisedInterimGuidelines.pdf (accessed November 1, 2011); Air Force Judge Advocate General (JAG) School, *The Military Commander and the Law,* 10th

ed. (Maxwell Air Force Base, AL: Air University Press, 2010), 220-226. http://www.afjag.af.mil/shared/media/document/AFD-101025-032.pdf (accessed November 1, 2011).

2. This article anticipates that most readers will be military leaders, but most of the article applies equally to civilian leaders and supervisors of military personnel and Department of Defense civilians. Although the coercive aspects of military rank do not apply to civilian leaders, the position of authority civilian leaders hold over subordinates could result in impermissible religious coercion.

3. Religious speech is broadly defined, to include religious expression, discussion, proselytizing, prayer, and religious displays. Thus, this article addresses many, but not all, religion-related issues leaders may face. For example, this article does not address requests for religious accommodation. Guidance on accommodation issues is in U.S. Department of Defense, *Accommodation of Religious Practices Within the Military Services*, Department of Defense Instruction 1300.17 (Washington, D.C.: U.S. Department of Defense, February 10, 2009), which is currently being considered for revision.

4. "Consult with JAG" is listed twice as a guiding principle—once regarding leaders vis-à-vis their subordinates and again concerning leaders' own religious speech—because it is that important. This is due to the complexity of this area of the law and because these issues are often very fact-specific. Consultation with chaplains also may be important, particularly in matters pertaining to the free exercise of religion.

5. See, for example, James E. Parco and David A. Levy, eds., "Religious Expression," in *Attitudes Aren't Free: Thinking Deeply About Diversity Issues in the US Armed Forces* (Maxwell Air Force Base, AL: Air University Press, 2010), http://aupress.au.af.mil/digital/pdf/book/Parco_Attitudes_Arent_Free.pdf (accessed November 1, 2011).

6. The First Amendment literally limits only Congress, but the Supreme Court has expanded the limitation to apply to all government (state and federal) including the military. The same is true regarding the Free Exercise and Establishment Clauses of the First Amendment.

7. See, for example, Texas v. Johnson, 491 U.S. 397, 404 (1989). The Supreme Court determined that burning a United States flag during a political demonstration was expressive conduct protected by the freedom of speech. This case illustrates the broad protection given to freedom of speech and that the government may not suppress a message merely because many people find it odious.

8. See, for example, Widmar v. Vincent, 454 U.S. 263, 270 (1981).

9. An important caveat to this entire paragraph is that the Establishment Clause (discussed below) imposes a separate limitation on religious speech, including displays. Thus, in circumstances where it applies, the Establishment Clause may justify military leaders treating subordinates' religious speech differently from other speech, even on the basis of its religious nature. See, for example, Good News Club v. Milford, 533 U.S 98, 112 (2001) (recognizing that avoiding an Establishment Clause violation may be a compelling interest justifying content-based governmental discrimination against certain speech). Similarly, if religious speech constitutes "unprotected speech" (discussed below) under the circumstances, leaders may take action even on the basis of its content.

10. See, for example, Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 806 (1985) (content-neutral limitation in a non-public forum). The government has a somewhat higher burden of justifying content-neutral regulations in "public forums," which are public places such as public parks and sidewalks where public assembly and speech have traditionally occurred. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

11. One example of this deference in the context of religion in the military is found in Goldman v. Weinberger, 475 U.S. 503 (1986).

12. Parker v. Levy, 417 U.S. 733, 759 (1974) (quoting United States v. Gray, 42. C.M.R. 255 (1970)). The Supreme Court upheld Captain Levy's conviction under UCMJ Article 133 (conduct unbecoming an officer) for making on-duty statements to enlisted soldiers that he would refuse to go to Vietnam if ordered to do so, and suggesting that "colored soldiers" should also refuse to deploy or fight because they are discriminated against and suffer a majority of the casualties.

13. United States v. Brown, 45 M.J. 389, 395 (1996).

14. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

15. See, for example, Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990), which explained that "The free exercise of religion means, first and foremost, the right to believe and *profess* [italics added] whatever religious doctrine one desires."

16. Ibid., 877-90.

17. See, for example, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

18. Goldman v. Weinberger, 475 U.S. 503 (1986).

19. Ibid., 508-510; In response to Goldman, Congress in 1987 enacted a statute generally permitting military members to wear items of religious apparel, including a yarmulke, in uniform. 10 U.S.C. § 774: *Religious Apparel: Wearing While in Uniform*.

20. Employment Division v. Smith.

21. 42 U.S.C. § 2000bb et seq.

22. When the Supreme Court decides the scope of an individual constitutional right, the government cannot provide any less protection than the Court has articulated, but it may provide more.

23. The Religious Freedom Restoration Act (RFRA) initially limited both federal and state governments. The Supreme Court struck down (primarily on federalism grounds) RFRA as it applied to state laws in City of Boerne v. Flores, 521 U.S. 507 (1997). Thereafter, Congress amended RFRA to apply only to the federal government. See 42 U.S.C. § 2000bb-2(1).

24. Gonzales v. O Centro Espirita Beneficente Uniao do Vegeta, 546 U.S. 418 (2006).

25. McCreary County v. ACLU, 545 U.S. 844, 860 (2005); Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

26. Lemon v. Kutzman, 403 U.S. 602 (1971).

27. Ibid., 612-13.

28. Lee v. Weisman, 505 U.S. 577, 587 (1992).

29. Mellen v. Bunting, 327 F.3d 355, 371-72 (4th Cir. 2003).

30. Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment).

31. 5 C.F.R. § 2635.702(b).

32. U. S. Chief of Staff Memorandum on Maintaining Government Neutrality.

33. Merriam-Webster's Collegiate Dictionary, 11th ed., s.v. "proselytizing," 998. Proselytizing is defined as inducing or recruiting (attempting to induce) someone to convert to one's faith.

34. The Pew Forum on Religion & Public Life, "U.S. Religious Landscape Survey," February 2008, http://religions.pewforum.org/reports (accessed November 1, 2011); Military Leadership Diversity Commission, *Religious Diversity in the U.S. Military*, Issue Paper #22, June 2010, http://mldc.whs.mil/download/documents/Issue%20Papers/22_Religious_Diversity.pdf (accessed November 1, 2011).

35. See, for example, Matthew 28:19, where Jesus commanded his followers to "go and make disciples of all nations" (New International Version).

36. At least one federal appellate court ruled that prayer at a public university graduation has the legitimate secular purpose of "solemnize[ing]" the occasion, express[ing] confidence in the future, and encourage[ing] what is worthy of appreciation in society." Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997) (quoting County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 625, (1989) (O'Connor, J., concurring in part and concurring in the judgment). The Supreme Court has not ruled on the issue of graduation prayer at public universities or on the issue of prayer at military functions.

37. See, for example, Wallace v. Jaffree, 472 U.S. 38, 59 (1985), which, even while holding that a moment of silence done with the clear governmental purpose of advancing religion is impermissible, suggested that most moments of silence in which individuals engage in voluntary prayer are permissible.

38. For amplification of these concerns, see Paula M. Grant, "The Need for (More) New Guidance Concerning Religious Expression in the Air Force," in *Attitudes Aren't Free: Thinking Deeply About Diversity Issues in the US Armed Forces*, eds. James E. Parco and David A. Levy (Maxwell Air Force Base, Air University Press, 2010), 39, 52, http://aupress.au.af.mil/digital/pdf/book/Parco_Attitudes_Arent_Free.pdf (accessed November 1, 2011); David E. Fitzkee and Linell

A. Letendre, "Religion in the Military: Navigating the Channel Between the Religion Clauses," *Air Force Law Review* 59: 1, 43-52 (2007) (detailing concerns over the constitutionality of public prayer at military functions).

39. See, for example, "Prayer at Staff Meetings," Opinion of The Air Force Judge Advocate General, No. 1998/76, July 14, 1998.

40. Air Force JAG School, *The Military Commander and the Law*, 233.

41. See, for example, Lynch v. Donnelly, 465 U.S. 668 (1984).