

United States Senate

June 9, 2020

The Honorable Mark T. Esper
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301

Dear Secretary Esper,

As you know, military chaplains play a crucial role tending to the spiritual and moral well-being of America's service members. With the COVID-19 pandemic forcing the closure of Department of Defense (DOD) installation chapels, military chaplains have been finding creative ways to provide for the spiritual needs of the DOD communities they serve. These services are essential during this global pandemic, as those in the Armed Forces, like so many other Americans, are leaning on their faith to help them through. Unfortunately, DOD and the Army have been hindering chaplains' efforts to send messages of hope and faith through a series of extremely concerning infringements on military chaplains' free exercise rights. We write to urge you to ensure that DOD complies with the religious freedom mandates of the Constitution and to ask you to issue clear guidance that strongly protects religious freedom within the DOD.

The chaplaincy serves as a historic example of government honoring religion's varied and robust role in public life. Since the inception of the Corps, chaplains have served in every American war. One of the first requests then-General George Washington made during the Revolutionary War was for an official chaplaincy that would be compensated for providing religious services to soldiers. Washington and the other Founders recognized that the First Amendment was never intended to sanitize religious discourse from the public square, but instead to prevent the government from infringing on individuals' religious expression or requiring individuals to adhere to any particular faith.

During this global pandemic, the Military Religious Freedom Foundation (MRFF) has been waging a campaign against the chaplaincy, and frankly, against religious freedom in the military generally. In response, the Army has censored chaplains' religious speech based on the flawed and arbitrary notion that military chaplains may not carry out their official duties outside of a religious ceremony that occurs within

the four walls of a chapel. A number of concerning examples have been brought to our attention:

- At Fort Drum, New York, chaplains assigned to the legendary 10th Mountain Division published a series of videos to a social media site inviting viewers to pray in the midst of the COVID-19 pandemic. The MRFF demanded the videos be removed, and the Army quickly complied.
- At Redstone Arsenal, Alabama, another Army chaplain published a video to social media in which he sought to encourage viewers with a message of hope during difficult times. Again, the MRFF demanded the video's removal, and the Army again complied.
- At Camp Humphreys, South Korea, an Army chaplain who sought to offer encouragement and hope sent an email to his fellow Christian chaplains recommending to them a Christian book he had recently read. The MRFF demanded that he be disciplined for his "deplorable actions," and the Army undertook an investigation into the chaplain's actions.
- At USAG Stuttgart, Germany, a chaplain hosted "Sunday Christian Porch Preaching" on the balcony of his apartment. The command at USAG Stuttgart unlawfully halted Lt. Col. McGraw's services in response to demands from the MRFF.

During a time of great crisis when the country desperately needs messages of hope and perseverance, the Army is expending resources to extinguish efforts to help service members connect with their faith. In each of these instances, chaplains were simply undertaking their duties to meet the spiritual needs of the men and women they serve, and the Army responded by unlawfully censoring and shutting down their religious exercise.

The First Amendment protects military chaplains' rights to freely exercise their religion. Historically, the chaplaincy has been an example of the government allowing respectful religious pluralism to flourish, employing chaplains of different faiths and creeds and allowing them, on a nondiscriminatory basis, to express their religious beliefs and accommodate the spiritual needs of the service members. This was the relationship between church and state that the Founders envisioned. Indeed, courts have made clear that the chaplaincy is a Constitutionally-mandated religious accommodation because the Constitution "obligates Congress upon creating an Army, to make religion available to soldiers."¹

¹ *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985).

Not only do the Army's actions violate the longstanding religious freedom principles of the First Amendment, they show a disregard for Congress's intent as expressed in the Religious Freedom Restoration Act (RFRA) and Section 532 of the FY2014 National Defense Authorization Act (Section 532). RFRA forbids the federal government, including DOD, from substantially burdening a person's religious exercise absent a demonstrated compelling government interest that is achieved by the least restrictive means. Section 532 of the FY2014 National Defense Authorization Act says that, absent an adverse impact on military readiness, unit cohesion, or good order and discipline, DOD must accommodate individual expressions of religious belief. These statutes plainly protect military chaplains' religious expression, whether conveyed via social media, email, or other means.

President Trump has issued clear guidance regarding existing law in this area. In 2017, the President issued Executive Order 13798-Promoting Free Speech and Religious Liberty. Shortly thereafter, the United States Attorney General issued a guidance memorandum interpreting religious liberty protections in federal law. Congress directed the DOD to implement a comprehensive training program for chaplains and judge advocates that further incorporates EO 13798 and the Attorney General's guidance within DOD. To date, the DOD has not complied with Congress's directive.

Service members give their lives to defend the principle of religious freedom enshrined in our Constitution, and that principle must be protected within the military. These unlawful infringements must end. We urge you to ensure that DOD implements the religious liberty training program that Congress has mandated. We also urge you to issue clear guidance, in accordance with the Attorney General's Memorandum on Religious Liberty, regarding the protections afforded to religious expression and how issues concerning religious freedom should be addressed amidst the pandemic.

We applaud your hard work and leadership during this pandemic and we thank you for your attention to this matter.

Sincerely,



Ted Cruz
United States Senator