Lawfully Addressing Religion and Spirituality Training – 20OCT22

Slide #1: Title Slide – Introduction

Thanks for the introduction!

Before we dive into these slides, I'd first like to start off with a "war story"…yall good with that? Here we go. So there I was…in IT up to "here" and I found myself in the direct line of fire wondering if I'd ever make it out of this hellhole alive. /// Seriously, when I started at the Pentagon my half cubical only came up to "here," and everyone who entered the office had to walk by and felt compelled to engage me in conversation. As a MAJ at the time, I was the lowest ranking officer in OCCH, so I couldn't tell the LTCs and COLs to go away…plus the TV was in front of me making it a natural hangout spot. It was a miracle that I could get any work done…but I survived, and was able to grow through my adversity. Anyway, in those days, the CCH was also the Chair of the AFCB and was invited to represent the Service Chaplaincies at a briefing to the White House Policy team with the Executive Director of the DoD Suicide Prevention Office (DSPO) to discuss the roles and responsibilities of military chaplains in suicide prevention. A lot of good came out of this engagement, to include my realization that most people outside of our Chaplain Corps have no idea what we do or how they can/should leverage our capabilities. So lesson #1, for me, was that I need to do a better job educating people and organizations about what we do without assuming they have any baseline or point of reference. More importantly, the work leading up to and in preparation for this engagement resulted in a really solid working relationship between PGAD and DSPO. During this time, we had an opportunity to help DSPO draft a white paper on "The Role of Chaplains in Suicide Prevention." Since it was a DoD level product, it was submitted to OSD OGC lawyers for legal review. The result was an absolute blood bath of different colors of ink crossing lines out, unreadable scribbled notes filling the margins, and the nail in the coffin – NONCONCUR. I can't make this stuff up, it is absolutely absurd, so I'll read it to you. The first paragraph of the legal review justifying their nonconcurrence reads:

"We (OSD OGC) have reviewed the attached draft White Paper and nonconcur as it is currently drafted.

The document suggests that the Department [of Defense] will encourage service members to utilize chaplains as a resource to report or self-report suicide concerns. This is legally problematic as it could be viewed as promoting religion in violation of the First Amendment of the Constitution."

Unbelievable, right!?! /// Unfortunately, this is not an isolated case or a rogue lawyer up at DoD. When we were working with the Army Resilience Directorate and educating them on how to leverage chaplains and our capabilities in Army suicide prevention programs and policy, they mentioned running into similar legal objections from Army OGC in the past…so they just stopped trying to promote chaplains as a primary resource. In reality, this legal opinion could just as easily come from your unit JAG, objecting to a program or SOP you are working because "it COULD be viewed as promoting religion in violation of the First Amendment of the constitution."

This is why it is so important for us as Chaplains and Religious Affairs Specialists to understand and appreciate the complexity of the law that impacts Religious Freedom. We don't need to become Constitutional Law Scholars, but we need to know enough IOT advise our commanders AND lawyers on religious freedom issues.

The purpose of the training is to equip you with the info you need to lawfully address religion.

Slide #2: Agenda

+ First Amendment

+ Religious Freedom in the United States

+ Lemon Test

+ Chaplain Advisement

Slide #3: First Amendment Text

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment to the U.S. Constitution, viewed broadly, protects religious liberty and rights related to freedom of speech. Specifically, the Religion Clauses prevent the government from adopting laws respecting an establishment of religion—the Establishment Clause—or prohibiting the free exercise thereof—the Free Exercise Clause.

The Establishment and Free Exercise Clauses were ratified as part of the Bill of Rights in 1791 and in 1947 were applied to the states by incorporation through the Fourteenth Amendment. Together with the constitutional provision prohibiting religious tests as a qualification for office, these clauses have been interpreted to promote individual freedom of religion and separation of church and state.

The Religious Clauses seem pretty straight forward. However, while it looks pretty black and white, there is a lot of gray area leading to a diverse spectrum of interpretation. To navigate the chaos, we need to at the history of religious freedom in the US.

Slide #4: Religious Freedom in the United States

1. Establishment Clause

+ Historical Context

- Development of the United States and the Framers of the Constitution:

Many colonists left Europe and settled in America to escape the bondage of laws which compelled them to support and attend government-favored churches. The Framers of the Religion Clauses built upon almost two centuries of historical developments that shaped this American model of religious freedom after the arrival of the earliest colonists. The colonists left a European society in which church and state were closely interconnected. Historically, political leaders throughout the world believed that a government could not legislate to preserve public morals or maintain civil order unless the state based its rule in a religion that was followed by the populace. The features of historic state-sponsored religions, known as religious establishments, included a government-recognized state church; laws outlining religious orthodoxy or church governance; compulsory church attendance; state financial support for the church; proscriptions on religious dissent; the limitation of political participation to the state church's members; and the use of churches for civil functions such as education or marriage.

- James Madison: Memorial and Remonstrance Against Religious Assessments (1785)

Presented to the Virginia General Assembly in 1785, Madison argued for complete religious liberty and against government support of religion in any form. This document started Virginia on a path to religious freedom, created a political climate that enabled him to secure passage the next year of the Virginia Statute for Religious Freedom, and reveals Madison's thinking about religious freedom four years before he introduced a national Bill of Rights in 1789.

- Thomas Jefferson: Virginia Statue for Religious Freedom (1786)

One of the most important documents in early U.S. religious history. It marked the end of a ten-year struggle for the separation of church and state in Virginia, and it was the driving force behind the religious clauses of the First Amendment of the U.S. Constitution, ratified in 1791. Drafted by Thomas Jefferson in 1776 and accepted by the Virginia General Assembly in 1786, the bill was, as Jefferson explained, an attempt to provide religious freedom to "the Jew, the Gentile, the Christian, the Mahometan, the Hindoo, and [the] infidel of every denomination." In effect, it was the first attempt in the new nation to remove the government's influence from religious affairs.

- The Bill of Rights: First Amendment's Religious Clauses (1791)

The First Amendment, one of the more symbolic and litigious of the amendments, guarantees fundamental rights such as freedom of religion, speech, and the press, and the rights to assemble peacefully and to petition the government. The free exercise clause in the First Amendment prohibits the government from restricting religious beliefs and practices, although exceptions have been made in situations in which ceremonial practices threaten an individual's safety or welfare. The establishment clause of the First Amendment has been interpreted as calling for separation of church and state.

+ Words Matter

- The Virginia Declaration of Rights (1776): George Mason's "Tolerance" for all – weak language

Mason had originally phrased this declaration in terms of "*tolerance*" for all, but Madison insisted that religious practice was not a matter of majority grace but of natural rights. Madison's phraseology is similar to that appearing later in the Virginia Statute for Religious Freedom and in his "Memorial and Remonstrance Against Religious Assessments" defending the statute. He declares "*that all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience*."

- "No law respecting religion" v. "No law respecting an establishment of religion"

+ What is an Established Religion?

- Founders were familiar with the centuries-old establishment in England

- At the founding, 9 of 13 colonies had established churches of some sort

- Established Churches share 6 common characteristics:

1. The Govt. exerted legal control over the doctrine and personnel of the est. church
2. The Govt. mandated attendance in the established church
3. The Govt. financially supported the established church
4. The Govt. punished worship in dissenting churches
5. The Govt. restricted political participation by dissenters
6. The Govt. used the established church to carry out civil functions

2. Wall of Separation between Church and State

+ Roger Williams (1604-1683)

Williams founded the colony of Providence in present-day Rhode Island in 1636, and put his ideas about the separation of church and state into practice. He did not wish to separate church and state primarily to preserve the peace and purity of the state but rather to preserve the peace and integrity of the church. He opposed linking political and economic privilege to church membership because such privileges corrupted the honesty of religious life.

+ Thomas Jefferson (1743-1826)

In an 1802 letter to the Danbury Baptist Association in Connecticut, then-president Thomas Jefferson highlighted the "wall of separation" metaphor previously utilized by Roger Williams. Jefferson explained his understanding of the First Amendment's religion clauses as reflecting the view of "the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall between church and State."

+ Hugo Black (1886-1971) – and the Early 1900's "Nativist" Movement (Popularized Separation of Church/St)

After serving in WWI, Black was a police court judge in rural Alabama before being elected to the U.S. Senate in a landslide in 1926. In the Senate, he was a strong supporter of President Franklin D. Roosevelt and the New Deal — reportedly a factor in his nomination by Roosevelt to the Supreme Court to replace Justice Willis Van Devanter in 1937. Because Van Devanter and his conservative colleagues had been wreaking havoc on the New Deal, in 1937 Roosevelt announced a Court Reorganization Plan, but his "Court-packing" scheme was controversial and widely panned. Nevertheless, Senator Black initially supported the plan. When Van Devanter, the first in a string of resignations, left the Court, Roosevelt had a chance to change the composition of the Court, and Black was his first appointee. Shortly after his confirmation, the public learned about Black's past affiliation with the Ku Klux Klan. On the eve of taking his seat on the Supreme Court, Black went public, explaining that membership in the Klan was a practical necessity to enter politics in the South (the KKK supported Black in his Senate campaigns). The Klan appealed to white, native-born Protestants who were very patriotic and fearful of immigrants, radicals, Jews and Catholics, and labor unions. As for religion, Black supported a relatively strict separation of church and state and wrote some of the most important decisions in the establishment clause area, including in *Everson v. Board of Education* (1947), which incorporated the establishment clause to the states

3. SCOTUS Landmark Decisions

+ Everson v. Board of Education (1947) – Began debate over 'establishment' of religion

The Supreme Court ruled as constitutional a New Jersey statute allocating taxpayer funds to bus children to religious schools — because it did not breach the "wall of separation" between church and state — and held that the establishment clause of the First Amendment applied to state and local governments as well as to the federal government. Black added that the "wall must remain high and impregnable." This discussion had a decidedly separationist tone and has been cited by liberals as authoritative ever since.

+ Lemon v. Kurtzman (1971)

The Court found that two states violated the establishment clause by making state financial aid available to "church-related educational institutions," and established a tripartite test to determine violations of the First Amendment establishment clause.

+ Kennedy v. Bremerton School District (2022)

Justice Neil Gorsuch authored a consequential opinion for a 6-3 majority upholding the right of a public school football coach to offer a prayer on the 50-yard line after a game. The decision is likely to have far-reaching repercussions for future interpretations of the free exercise, establishment and free speech clauses of the First Amendment. The majority opinion argued that the court had long abandoned the Lemon test, which he criticized as being too abstract and ahistorical, for an approach that emphasized "reference to historical practices and understandings."

Slide #5: The Impact of Lemon

1. The Lemon Test

+ Three-Pronged Test (Purpose, Effect, Entanglement)

Under *Lemon*, to be considered constitutional, laws
(1) must have a secular legislative purpose;
(2) must have a principal or primary effect . . . that neither advances nor inhibits religion;
(3) and must not foster 'an excessive government entanglement with religion.

+ Tool to evaluate Establishment Clause issues

Since 1971, the Supreme Court has most frequently evaluated financial assistance to religious entities under the *Lemon* framework, notwithstanding its gradual disfavor and eventual abandonment of *Lemon*. In a series of decisions issued during the 1970s, the Court applied these three factors to a series of programs offering funds to schools, holding some of those programs constitutional and others unconstitutional. The Court also applied *Lemon* to disapprove of a number of financial aid programs in the 1970s.

+ Controversial and Chaotic History

The Supreme Court did not generally apply Lemon rigidly, and two years after the decision, the Court described its three factors—purpose, effect, and entanglement—as helpful signposts in the Establishment Clause inquiry. These three factors were also part of Establishment Clause jurisprudence before *Lemon*. Since at least the early 1990s, however, the Supreme Court faced calls to reconsider *Lemon*. While some opinions in the beginning of the 2000s continued to use the Lemon factors or variations on that test as their primary mode of analysis, the Court ultimately said *Lemon* was abandoned in a 2022 opinion.

2. Other Tests used by SCOTUS

+ Endorsement Test

In *Lynch v. Donnelly*, issued in 1984, Justice O'Connor suggested a clarification of *Lemon*. She argued that the Court should ask whether a city's Christmas display had endorsed Christianity, saying that the first and second prongs of the *Lemon* test relate to endorsement. Justice O'Connor stated: The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. In a later concurrence, Justice O'Connor stated that endorsement should be judged by whether a reasonable observer would think the government is endorsing religion.

+ Coercion Test

Particularly in the context of government-sponsored prayer practices, the Supreme Court has sometimes evaluated Establishment Clause challenges by looking for impermissible government coercion. Although the Court has said the Establishment Clause is concerned with many aspects of the relationship between government and religion, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. The Supreme Court has accordingly held that the government violates the Establishment Clause where there is coercion, including indirect coercive pressure. In *Engel v. Vitale*, the Court clarified that a law requiring a specific prayer to be recited in schools was unconstitutional even though participation was voluntary, in the sense that students could opt out. Similarly, in *Lee v. Weisman*, the Court held that a high school violated the Establishment Clause with its involvement in prayers at high school graduations.

+ Historical Test

the Supreme Court has long evaluated Establishment Clause challenges in part by reference to historical understandings of the Clause. In the 2019 decision *American Legion v. American Humanist Association*, a split majority of the Supreme Court rejected a constitutional challenge to a Latin Cross erected as a World War I memorial. The plurality opinion (with some support from Justice Thomas, concurring in the judgment) stated that longstanding monuments, symbols, and practices, should not be evaluated under *Lemon*'s tripartite analysis, but should instead be considered constitutional so long as they follow in a historical tradition of religious accommodation. The Supreme Court engaged in a similar analysis in 2014's *Town of Greece v. Galloway*, ruling that a municipality's challenged prayer practices fit within the tradition long followed in Congress and the state legislatures."

3. Impact on Establishment Clause Jurisprudence

+ "Reasonable Observer" – Estimates Endorsement

In 1989, Allegheny County v. ACLU, Justice O'Connor stated that endorsement should be judged by whether a reasonable observer would think the government is endorsing religion. O'Connor later explained in her concurring opinion in *Capitol Square Review and Advisory Board v. Pinette* (1995) that her test "focuses upon the perception of a reasonable, informed observer." Such an observer must be assumed to be aware of the history and context underlying a challenged program or religious display.

+ "Heckler's Veto" – Offense equals Coercion

A heckler's veto occurs when the government accepts restrictions on speech because of the anticipated or actual reactions of opponents of the speech. The term is also used in general conversation to refer to any incident in which opponents block speech by direct action or by "shouting down" a speaker through protest. In general, the core concern with the heckler's veto is that allowing the suppression of speech because of the discontent of the opponents provides the perverse incentive for opponents to threaten violence rather than to meet ideas with more speech. Thus the Supreme Court has tended to protect the rights of speakers against such opposition in these cases, effectively finding hecklers' vetoes inconsistent with the First Amendment. In Kennedy, Gorsuch was critical of what he described as the Lemon's test "its endorsement test offshoot" and with attempts to identify how a "reasonable observer" might interpret such actions. He thought such an approach resembled capitulation to a "heckler's veto" over any speech or action that others might find to be offensive.

+ Creates Conflict between the Two Religious Clauses

Slide #6: Chaplain Advisement

1. Three Approaches to Interpret First Amendment/Religious Freedom

+ Secularism – Opposition to Religion in Public Arena

Secularism has been defined as opposition to religion in the public arena. In *Everson v. Board of Education* (1947), Justice Hugo L. Black wrote that separatism asserts a "high and impregnable wall of separation" between church and state.

+ Separatists – Find any law regarding Religion as a Violation

Separatists find any law regarding religion in violation of the First Amendment.

+ Accommodationists – Promote Cooperation between Govt/Religion

Accommodationism rests on the belief that government and religion are compatible and necessary to a well-ordered society. Accommodationists assert that in the First Amendment the framers intended to promote cooperation between government and religion, not neutrality or government hostility toward religion. They argue that because the establishment clause forbids Congress to make laws regarding "an establishment," rather than "the establishment" of religion, government must not show preference among religions or the religious versus the nonreligious. According to accommodationists' interpretation, the First Amendment permits governmental actions that promote religion, but not religious institutions.

2. What are the Army's SMEs on Religious Freedom

+ Commanders?

+ The JAG Corps?

+ The Chaplain Corps?

3. A Leader's Guide to Lawfully Addressing Religion

+ We have been taught that Lemon is a Foundational Principle

+ Parker v Levy (Free Speech)

In 1974, the Supreme Court established for the first time the limits of free political expression for those serving in the armed forces of the United States. The Court determined that the demands of military necessity are superior to individual constitutional rights in the military setting. *Levy* has served as precedent for subsequent decisions allowing military prosecution for such disparate offenses as possessing marijuana off base (*Schlesinger v. Councilman* [1975]), exercising the right to petition without permission from the base commander (*Brown v. Glines* [1980]), and wearing religious garb in violation of the uniform dress code (*Goldman v. Weinberger* [1986]). It remains the foundation for judicial recognition of "military necessity" as a weightier interest than First Amendment rights of individuals in the military.

+ Katcoff v. Marsh (US Army Chaplain Corps)

Chaplaincy programs established and funded by the government appear on their face to be a clear violation of the establishment clause of the First Amendment. State and federal courts have recognized, however, that the chaplaincy is one area in which the free exercise rights of affected prisoners and military personnel outweigh any potential establishment clause violation.

Although the Supreme Court has never addressed the constitutionality of military or prison chaplains, the Second Circuit Court of Appeals explicitly held in *Katcoff v. Marsh* (2d Cir. 1985) that the military chaplaincy does not violate the establishment clause.

In that case, two federal taxpayers challenged the constitutionality of the U.S. Army's chaplaincy on the grounds that it was funded by government, as opposed to private, sources.

The court held that if viewed in isolation, the chaplaincy would fail under the *Lemon* test. The court also noted, however, that the establishment clause must be interpreted in light of other constitutional provisions, namely the free exercise clause and the war powers clause.

Rejecting the application of the *Lemon* test in this case, the court stated that in light of the courts' traditional deference to the military, the standard to evaluate the chaplaincy should be "whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense."

The court held that the chaplaincy program meets this standard because there are no practical alternatives to a government funded chaplaincy, and the plaintiffs failed to show that a privately funded chaplaincy or a civilian chaplaincy were feasible options.

+ Religious Freedom Restoration Act of 1993 (RFRA)

Congress adopted the Religious Freedom Restoration Act (RFRA) of 1993 to override the Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) and provide greater protection

under the First Amendment free exercise clause. In *City of Boerne v. Flores* (1997), the Court struck down the provisions of the RFRA as they applied to the states. RFRA remains constitutional on the federal level.

Congress responded with the RFRA to mandate that the courts use strict scrutiny when examining laws that substantially affect religious freedom.

In doing so, Congress relied upon its authority under the enforcement clause, section 5 of the Fourteenth Amendment, to protect the constitutional rights of individuals.

Slide #7: Questions? / Discussion

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Part 3

Slide #1 (19): Title Slide - Introduction

Slide #2 (20): Spiritual Readiness

1. The Army's Definition of Spiritual (FM 7-22)

Concerned with an individual's core religious, philosophical, or human values that form that individual's sense of identity, purpose, motivation, character, and integrity. These elements enable one to build inner strength, make meaning of experiences, behave ethically, persevere through challenges, and be resilient when faced with adversity.

2. What Spiritual Readiness IS

+ Inclusive and Universally Vital to ALL Personnel

+ Applies to both Religious/Non-religious Persons & Concepts

+ It is Unique to Each Individual

3. What Spiritual Readiness IS NOT

+ Spiritual Readiness is not synonymous with religion

+ Spiritual Readiness is not covered by the First Amendment

+ Spiritual Readiness Training should not be Optional

Slide #3 (21): Questions? Discussion