



July 2, 2018

**VIA OVERNIGHT DELIVERY SERVICE**

The Honorable Marguerite C. Garrison  
Deputy Inspector General for  
Administrative Investigations  
Room 15D27, West Tower  
4800 Mark Center Drive  
Alexandria, VA 22350

RE: MRFF Formal Complaint – U.S. Naval Hospital, Okinawa, Japan

Dear Ms. Garrison:

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States.<sup>1</sup>

The purpose of this letter is to provide you with relevant legal information in response to a recent complaint filed by Attorney Donald G. Rehkopf, Jr. and the Military Religious Freedom Foundation (“MRFF”) on behalf of 26 “U.S. military and DoD civilian family clients at the Marine Corps Base Camp Butler” in Okinawa, Japan (“Camp Butler”).<sup>2</sup> The complaint raises the following two issues.

First, Mr. Rehkopf states the following: “In the public Galley area of the Naval Hospital, Okinawa, a ‘POW/MIA’ memorial table display was recently set up.”<sup>3</sup> In this regard, Mr.

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<sup>1</sup>See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8–1 vote that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport’s ban on First Amendment activities).

<sup>2</sup>Letter from Donald G. Rehkopf, Jr., to Marguerite C. Garrison, dated 26 June 2018, at 2 (hereinafter “Rehkopf Letter”), available at <https://www.militaryreligiousfreedom.org/wp-content/uploads/2018/06/DoD-IG-Complaint-26-June-18-Final.pdf>

<sup>3</sup>*Id.*



Rehkopf claims that, “by including a Bible as part of the POW/MIA Display in the public Galley, it signifies two things. First, that this is an official, command-endorsed Display.<sup>4</sup> Second, that the command is endorsing *Christianity*. . . .”<sup>5</sup> He further claims that the Bible on the POW/MIA Display totally excludes “any other belief systems or non-belief traditions.”<sup>6</sup> He speaks of religious tolerance, but then consigns the beliefs of those who “personally believe that the Bible is indeed holy” as “belong[ing] in the Chapel or in their personal residences . . . ,”<sup>7</sup> thereby suggesting that religious beliefs and religious sentiments somehow do not enjoy the robust protection of the First Amendment afforded to other beliefs and sentiments. That is simply incorrect.

**Second**, Mr. Rehkopf, takes issue with the “bi-lingual placard . . . on the table behind the Bible and other objects. That states in relevant part in both English and Japanese: ‘The Bible represents the strength gained through faith to sustain those lost from our country, founded one nation under God.’”<sup>8</sup> Note that Mr. Rehkopf neglects to mention that the bi-lingual placard explained what each object in the display symbolized and that it did not emphasize the Bible over the other objects, all of which were non-religious in nature. Mr. Rehkopf attempts to buttress his argument by asserting that “there was absolutely no religious component to our Founding”<sup>9</sup> and that, “[n]owhere in our Constitution does the word ‘God’ appear even once.”<sup>10</sup>

He then attempts to equate the text of the bi-lingual placard with Article VI § 3 of the Constitution, which states, in relevant part, the following: “no religious test shall ever be

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<sup>4</sup>The wording of Mr. Rehkopf’s assertion suggests that it is the presence of the Bible that makes the Display “an official, command-endorsed Display.” That is ludicrous. The mere presence of a Bible in the Display does not automatically make it “an official, command-sponsored Display.”

<sup>5</sup>Attorney letter- pg. 2 – (italics in original). Just as the presence of the Bible does not make the Display “an official, command-sponsored Display,” *see* note 4, *supra*, neither does the presence of the Bible automatically signify that the Command is endorsing Christianity, especially since each item in the Display is meant to *symbolize* an aspect of the plight of POWs and MIAs.

<sup>6</sup>Rehkopf Letter at 4.

<sup>7</sup>*Id.* at 2.

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

<sup>9</sup>*Id.* This is a strange statement in light of the various groups of people who came to the American colonies and why they came. The vast majority came here to escape religious persecution in their home countries. They came to be able to practice freely their religious faiths. Our Declaration of Independence acknowledges the importance of “Nature’s God” in the founding and grounding of our Nation. And, finally, the fact that the drafters of the Bill of Rights included the Establishment Clause in the First Amendment did not mean that state churches were forbidden. It meant that the country as a whole would have no state church. The First Amendment limited only the national government, not the states, some of which continued to have state churches for decades after the Bill of Rights had been ratified by those very same states. *See, e.g., Kelly Olds, Privatizing the Church: Disestablishment in Connecticut and Massachusetts*, 102 J. POL. ECON. 277, 281–82 (1994).

<sup>10</sup>Although Mr. Rehkopf is correct that the word “God” does not appear in our Constitution, he fails to recognize a direct reference to the Christian faith in the document. At the very end of the Constitution, it reads: “done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven . . . .” (emphasis added). Such wording is commonly understood to refer to Jesus Christ and was so understood at the time. Hence, the drafters understood that they were acting in an age whose beginning was determined with respect to the birth of Jesus of Nazareth, the Lord of the Christian faith, a fact recognized and memorialized by the drafters.

required as a qualification to any officer or public trust under the United States.” As explained below, this reference is wholly inapt to the situation about which Mr. Rehkopf complains.

With respect to both of the above claims, Mr. Rehkopf’s legal arguments are significantly flawed, as will be discussed below. Furthermore, the Navy has already reviewed this identical complaint and has properly determined that Mr. Rehkopf’s arguments do not meet Constitutional muster. The display of a Bible on the POW/MIA Display is fully lawful, as the DOD IG office should confirm.

### *POW/MIA Displays*

Camp Butler, like many other military installations around the world, has erected a POW/MIA memorial in remembrance of military service members who are either POWs or MIAs. Although each memorial may differ slightly from one another, a memorial generally consists of the following items: A round table with a white cloth, a red rose, a vase, a slice of lemon, a pinch of salt, a Bible, an inverted glass, and an empty chair.<sup>11</sup> The white cloth symbolizes “the purity of the[] motives” of those “answering the call to serve.”<sup>12</sup> The rose is a reminder of the lives of the missing Americans, “and their loved ones and friends who keep the faith while seeking answers.”<sup>13</sup> The lemon slice is a reminder of “their bitter fate, captured and missing in a foreign land.”<sup>14</sup> The “pinch of salt symbolizes the tears of our missing and their families.”<sup>15</sup> The Bible represents “the strength gained through faith to sustain those lost from our country, founded as one nation under God.”<sup>16</sup> The inverted glass represents the missing person’s “inability to share a toast,”<sup>17</sup> and the empty chair reminds us “they are missing.”<sup>18</sup> Note that the Bible and the bilingual placard are merely part of a number of objects used to convey the message of the display. All objects in the display other than the Bible are non-religious.

### *Determining the Meaning & Reach of the Religion Clauses of the First Amendment*

One of the methods used by the Supreme Court of the United States for interpreting the meaning and legal reach of the First Amendment is to examine how those who drafted and ratified the Amendment acted in light of its express terms. One can begin to understand what the Establishment Clause allows (and disallows) by examining what transpired in the earliest years of our Nation during the period when the First Amendment was being drafted and subsequently ratified.<sup>19</sup>

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<sup>11</sup> *Missing Man Table and Honors Ceremony*, THE NAT’L LEAGUE OF POW/MIA FAMILIES (Oct. 9, 2015), <http://www.pow-miafamilies.org/events/recognition-day/missing-man-honors-ceremony/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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

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

<sup>19</sup> Most agree that, *at a minimum*, the Establishment Clause was intended to prohibit the creation of a national church for the U.S., such as existed in England. Nevertheless, one must keep in mind that the First Amendment did not preclude individual states from adopting a state church or a state religion. See CARL ZOLLMAN, AMERICAN CHURCH

For example, “the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer,”<sup>20</sup> and a “statute providing for the payment of these chaplains was enacted into law on September 22, 1789.”<sup>21</sup> Within days of legislating to pay Congressional chaplains with funds from the federal treasury, “final agreement was reached on the language of the Bill of Rights.”<sup>22</sup> As former Chief Justice Burger explained, it “can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause to forbid what they had just declared acceptable.”<sup>23</sup> If the Establishment Clause is not violated when the government pays for legislative chaplains out of the public treasury, certainly, then, the placement of an inanimate object (i.e., a symbolic Bible) and a placard in the context of a passive display does not violate the Establishment Clause either.

Early national leaders also acted in ways that some today—like Mr. Rehkopf and the MRFF—argue expressly violate the Establishment Clause. For example, President George Washington issued proclamations of thanksgiving to Almighty God during his presidency,<sup>24</sup> and President John Adams called for a national day of fasting and prayer.<sup>25</sup> President Thomas Jefferson—a man often described as a strong defender of strict church-state separation—signed multiple Congressional acts to support Christian missionary activity among the Indians.<sup>26</sup> Further, during his presidency, President Jefferson also approved a curriculum for schools in the District of Columbia which used the Bible and a Christian hymnal as the primary texts to teach reading,<sup>27</sup> and he signed the Articles of War which “[e]arnestly recommended to all officers and soldiers, diligently to attend divine services.”<sup>28</sup> Also, once the U.S. Navy was formed, Congress enacted legislation directing the holding of, and attendance at, divine services aboard U.S. Navy ships.<sup>29</sup>

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LAW 2-4 (2d ed. 1933). In fact, Massachusetts was the last state to disestablish its state church, and it did so of its own accord in 1833, more than forty years after the ratification of the First Amendment. Kelly Olds, *Privatizing the Church: Disestablishment in Connecticut and Massachusetts*, 102 J. POL. ECON. 277, 281-82 (1994).

<sup>20</sup>*Marsh v. Chambers*, 463 U.S. 783, 787-88 (1983).

<sup>21</sup>*Id.* at 788.

<sup>22</sup>*Id.* (citation omitted). The First Amendment is part of the Bill of Rights.

<sup>23</sup>*Id.*; *see also id.* at 790.

<sup>24</sup>E.g., CATHERINE MILLARD, *THE REWRITING OF AMERICA’S HISTORY* 61-62 (1991).

<sup>25</sup>Proclamation of President John Adams (Mar. 6, 1799), in 1 JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897* 284-86 (1899).

<sup>26</sup>*See* DANIEL L. DRIESBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* 127 (1987) (noting that the 1803 treaty with the Kaskaskia Indians included federal funds to pay a Catholic missionary priest; noting further treaties made with the Wyandotte and Cherokee tribes involving state-supported missionary activity).

<sup>27</sup>JOHN W. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* 100 (1982) (citing 1 J. O. WILSON, *PUBLIC SCHOOL OF WASHINGTON* 5 (1897)).

<sup>28</sup>CHARLES E. RICE, *THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT* 63-64 (1964).

<sup>29</sup>Act of March 2, 1799, ch. XXIV, 1 Stat. 709 (where Congress enacted legislation requiring commanders of ships with chaplains on board “to take care that divine service be performed twice a day, and the sermon preached on Sundays”); Act of March 23, 1800, ch. XXXIII, 2 Stat. 45 (where Congress directed commanders of ships to require the ship’s crew “to attend at every performance of the worship of God”).

As one honestly examines Governmental acts contemporaneous with the adoption of the First Amendment, it is difficult to deny that, in the early days of our Republic, church and state existed relatively comfortably (and closely) together, with contemporaries of the drafters of the First Amendment showing little concern that such acts violated the Establishment Clause.

More recently, as the Court in *Marsh v. Chambers* aptly recognized, actions of the First Congress are “contemporaneous and weighty evidence” of the Constitution’s “true meaning.”<sup>30</sup> Despite such evidence, however, the MRFF and its members seem utterly unwilling to tolerably acknowledge our nation’s rich religious history, to the point of calling for the removal of a passive Bible from a Display. Note also that the Bible was not placed in the Display to propagate the specific teachings it contains, but to *symbolize* “the strength gained through faith to sustain those lost from our country . . . .”<sup>31</sup>

The Supreme Court has also aptly noted that strict separation between church and state could lead to absurd results. In *Zorach v. Clauson*,<sup>32</sup> for example, the Court stated that the First Amendment

does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. . . . A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: “God save the United States and this Honorable Court.”<sup>33</sup>

Rather than a bright-line rule, the so-called “wall” separating church and state “is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship,”<sup>34</sup> and the location of the line separating church and state must be determined on a case-by-case basis.<sup>35</sup>

Justice Brennan explained it this way: “The line we must draw between the permissible and the impermissible is one which accords with history and *faithfully reflects the understanding of the Founding Fathers.*”<sup>36</sup> *Strict church-state separation has never been required in the United States*

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<sup>30</sup>*Marsh*, 463 U.S. at 790 (citation omitted); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 328 (1936) (noting that understanding “placed upon the Constitution . . . by the men who were contemporary with its formation” is “almost conclusive”) (citation omitted).

<sup>31</sup>*Missing Man Table and Honors Ceremony*, THE NAT’L LEAGUE OF POW/MIA FAMILIES (Oct. 9, 2015), <http://www.pow-miafamilies.org/events/recognition-day/missing-man-honors-ceremony/>.

<sup>32</sup>343 U.S. 306 (1952).

<sup>33</sup>*Id.* at 312–13; see also *id.* at 314 (noting “no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence”).

<sup>34</sup>*Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

<sup>35</sup>*Id.*

<sup>36</sup>*Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (emphasis added).

and is not required now. Mr. Rehkopf fails to understand this, and, as such, incorrectly interprets the passive presence of a Bible as part of a larger display with numerous non-religious items as violative of the First Amendment.

Note that the Bible in the POW/MIA display is there to represent “the strength gained through faith to sustain those lost from our country, founded as one nation under God.”<sup>37</sup> It is not there to propagate the specific teachings it contains. It is there to *symbolize* faith, in general, not the Christian faith, in particular. No one is compelled—*or even encouraged*—to read what the book says. No one is compelled—*or encouraged*—to believe what the book teaches. No one is compelled—*or encouraged*—to change one’s belief in any way. The mere presence of the Bible neither actively promotes a particular religious belief nor denigrates any other religion, religious belief or non-belief. It is there to symbolize strength gained through faith, not a specific teaching or belief.

It is no more a Constitutional violation than is the presence of our national motto, “In God we trust,” on the currency we use to pay each Sailor and Marine on payday. The bi-lingual placard, similarly, does not create a Constitutional problem (nor does it in any way suggest that a religious test is required for office). To attempt to make this type of connection is simply specious.

In *Marsh*, the Court was dealing with the constitutionality of prayers led by paid legislative chaplains. The Court concluded that chaplain-led prayer opening each day’s legislative session “is not . . . an ‘establishment’ of religion,” but rather “a tolerable acknowledgment of beliefs widely held among the people of this country.”<sup>38</sup> *Marsh* refuted the contention that clergy-led, ceremonial prayer violated the Establishment Clause merely because a particular prayer might reference monotheistic terminology or beliefs. In *Marsh*, the Court rejected the argument that selection by the Nebraska legislature of a Presbyterian clergyman who chose to pray in the “Judeo-Christian” tradition violated the Establishment Clause.

The Court declared: “We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergy man of one denomination advances the beliefs of a particular church.”<sup>39</sup> The Court noted that “[t]he content of the prayer is not of concern to judges where, *as here*, there is *no indication that the prayer opportunity has been exploited to proselytize or advance any one, or disparage any other, faith or belief.*”<sup>40</sup>

This is analogous to the use of a Bible and the bi-lingual placard in a POW/MIA display. Just as the Court refused to find unconstitutional prayers said in the Judeo-Christian tradition, Mr. Rehkopf is mistaken to claim that a Bible (and an explanatory placard), even the Christian Bible containing both the Old and New Testaments, violates the Constitution merely by being present as one of a number of *symbolic* items in a POW/MIA display. Instead, the presence of the Bible

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<sup>37</sup>*Id.*

<sup>38</sup>*Marsh*, 463 U.S. at 792.

<sup>39</sup>*Id.* at 793.

<sup>40</sup>*Id.* at 794–95 (emphasis added).

easily falls into the category of “tolerable acknowledgment” of widely held beliefs (especially considering that the most widely held religious beliefs in the United States are some form of the Christian faith, which most likely mirrors the beliefs of most of the POWs and MIAs being honored). Moreover, the placard did not merely mention what the Bible symbolized, it explained the symbolism of the non-religious objects as well. Finally, the mere presence of the Bible neither proselytized anyone nor disparaged anyone’s beliefs, religious or otherwise.

The reality is that Mr. Rehkopf and the MRFF do not want to acknowledge the fact that the United States is a nation with a robust, yet diverse, religious heritage and that this heritage is reflected throughout our society—including within the armed forces of the United States. In *Zorach*, the Supreme Court further noted that “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>41</sup> Elsewhere, the Supreme Court has held that “[t]he First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the [Government].”<sup>42</sup> Mr. Rehkopf and the MRFF would instead consign the expression of religious sentiments on military installations to “the Chapel” or the believers’ “personal residences.”<sup>43</sup> That is not the Constitutional standard.

With respect to government neutrality, a concept which the MRFF has taken to an illogical level, Justice Goldberg pointed out the following:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. *Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.*<sup>44</sup>

Accordingly, when considering whether the government has “endorsed” religion (i.e., violated the Establishment Clause), one must keep in mind that

[t]here is always someone who, with a particular quantum of knowledge, reasonably *might perceive* a particular action as an endorsement of religion. A State has not made religion relevant to standing . . . simply because a particular viewer of a display might feel uncomfortable.

*It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [activity] appears.*<sup>45</sup>

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<sup>41</sup>*Zorach*, 343 U.S. at 313.

<sup>42</sup>*Lee v. Weisman*, 505 U.S. 577, 589 (1992) (emphasis added).

<sup>43</sup>Rehkopf Letter at 2.

<sup>44</sup>*Sch. Dist. of Abington Twp.*, 374 U.S. at 306 (emphasis added).

<sup>45</sup>*Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (emphasis added); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government

The men and women stationed at Camp Butler (and throughout the U.S. Armed Forces) are deemed to be “reasonable observers” who understand the symbolic meaning of the Bible on the POW/MIA display. That some nonetheless object does not require the government to accommodate their objections. As the Court in *Lee* aptly noted: “We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.”<sup>46</sup>

Further, in *Town of Greece v. Galloway*, the Supreme Court opined (concerning prayer at a town hall meeting) that our “tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.”<sup>47</sup> Similarly, men and women in the U.S. Armed Forces—all adults—can likewise tolerate an historical religious symbol—a Bible—in the context of many other, secular, symbols, in a POW/MIA Display whose purpose is to honor the memory of POWs and MIAs.<sup>48</sup>

Moreover, as in *Marsh*, the inclusion of this symbol and the accompanying placard, was not “exploited to proselytize or advance any one, or to disparage any other, faith or belief,”<sup>49</sup> and, as discussed in *Town of Greece*, mere personal offense, “does not equate to coercion.”<sup>50</sup> With respect to this matter, no one was asked to believe or do anything, no one was questioned about his or her faith (or lack thereof), and no one was required to support the symbol or the text in the placard. In other words, no one was forced to do, say, or believe anything. *Moreover, there is simply no constitutional crisis merely because some men and women in the military encounter a religious symbol or text of which they may personally disapprove in a display or ceremony.*

One must keep in mind that there are persons and organizations in our Nation—like Mr. Rehkopf and the MRFF (including, undoubtedly, some members of the U.S. Marines and others currently on active duty)—which are hypersensitive to religion and religious expression. Accordingly, commanders must studiously avoid blindly reacting to complaints, especially when any reasonable, minimally informed, person knows that no endorsement of religion is intended (as with the POW/MIA display).

That principle was clearly enunciated in *Americans United for Separation of Church & State v. City of Grand Rapids*, where the court noted that there are persons in our society who see religious endorsements, “even though a reasonable person, and any minimally informed person, knows that no endorsement is intended.”<sup>51</sup> The court characterized such a hypersensitive

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may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional.”)

<sup>46</sup>*Lee*, 505 U.S. at 597.

<sup>47</sup>*Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).

<sup>48</sup>See, e.g., *Nat’l POW/MIA Recognition Day Honors Sacrifices of Missing, Imprisoned Soldiers*, MICH. DEP’T OF MIL. & VETERANS AFFAIRS (Sept. 16, 2014), <http://www.michigan.gov/dmva/0,4569,7-126--337558--,00.html>.

<sup>49</sup>*Town of Greece*, 134 S. Ct. at 1823; see *Marsh*, 463 U.S. at 794–95.

<sup>50</sup>*Town of Greece*, 134 S. Ct. at 1826.

<sup>51</sup>980 F.2d 1538, 1553 (6th Cir. 1992).



response as a form of heckler's veto which the court labeled an "'ignoramus' veto."<sup>52</sup> One need not yield to such persons. This appears to be just such an instance.

Mr. Rehkopf also alleged that the mere presence of a Bible as part of the POW/MIA display constitutes a violation of Article 6, Clause 3 of the United States Constitution. The Constitutional provision to which Mr. Rehkopf refers reads as follows: "[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."<sup>53</sup>

The most obvious response to Mr. Rehkopf's allegations—something that he apparently fails to grasp—is that the passive presence of a Bible as part of a POW/MIA display is simply not a "test" at all, much less a religious test for *office*. Moreover, Mr. Rehkopf utterly fails to show that any Sailor or Marine or civilian employee exposed to the Display has been (or will be) denied any office or public trust based on the presence of the Bible or their disapproval thereof.

Historically, the religious test prohibition in the U.S. Constitution was to counter—at the *national level*—provisions in some state constitutions, a number of which required, for example, that one believe in Jesus Christ to be qualified to serve in public office.<sup>54</sup> There is no evidence of that or anything similar here—simply because no such test is applied in the Navy, the Marine Corps or at Camp Butler. The presence of a Bible at Camp Butler's POW/MIA display will have no effect whatsoever on one's ability to serve in public office. Mr. Rehkopf's claim to the contrary is ludicrous on its face and indicates a fundamental misunderstanding of the Constitution of the United States.

Mr. Rehkopf's misreading of the Constitution, no matter how forcefully stated, is not binding on you and your staff. In fact, your very oath of office requires you to support and defend the Constitution of the United States, not someone's misinterpretation of the document. You and your staff must not become complicit in the MRFF's desire to consign constitutional expression to Chapels or individual homes. That is not what the Constitution requires.

*Two final points. First*, the Supreme Court has affirmed that the *government itself* is permitted to display religious symbols on public property under certain conditions without violating the Establishment Clause. In *Lynch v. Donnelly*,<sup>55</sup> the Court upheld the constitutionality of a Christmas holiday display that included a government erected crèche *because it was a part of a larger holiday display in which there were a number of secular symbols*. Courts generally hold that so long as the religious elements of a display are part of a larger display such that the primary effect of the entire display is secular, the display is constitutional.<sup>56</sup> In *Salazar v. Buono*, the Court noted the importance of context and purpose of public displays and reiterated that the

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<sup>52</sup>*Id.*

<sup>53</sup>U.S. CONST. art. VI, cl. 3.

<sup>54</sup>*See, e.g.*, FRAME OF GOVERNMENT OF PENNSYLVANIA, Laws Agreed Upon in England, art. XXXIV (1682); DEL. CONST. of 1776, art. XXII (1776).

<sup>55</sup>465 U.S. 668 (1984).

<sup>56</sup>*Salazar v. Buono*, 130 S. Ct. 1803, 1817-20 (2010) (plurality opinion).

“goal of avoiding governmental endorsement *does not require eradication of all religious symbols in the public realm.*”<sup>57</sup>

In the POW/MIA Display at issue here, the Bible is the only religious object among a significant number of secular objects. This should be an even easier case to decide than the case of the crèche in a Christmas holiday display for the following reason. The crèche was included in the display in *Lynch* to convey a distinctly *Christian* message, to recognize and celebrate the birth of Jesus Christ, whereas the Bible in the POW/MIA Display was not placed there to convey a Christian message at all. Rather, it was displayed to symbolize “the strength gained through faith to sustain those lost from our country, founded as one nation under God.”<sup>58</sup> The Supreme Court found Constitutional the placement of a religious object *with an intentional Christian message* on public property as long as it was part of a larger display of secular items. How much easier to conclude that a religious object on public property surrounded by secular items is Constitutional when there is no intentional Christian message as in the POW/MIA Display in Okinawa.

**Second**, one must not be seduced by the specious demand made by Mr. Rehkopf that, if one permits the placement of a Bible in such a Display, then one is legally obligated to display a whole host of other books, as listed in Mr. Rehkopf’s letter (ranging from various versions of the Christian Bible to the Satanic Bible, the Quran, the Torah, the Vedas, and so on<sup>59</sup>). That is simply not true. In *Pleasant Grove City v. Summum*,<sup>60</sup> the Supreme Court was faced with a similar argument. It was argued that if a city included a Ten Commandments monument—clearly an item with a religious message—on government property, then the city could not refuse to include other religious monuments there as well. The Court unanimously ruled that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property. Further, the Court noted that the Ten Commandments monument was not placed in the city park because of its religious message, it was there as one of a number of significant memorials important to the city’s history. This mirrors the use of the Bible in the POW/MIA Display. The Bible was not placed there to further the Christian faith, but to symbolize “strength gained through faith” in general, not specifically through the Christian faith.

One must also note Mr. Rehkopf’s and the MRFF’s real goal in asserting that, if a Bible is allowed, one must flood the Display with books reflecting all religious and non-religious views and beliefs. They seek to so burden the display with other religious and non-religious texts to the point where the government will simply throw up its hands and submit to their demands—*the removal of all religious expression from the public sphere in the Military, including, but not limited to, MIA/POW Displays*. That is revealed in part by Mr. Rehkopf’s condescension that religious beliefs and expression are permissible in Chapels and personal homes. Yet, as Justice O’Connor noted in *Board of Education v. Mergens*, “[t]he Establishment Clause does not license

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<sup>57</sup>*Id.* (emphasis added); see also *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005) (conducting similar purpose and effect analysis of entire display in Ten Commandments cases).

<sup>58</sup>*Missing Man Table and Honors Ceremony*, THE NAT’L LEAGUE OF POW/MIA FAMILIES (Oct. 9, 2015), <http://www.pow-miafamilies.org/events/recognition-day/missing-man-honors-ceremony/>

<sup>59</sup>Rehkopf Letter at 5.

<sup>60</sup>555 U.S. 460 (2009).

government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore *subject to unique disabilities*.<sup>61</sup> In reality, Mr. Rehkopf and the MRFF espouse freedom *from* religion, rather than freedom *of* religion, and freedom *from* religion is not the Constitutional standard.

### *The MRFF and Its Agenda*

Although Mr. Rehkopf and the MRFF have every right to believe and espouse the views they do, it is imperative that you and members of your staff be aware of what the MRFF's agenda entails. It is also imperative that you not accept such charges at face value. They espouse a skewed view of the Constitution and its guarantees and requirements.

The MRFF was founded by Mr. Michael L. "Mikey" Weinstein, a self-described opponent of so-called "Dominionist Christians" in the military. Mr. Weinstein has repeatedly claimed that he is fighting "a subset of Evangelical Christianity that goes by a long technical name . . . Pre-Millennial, Dispensational, Reconstructionist, Dominionist, Fundamentalist, Evangelical Christianity."<sup>62</sup> Moreover, how Mr. Weinstein describes his organization, the MRFF, also says much about his beliefs and how he approaches those with whom he disagrees. He describes the MRFF as follows: "We are a weapon. We're a militant organization. Our job is to kick ass, take names, lay down a withering field of fire, and leave sucking chest wounds on this unconstitutional heart of darkness, if you will, this imperious fascistic contagion of unconstitutional triumphalism."<sup>63</sup> He has demonstrated open and continuing hostility to Evangelical Christians and their message and admits that he is willing to do whatever it takes to achieve his ends: "*I don't want to be on the losing side knowing that I didn't use every last diatribe and embellishment and wild-eyed, hair-on-fire, foaming-at-the-mouth harangue to get my point across . . .*"<sup>64</sup> The MRFF finds Constitutional violations everywhere. The POW/MIA display at Camp Butler was simply the most recent example. It is also interesting to note that Mr. Weinstein and the MRFF have yet to win a case in court on their skewed view of the Constitution. That alone should be enough to give you pause as you entertain this most recent complaint.

## CONCLUSION

The MRFF's frequent demands invite extreme caution on the part of all persons who receive their demand letters, lest the recipients become unwitting pawns in the MRFF's strategy to

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<sup>61</sup> *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990) (emphasis added).

<sup>62</sup> Although Mr. Weinstein has frequently said that his attacks are aimed solely at a very small slice of Evangelical Christianity (as described in the foregoing text), that claim is belied by a presentation he gave at the United States Air Force Academy in April 2008 where he attempted to show a portion of a virulently anti-Catholic movie entitled *Constantine's Sword*. Luchina Fisher, '*Constantine's Sword*' Cuts into Anti-Semitism, ABC NEWS (Apr. 20, 2008), <http://abcnews.go.com/Entertainment/story?id=4684837&page=1#.T0QKSlcgdcl>. By seeking to attack the Catholic Church as well, Mr. Weinstein demonstrated a broad-based hostility to Christianity, in general, which no U.S. Government official should tolerate.

<sup>63</sup> Brian Kresge, *An Interview with Mikey Weinstein*, JEWS IN GREEN (Aug. 24, 2007), <http://www.jewsingreen.com/2007/08/an-interview-with-mikey-weinstein/>.

<sup>64</sup> MICHAEL L. WEINSTEIN & DAVIN SEAY, WITH GOD ON OUR SIDE 129 (2006) (emphasis added).

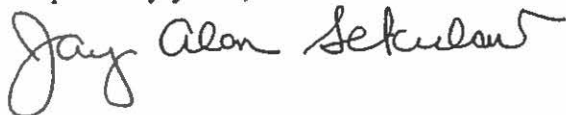
eviscerate religious freedom in the U.S. armed forces. Mr. Weinstein has readily admitted that he values the use of diatribe, embellishment, and harangue as tools to get his way. Mr. Rehkopf's specious demands regarding the POW/MIA Memorial Display at Camp Butler fit neatly into that mold.

Despite Mr. Rehkopf's claims to the contrary, the presence of both the Bible and placard in the POW/MIA display at Camp Butler is fully constitutional. Men and women in uniform are certainly capable of tolerating, and even acknowledging when appropriate, this nation's rich religious history, and a passive display of a Bible when placed in a grouping of other, non-religious symbols in remembrance of MIAs and POWs does not violate the Establishment Clause of the First Amendment.

As such, we strongly and respectfully urge you to disregard Mr. Rehkopf's specious demands. Other than espousing general offense on the part of some at Camp Butler at the mere presence of such items, no legally cognizable injury has been raised. Accordingly, these allegations are baseless, and they must be treated as such by you.

Should you or any member of your staff desire further information or assistance concerning this matter, please do not hesitate to contact our office. We stand ready to assist you in any way we can.

Respectfully yours,



Jay Alan Sekulow  
Chief Counsel



Robert W. Ash  
Senior Counsel

Cc: The Honorable James Mattis, Secretary of Defense  
General Joseph F. Dunford, Jr., USMC, Chairman, Joint Chiefs of Staff  
The Honorable William S. Castle, Esq., Acting General Counsel