

House Resolution 5122, Title V, Section 590 - Military Chaplains

Synopsis of Issues and Problems

28 June 2006

Each chaplain shall have the prerogative to pray according to the dictates of the chaplain's own conscience, except as must be limited by military necessity, with any such limitation being imposed in the least restrictive manner feasible. H.R. 5122, Section 590.

Overview

Part 1. Background and Institutional Context

- 1.1 Background of the Legislation
- 1.2 Legislative Intent and Benefit
- 1.3 Short-circuiting the Department of Defense
- 1.4 The Institutional Context of Chaplaincy
- 1.5 Burden for Adapting to Needs of the Military
- 1.6 Identifying the Scope of Unacceptable Limitation

Part 2. Specific Issues and Implications

- 2.1 New Category of "Protected Speech"
- 2.2 Adverse Consequences for Military Order
- 2.3 Responsibility for Imprecatory Prayer
- 2.4 Development of Administrative Certification
- 2.5 Predictable Increase of Litigation
- 2.6 Existing Agreement for Endorsement of Chaplains
- 2.7 The Military as a Constitutional Test-bed
- 2.8 The Reputation of Chaplains and Chaplaincy
- 2.9 Best Response to an Unattainable Ideal

Part 3. Additional Considerations

- 3.1 Other Options for Congressional Response
- 3.2 Need for Companion Legislative Relief
- 3.3 Others Expressing Concern about this Legislation

Closing Observation

Disclaimers

The following is a synopsis that highlights significant issues and problems with House Resolution 5122, Title V, Section 590. At times, this legislation is difficult to discuss objectively because of vigorous appeals to religious freedom, patriotism, or authentic Christian belief by some advocates. Issues stated here in no way reflect or imply support for the erosion or reduction of religious free exercise within the Armed Services. While benefiting from the advice and review of other individuals and subject matter experts during research and composition, the material presented is sole responsibility of the writer. It does not claim to represent the official position of any other person or organization beyond citation of items that are a matter of public record. Neither does it claim to be exhaustive on any single issue noted.

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Overview

House Resolution 5122 is the House of Representatives version of the FY2007 National Defense Authorization Act. Title V, Section 590 of the bill establishes an extraordinary legal situation for all military chaplains and creates a new category of protected speech. This derives from the phrase “pray according to the dictates of a chaplain’s own conscience.” The remaining text of the provision states a conditional qualification for such prayer. While apparently intended to acknowledge military mission and order, the condition will not totally prevent disruptive consequences. As now framed, this congressional intervention will reach far beyond the grievance(s) it seeks to remedy and foster a host of new difficulties.

One might naturally assume that freedom to pray according to personal conscience is a patently obvious behavior guaranteed by the Constitution. However, the exercise of First Amendment rights within a military setting involves numerous factors that are not necessarily part of ordinary civilian life. Once citizens swear the oath and place themselves under military jurisdiction, individual rights are exercised in keeping with the unique purposes of military organization and requirements for military mission. This is true for clergy in uniform just as much as for all others who serve.

Among other things, Section 590 seeks to remedy an alleged breach in the First Amendment rights of military chaplains. In so doing, it does not address the same rights of everyone else in uniform. Those rights are surely affected by the manner in which military chaplains exercise theirs, especially during public ceremonies that are not primarily religious in purpose and are frequently formed through mandatory attendance.

To understand the potential for serious negative consequences from Section 590, it is necessary to consider the background for this legislation and major elements of the institutional context that it addresses. These are identified in Part 1. Specific concerns with the implications of Section 590 are discussed briefly in Part 2. Finally, Part 3 notes additional considerations including other options for congressional response.

Part 1. Background and Institutional Context

1.1 Background of the Legislation

Background for the introduction of House Resolution 5122, Title V, Section 590 includes at least five primary factors:

a) Contention by some chaplains that commanders or senior chaplains are preventing them from including the name “Jesus” in their prayers. Coupled with that is another ongoing claim that career progressions of some chaplains have been stifled as the result of their religious beliefs and practices.

b) A companion objection to the use of prayer language that seeks to include all religious traditions that might be present among participants in public [and largely involuntary], non-religious military ceremonies – or language that at least avoids blatant exclusion of these participants.

c) Substantial media arousal of the warning that First Amendment rights of military chaplains are breached and must be protected by Executive or Legislative Branch intervention.

d) An unsuccessful campaign to date that seeks an Executive Order on the matter.

e) Reaction to recent Air Force and Navy guidance on religious expression during military events that are not primarily religious in nature.

1.2 Legislative Intent and Benefit

Without questioning the sincerity of any complainants or advocates, and in spite of the media arousal level, do the

complaints justify congressional intervention at this time? As now framed in the bill, what effect might this intervention have on similar individuals not seeking relief, or others in a completely different group that becomes affected by the outcomes of the relief?

What about “the Troops”? More widely construed for possible result, the provision has potential bearing on the welfare of every individual person in the Armed Services. Most of them are not speaking out about the prayers of military chaplains at the moment or, for that matter, their own situations for prayer. But their interests are relevant nonetheless. And, it seems important as well to consider the provision in relationship to the entire military with unique and separate identity as an “organism” or “institution.”

Chaplains do not exist to guarantee the religious freedom of a religious tradition or denomination. They exist to help the government support the opportunity for religious expressions by the individual citizens that live and work under the unique conditions and limitations of military service. When Congress intervenes in the matter of a religious expression such as prayer, how does that intervention benefit all military personnel without increasing the possibility of injury to some? Therefore, a report from impartial and thorough inquiry into the allegations that drove the introduction of Section 590 certainly would be appropriate for legislation of this potential magnitude and consequence. To this point, none exists.

1.3 Short-circuiting the Department of Defense

The Department of Defense is working on efforts to balance the needs of various individuals in religious settings or where religious language is included in non-religious settings. New guidelines on free exercise of religion under review by the Air Force and a new Secretary of the Navy Instruction 1730.7C are the principal references. Enactment of Section 590 would be done without sufficient opportunity for the Defense Department to complete its work and measure the outcomes.

The Armed Services have developed an imposing record of success for dealing with the delicate balances between “non-establishment” and “free exercise” of religion under the unique conditions of military life and mission. This record includes challenges, difficulties, and complaints along the way. Nonetheless, it merits considerable respect and substantial weight as precedent when new elements are introduced that affect the legal foundation and policy governance for religious expression within the Armed Services.

1.4 The Institutional Context of Chaplaincy

Crucial to the context where Section 590 would apply is the somewhat paradoxical identity and role of a military chaplain. On the one hand, a military chaplain is a qualified clergy-person of a religious faith group who has been fully authorized to minister within that faith group’s tradition. On the other hand, the military chaplain is a commissioned officer who has come under military jurisdiction for the purpose of assisting in command responsibility to provide for the religious free exercise of all eligible personnel.

According to prior court opinion, for military chaplaincy to remain viable, it must perform a “secular redeeming purpose.” That purpose is to help citizens who accept certain restrictions upon their lives when they enter the military. One obvious restriction is that they can not so readily practice their religions while executing military mission. In the interest of supporting citizens under the conditions and limitations of military service, the government authorizes chaplains and asks religious faith groups to provide qualified clergy to function in that role. Were it not for the citizenship privileges of the Troops and their commanders, there would be little or no justification for chaplains in the Armed Services.

1.5 Burden for Adapting to Needs of the Military

Thus, the setting under view is religious ministry within an institution that has many counter-posing needs and priorities. Those religious faith groups who have established standing with the Department of Defense in order to provide chaplains give their consent to the Department’s definition of pluralism. The exact language from Department

of Defense Instruction 1304.28 is:

Pluralistic Environment. A descriptor of the military context of ministry. A plurality of religious traditions exist side-by-side in the military.

The faith groups accept this definition even if they maintain a somewhat or entirely different one within the canons of their faith traditions and common life in civilian settings.

A crucial guideline in DoD Instruction 1304.28 states:

Religious Organizations that choose to participate in the Military Chaplaincies recognize the chaplaincies of the Military Departments serve a religiously diverse population and that military commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility.

And these religious faith groups agree to assist commanders by providing

. . . chaplains who shall support directly and indirectly the free exercise of religion by all members of the Military Service, their family members, and other persons authorized to be served by the military chaplaincies.

Therefore, considerable responsibility falls upon religious faith groups and their chaplains to make whatever adjustments or craft whatever balances they must in order to function within the institutional environment of the military and support its mission.

1.6 Identifying the Scope of Unacceptable Limitation

Eventually, adaptations from a strictly civilian setting to military ministry might approach strain or even unacceptable limitations upon vital elements in a given religious tradition. If that happens, response and remedy by all concerned needs to avoid creation of new or even greater difficulties.

Existing policy and regulation is abundantly clear that any and all military chaplains are entitled to deliver religious ministry in accordance with the practices of faith groups that endorsed them for military service. This routinely applies whenever chaplains conduct worship services and scripture studies or administer rites that are voluntarily attended or sought. However, a major element in the current complaint involves prayers offered in non-sectarian, non-voluntary military ceremonies. Ironically, this is one setting where the necessity for chaplains to reach beyond themselves as much as possible and attend to the rights and needs of others not like them is very important. It is also an astonishing privilege.

Proponents of Section 590 are declaring that pervasive unacceptable limitation on their chaplains now exists. Some media reports contend that the constitutional rights of large numbers are in jeopardy. Current complaints may be narrow in scope or on the scale of unacceptable limitation that extends overwhelmingly to all ministry actions or a constitutional violation. In any event, they must be heard and resolved where possible. No matter how enigmatic some parts of their roles, military chaplains are still citizens. But, aggrieved parties need to furnish thorough substantiation and submit to impartial evaluation when seeking remedy that will affect the entire military institution. The Congress is dealing with such legislation based largely on passionate appeal rather than a preponderance of empirical data.

Part 2. Specific Issues and Implications

2.1 New Category of “Protected Speech”

Ordinarily, military chaplains deal with two categories of belief, speech, or action of conscience that receive specialized consideration in the military. One is privileged communication recognized by the *Manual for Courts-Martial*. In

this case, “the privilege” belongs to the person that is divulging information to a chaplain under certain conditions. The other is the belief system of a Conscientious Objector that is evaluated to determine whether there are sufficient grounds for discharge from the military. Again, the beliefs under review are those of the applicant. Both of these time-tested exceptions or “protections” are for the potential use and benefit of any and all military personnel - not for one particular group of staff officers.

Section 590 contains an important conditional phrase to preserve recognition of the overall military mission: “. . . except as must be limited by military necessity, with any such limitation being imposed in the least restrictive manner feasible.” Even so, the principal declaration on conscience that precedes this phrase is very potent. It could reach well beyond specific grievance and relief to create a new special category of “protected speech” within the Armed Services. Have the Armed Services indicated any need to bolster the legal standing of whatever one of their chaplains might choose to say in a prayer?

The “protected speech” consequence might appear to be a reasonable derivative from the “free exercise of religion” or “freedom of speech” clauses in the First Amendment. As noted previously, Section 590 does not address protection for all military personnel who might wish to pray or not pray or not be compelled to hear prayer. If protection of religious freedom or religious speech by congressional intervention is actually necessary at this juncture, then it should extend to all concerned. The likely net results of the focus on one group are overreach, excessive government entanglement in religious matters, and other difficulties far beyond those that the legislation seeks to remedy.

2.2 Adverse Consequences for Military Order

In the first place, there is no universally held theological much less statutory definition of exactly what constitutes “prayer” or what verbal or written content may legitimately fall within the boundaries of “a prayer” or “the act of praying.” A chaplain [commissioned officer] - in spite of other guidance set forth in the provision - could include material that is prejudicial to good order and discipline or a blatant violation of other military regulations. This might be done with the weight of Title X through any communication that the chaplain chooses to call “a prayer.” If challenged, that chaplain could reply, “I was praying. Title X United States Code gives me the authority to say what I said. It was necessary.”

Historically, prudent chaplains most commonly first brought conscience issues or moral objections to a military commander behind closed doors. With all the force of Public Law, chaplains could intentionally or unintentionally blindside commanders or any other military members in public under “the dictates of their own consciences.” Ultimately, it would not matter whether the chaplain’s intention was positive, negative, or simply inadvertent. With damage done, the command would then face determination as to whether “military necessity” had been violated and any requirement for disciplinary action.

The caveat about “military necessity” as a condition of Section 590 would not completely prevent the possibility or probability of this scenario. The prescriptive language that declares “according to the dictates of the chaplain’s own conscience” can easily overwhelm and contravene this caveat. If enacted into Public Law as written, without caveats of balancing force equal to the autonomy of individual “conscience,” the situations noted above will occur - and sooner than later.

2.3 Responsibility for Imprecatory Prayer

The scenario of negative encroachment through a chaplain’s prayer might seem improbable if not ludicrous speculation. However, there are numerous examples of prayer custom using language about situations, groups of people, or individual persons that would sound critical or condemnatory to an ordinary bystander. These statements are frequently delivered in the course of appraising a behavior or perceived spiritual state. Some of these prayers even reach the level of an “imprecation,” an appeal to divine justice for punishment or a curse upon an evil.

What may be acceptable in a totally civilian setting would become legal in a military setting. And this in spite of the significant differences and limitations that are appropriately unique for military service. In the past, imprecations

against an official enemy of the United States have been acceptable and even sometimes expected. Section 590 substantially increases the field of acceptable and legal targets for such prayer. Is the Congress now prepared to take responsibility when it opens the door to imprecatory statements by chaplains based solely on their own consciences as compelling authority?

2.4 Development of Administrative Certification

Considering the nature of governmental processes, one can fairly expect eventual development of an administrative protocol for legal determination of every single public prayer by a chaplain. This might become necessary in order to certify compliance with all portions of the statute and forestall any possible incident by chaplains or complaint about chaplains. Even if limited strictly to non-sectarian occasions for prayer, this would have a highly counterproductive result for religious ministry in the Armed Services.

2.5 Predictable Increase of Litigation

The force of a Title X declaration about prayer, coupled with the persistence of pursuit for redress of grievance that in part brought on this legislative remedy, leads to another major concern. There is ample reason to forecast a growing environment of military chaplains engaged in litigation about their prayers. Compounding this would be other parties who pursue suit against the very same chaplains or their military departments because of those prayers.

Already on the record are claims of grievance by chaplains and claims of grievance against chaplains. Some chaplains believe that they have suffered unjust limitation upon their career progression and advancement. Others report that they were oppressed by their military seniors, whether chaplains or officers of the line, because of religious beliefs and expression. On the other hand, some military members report that they were “bullied” by military chaplains or adherents to beliefs advocated by certain chaplains. Citizens on both sides of these claims fear that such injury will happen again.

Perhaps emboldened by the current climate for litigation in American society - as well as the intensity of belief in a just cause - individuals and groups on both sides are relentlessly pursuing redress in the courts. New or miscrafted legislation on the prayers of military chaplains could easily spill over into and aggravate rather than alleviate or improve this situation. Thus, it is highly unlikely that this “Military Chaplain Prayer Law” would only guarantee chaplains the right to name the deity or deities of their tradition or choice on every occasion of prayer - and do nothing else.

Once congressional precedent is set for a specific aspect of religious behavior, there is also reason to speculate that other issues could and will enter the scene. If there is a law about prayer, then requests for a law concerning or litigation about sacraments and ordinances, versions of scriptures, educational materials, service music, and so forth may follow with more incentive and ease. The subsequent potential for excessive entanglement by the government is enormous.

2.6 Existing Agreement for Endorsement of Chaplains

Enactment of Section 590 might also lead to alteration of the partnership between the religious faith groups and Congress that results in military chaplaincy. It is fair here to question whether some advocates for this legislation are actually sending notice to the Department of Defense. Are they saying that their religious faith groups and chaplains can no longer meet their contractual obligations with DoD? Are they relying on Congress to create exception [as a by-product] so that they can continue to participate in military chaplaincy under other terms?

Whether or not such motive exists, one must observe that Section 590 could significantly impact the climate and conditions for endorsement of military chaplains. This would transpire without bringing all current parties to the arrangement into thorough consultation and review. And, at the very least, it could create two different categories of faith groups in terms of their ability to deliver the requirements and accomplish the purposes set forth by the government. Or ultimately, Section 590 could compel the Department of Defense to make a substantial revision of policy for the religious support of all eligible personnel and the expectations for any faith group seeking endorsement

of chaplains.

2.7 The Military as a Constitutional Test-bed

The confrontation between two seriously held perspectives about religion and the First Amendment continues to evolve - and in some quarters escalate - throughout American society as a whole. Within the military setting, Section 590 would likely result in momentum for a shift of that dynamic balance toward one side of the larger debate. The Congress can always decide to alleviate grievance for one constituency within many who comprise military chaplains or benefit from the ministry of military chaplains. But, in the aftermath, the Armed Services as a whole might become a test-bed for such profound philosophical and legal shift in the constitutional debate between “free exercise” and “non-establishment” of religion.

This test-bed would not be limited to chaplains. Section 590 does not address military commanders who might choose to pray and are authorized to do so by service regulations for certain situations. There are appointed lay readers who pray, ordained clergy who are not chaplains but are military members, and visiting civilian clergy-persons invited to worship services or military ceremonies. And then there are the Troops who pray. However well intended, Section 590 has every potential to start an unfortunate landslide. In the worst case, it could settle a stifling haze over the very praying that our Warriors need and want to do - and apparently do so now without significant hindrances.

2.8 The Reputation of Chaplains and Chaplaincy

A long line of military chaplains from the Colonial Era to this very day have fostered the reputation whereby chaplains are known principally as “champions for the Troops” and not for themselves. Throughout the decades there were plenty of struggles concerning the roles, religious expressions, and career situations of chaplains. The balance between acting as agent of a specific denomination and acting as an advocate for all eligible to receive care always required wise attention. Yet, for the most part, military chaplains resisted the lure to focus on their own rights and needs. Instead, they fully embraced the unique privileges and responsibilities that were designed by initiative of the government rather than the vision of any single religious faith group.

Among active, guard, reserve, and retired chaplains, there is growing concern about a new “Military Chaplain Prayer Law.” Negative effects from Section 590 could greatly diminish the overall legacy and reputation of military chaplains and chaplaincy. For our profession, trust and reputation is crucial to the religious care and pastoral friendship that all of our military personnel may need and certainly deserve. Commanders continue to report the superb ministries of their chaplains. Why impede this work now?

2.9 Best Response to an Unattainable Ideal

In an ideal world, we would be able to have military ceremonies such as those public memorials that were held shortly after the attacks of 11 September 2001. We saw representatives from diverse religious faith groups standing together, dressed in the vestments of their traditions, and offering prayers side by side. Those prayers began and ended with different acknowledgments of deity. These were remarkable, inspiring events. Here we witnessed some of the finest examples of human character and expression of our American social compact ever demonstrated in a public service with religious content.

Why were these events possible? First, they were unique ceremonies where provision could be made to include a wide spectrum of religious faith representatives. And second, participation in these memorials - at least for the audiences - was overwhelmingly if not entirely voluntary. Most official public ceremonies of the military never fit both of these conditions simultaneously much less completely fulfill one of them.

Moreover, there is simply not enough money or available clergy to provide a chaplain from every single religious faith group for every military unit or ceremonial occasion. And, among other reasons, that is why the government hires chaplains, “keepers of sacred things,” to act on behalf of everyone eligible.

Section 3. Additional Considerations

3.1 Other Options for Congressional Response

If Congress must deal with alarm about the prayer rights of chaplains, there are other options available rather than passage of Section 590. The House and Senate Armed Services Committees could send formal notification to the Department of Defense of concerns and perspective on resolution of ongoing issues with public prayers. Congress could establish formal review of the allegations noted in Section 1.1 and any others that pertain. And most important of any response at this high level, Congress could still redirect involvement at this time towards balancing the religious rights and needs of all military personnel who may or may not wish to pray or hear prayer.

Failing resort to any of these options, then Congress needs to better focus the statutory language to deal with the actual complaint that it seeks to remedy. In other words, simply direct that chaplains may in all circumstances for prayer use the name or names of any deity or deities that they choose. Such language would at least narrow the field of opportunity for chaplains to disrupt military order or otherwise abuse their positions as religious leaders in uniform with legal impunity. Of course, that language might still create significant problems with respect to the religious rights and needs of those who hear prayers during mandatory, non-sectarian military formations.

3.2 Need for Companion Legislative Relief

If Congress proceeds with new law on the prayer of military chaplains when it develops a final version of the FY 2007 National Defense Authorization Act, then there should be a companion action. Congress should simultaneously enact limitations on litigation over the prayers of chaplains. That would be similar to its action within the FY2002 National Defense Authorization Act concerning litigation over the results of Selection Boards.

There are mounting strains on Warriors and their families with the challenges of Defense Transformation and “Campaign Fatigue” from several years of our Global War on Terror. At this time, chaplaincies and their military departments can ill afford to be substantially diverted from their vital ministries by any wholesale preoccupation with legal action over prayer.

3.3 Others Expressing Concern about this Legislation

Objections on record by Rear Admiral Louis V. Iasiello, Chaplain Corps, U.S. Navy - Chief of Chaplains

Objections on record by the National Conference on Ministry to the Armed Forces. This federation represents over 85% of the religious faith groups that provide endorsements to the Department of Defense in order for their clergy to be considered for accession into Army, Navy, or Air Force chaplaincies.

Concerns expressed at a meeting with Senator Lindsey Graham on 12 June 2006:

Department of Defense

The Honorable David S. C. Chu - Undersecretary of Defense for Personnel and Readiness

Chaplain, Major General Charles C. Baldwin, U.S. Air Force - Chief of Chaplains.

Rear Admiral Robert F. Burt, Chaplain Corps, U.S. Navy - Deputy Chief of Chaplains

Chaplain (Brigadier General) Douglas L. Carver, U.S. Army - Deputy Chief of Chaplains

Ecclesiastical Endorsers

The Reverend Roy L. Bebee, Captain, Chaplains Corps, U.S. Navy (Retired) - Endorser for The Evangelical

Free Church of America

The Reverend Herman Keizer, Jr., Chaplain (Colonel), U.S. Army (Retired) - Chairman, National Conference on Ministry to the Armed Forces; Endorser for the Christian Reformed Church in America

The Reverend Charles W. Marvin, Captain, Chaplain Corps, U.S. Navy (Retired)-Executive Director and Endorser for the National Association of Evangelicals; Assistant Endorser for the Assemblies of God

Closing Observation on Struggles with Religious Expression

We have worked and are working hard in our Nation to correct old injustices and discover new means for supporting the essential dignity and basic rights of injured or marginalized parties - whether longstanding or newly understood. Some territory that we are exploring involves the nature, occasion, and resolution of religious offense, prejudice, or even oppression in a society where many religious faith groups exist side by side and new ones continue to appear. This endeavor also includes consideration for those who want no religious belief whatsoever expressed in the public square.

For this leg of our American journey to reach its best possible destination, we must stretch our capacity to recognize, understand, affirm, and even promote the rights of others while caring for our own. Among other things, this will likely require substantial departure from the evolving notion that the Constitution guarantees absolute freedom from ever being offended for any reason. It will also likely require that we resist the tendency to seek new laws or file suits in order to mitigate if not resolve conflicts over religious practices. In matters of religion, such actions often only further impede any efforts to alleviate injury or achieve just arbitration of competing needs, interests, and perspectives.