



December 9, 2014

Via Certified Mail RRR

Colonel David G. Fivecoat
Commander
Airborne and Ranger Training Brigade
6850 Barron Ave, Building 85
Fort Benning, GA 31905

Re: Response to Letter of Concern

Dear Colonel Fivecoat:

Chaplain (Captain) Joseph "Joe" Lawhorn retained the Liberty Institute to represent him in this matter. Accordingly, please direct all correspondence to Liberty Institute Senior Counsel, Michael Berry.

Although you first issued a Letter of Concern to Chaplain Lawhorn on November 27, 2014, this letter constitutes Chaplain Lawhorn's response to the second Letter of Concern you issued to him on December 8, 2014.

On 20 November 2014, in accordance with Army Regulation (AR) 350-1, 5th Ranger Training Battalion (RTB) conducted its annual sexual harassment, awareness, response, and prevention (SHARP), alcohol awareness, and suicide prevention training. At the direction of Chaplain Lawhorn's commanding officer, Lieutenant Colonel (LTC) Michael A. Scarpulla, and in accordance with AR 165-1, Table 1-3, Chaplain Lawhorn was designated the primary instructor for 5th RTB's suicide prevention training session.

In preparation for 5th RTB's suicide prevention training, Chaplain Lawhorn created a handout for those in attendance who wished to have notes. The handout's purpose was to serve as a reference, and it directly related to Chaplain Lawhorn's teaching points.

During the course of conducting the suicide prevention training, Chaplain Lawhorn discussed his own struggles with depression, and the methods and techniques he personally uses to combat depression. Specifically, Chaplain Lawhorn discussed how his personal faith enables him to remain resilient despite his depression.

As an Army Chaplain, Chaplain Lawhorn is acutely aware of the need to balance his religious responsibilities with his military officer responsibilities. To

ensure that he maintained an appropriate balance between these roles, Chaplain Lawhorn repeatedly explained that, although faith is central to how he personally remains resilient, each soldier's experiences and techniques might differ. Chaplain Lawhorn further explained that religion and faith are not the only methods for remaining resilient; he simply shared his own personal experience, and what works for him. Chaplain Lawhorn's point was that soldiers experiencing depression or suicidal thoughts should seek help, in any form.

At all times, Chaplain Lawhorn's sole intent was to protect and ensure the well being of 5th RTB Soldiers; all of them. At no time did he consider himself to be in a "preacher" role. Nevertheless, as a Chaplain, Chaplain Lawhorn is often one of the first soldiers called upon to respond when the tragedy of suicide strikes the Army family. Again, Chaplain Lawhorn was drawing upon his personal experience in an attempt to positively affect 5th RTB, particularly those who may be suffering from suicidal thoughts or ideations. It took a great amount of courage for Chaplain Lawhorn to discuss his own personal battle with depression. Often, a chaplain's greatest tool for developing mutual trust with his soldiers is his sincerity and genuineness. In an attempt to be sincere and genuine, Chaplain Lawhorn made himself vulnerable. Unfortunately, someone exploited his vulnerability.

Throughout Chaplain Lawhorn's suicide prevention training session, he solicited questions, concerns, and feedback from the audience. He received no complaints or negative comments. To the contrary, his presentation received an ovation from the soldiers in attendance. But to his surprise, Chaplain Lawhorn later learned that one of the soldiers in attendance took offense at his presentation. Had Chaplain Lawhorn known of this, he would have happily sat down with this soldier and answered any questions or concerns he or she had. Unfortunately, Chaplain Lawhorn was not given this opportunity—a professional courtesy—because the soldier in question alerted a civilian advocacy group, the Military Association of Atheists and Freethinkers (MAAF),¹ who apparently then alerted a media outlet, the Huffington Post.²

These events led to your issuance of a Letter of Concern on December 8. Your letter alleges that Chaplain Lawhorn was "perceived to advocate Christianity and used Christian scripture and solutions." Notably, while your first Letter of Concern, of November 27, 2014, alleges that Chaplain Lawhorn's presentation was "in direct contrast with Army Regulation 600-20 and violates the Army's Equal Opportunity Policy," your December 8 Letter of Concern cites no Army regulation or policy. We respectfully disagree.

Despite the unfortunate outsider and media attention this issue received, Chaplain Lawhorn did nothing illegal, immoral, or unethical. He followed his Army training, and sought only to accomplish the mission and to improve 5th RTB's morale, cohesion, good order, and discipline.

¹ <http://militaryatheists.org/news/2014/11/ranger-suicide-prevention-becomes-christian-sermon/>

² http://www.huffingtonpost.com/tom-carpenter/religious-accommodation-a_b_6207764.html

Chaplain Lawhorn's presentation was lawful, consistent with, and supported by Army regulations. For example, AR 600-63, Army Health Promotion, paragraphs 1-26 and 1-27, designates chaplains as approved Ask-Care-Escort (ACE) suicide-prevention trainers. Specifically, paragraph 1-26 directs chaplains to "share information, trends, best practices, lessons learned, and training developments." That is precisely what Chaplain Lawhorn did during his presentation. Likewise, chapters 2 and 3 of Department of the Army (DA) Pamphlet 600-24, Health Promotion, Risk Reduction, and Suicide Prevention, make clear that Army leaders are to include "spiritual fitness" as an integral component of Army suicide-prevention training. And a recent presentation entitled "Suicide Prevention and Awareness Training for the United States Army," prepared by the U.S. Army Center for Health Promotion and Preventive Medicine in conjunction with The American Association of Suicidology, states that "high spiritual resiliency" and "healthy spiritual/religious affiliation" are protective factors against suicide. In other words, matters of religion, faith, and spirituality are not only permissible in Army suicide prevention training, but the Army identifies them as critical components of such programs.

In addition to being permissible, Chaplain Lawhorn's expression of his religious beliefs during his presentation constitutes protected religious expression. In fact, AR 600-20—the very regulation Chaplain Lawhorn is alleged to have violated—references Department of Defense Instruction (DODI) 1300.17. Under DoDI 1300.17, the Army may not substantially burden a soldier's sincerely held beliefs. "Sincerely held beliefs" are defined as conscience, moral principles, or religious beliefs. There can be no question that Chaplain Lawhorn's statements arose from his Christian principles and beliefs. As a general rule, the Army may not substantially burden Chaplain Lawhorn's religious beliefs, but must accommodate the expression of those beliefs unless it can demonstrate a compelling governmental interest—defined as "a military requirement that is essential to accomplishment of the military mission"—and that the interest is furthered by the least restrictive means. There is no compelling governmental interest in preventing a Chaplain from sharing his personal experience in a suicide prevention class. And even if there were a compelling governmental interest, a Letter of Concern would not be the least restrictive means of furthering that interest.

DODI 1300.17 further states that the expression of sincerely held beliefs "may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment." Thus, any adverse administrative action or punishment that is in response to Chaplain Lawhorn's presentation would constitute a substantial burden on his sincerely held religious beliefs, in violation of DODI 1300.17 and AR 600-20.

DODI 1300.17 is also reflected in current federal and military law. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb – 2000bb-4, applies to all federal agencies, including the military. Like DODI 1300.17, RFRA prohibits any substantial burden on the free exercise of religion unless there is a compelling governmental interest that is furthered by the least restrictive means. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Under existing military case law, the expression of Chaplain Lawhorn's sincerely held beliefs is also protected under the First Amendment to the Constitution. Military courts have repeatedly ruled in favor of First Amendment protection for religious expression such as Chaplain Lawhorn's.

In 1972, the highest military court recognized that "we must be sensitive to protection of 'the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.'" *United States v. Priest*, 21 U.S.C.M.A. 564 (C.M.A. 1972). The court went on to explain that service member speech is protected unless it undermines the effectiveness of response to command. As explained above, Chaplain Lawhorn's presentation did no such thing.

It is also insufficient to allege that Chaplain Lawhorn's presentation undermined good order and discipline or unit morale because it offended someone. The fact that Chaplain Lawhorn's presentation allegedly offended a soldier is irrelevant to this analysis. The critical inquiry is whether there is religious coercion, which the Establishment Clause of the First Amendment forbids. In the context of the Establishment Clause the United States Supreme Court has repeatedly, and recently, stated that, offense does not equal coercion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004). Moreover, in *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces stated that even racist or supremacist speech is not punishable under the Uniform Code of Military Justice (UCMJ) because it is protected by the First Amendment. If the First Amendment protects racist or supremacist speech, then it certainly protects religious speech.

Finally, your original Letter of Concern of November 27 alleged that Chaplain Lawhorn violated Army Equal Opportunity (EO) policy. Your December 8, Letter of Concern, however, acknowledges that Chaplain Lawhorn did not violate AR 600-20 and Army EO policy, and you withdrew those allegations. While withdrawing those allegations was certainly appropriate, it is nonetheless inappropriate that you continue to allege Chaplain Lawhorn violated other Army regulations by expressing his religious beliefs, and that you have not withdrawn the Letter of Concern.

Under the Constitution, federal law, DODI 1300.17, Army Regulations, Army EO policy, and military case law, religious discrimination in the Army is unlawful. A Letter of Concern, even if filed locally, does not constitute fair treatment for Chaplain Lawhorn's religious beliefs, and would therefore violate AR 600-20 and Army EO policy. Moreover, a Letter of Concern, even if filed locally, or any attempt to censor, punish, or adversely treat Chaplain Lawhorn for expressing his religious beliefs violates the legal safeguards afforded by the Constitution, federal law and Army regulations.

As a result of the publicity this incident received, Members of Congress and the media continue to express interest and make inquiries. Our desire is to portray

5th RTB and the Airborne Ranger Training Brigade in a positive manner, and to explain that MAAF and the Huffington Post mischaracterized the incident.

Colonel, as you know, a Letter of Concern has the potential to adversely affect or prematurely terminate Chaplain Lawhorn's career. As the enclosed letters of support describe, Chaplain Lawhorn's service to our nation has thus far been stellar and free from blemish. A Letter of Concern would needlessly tarnish his reputation. Accordingly, we respectfully request you withdraw the Letter of Concern from Chaplain Lawhorn's Official Military Personnel File, and any other applicable personnel records. We also request an in-person meeting with you in order to resolve this issue amicably and without the need for escalation to higher echelon authority. Please let me know a time and place that is convenient for you to meet. We request the courtesy of a response by no later than December 15, 2015. I may be reached via e-mail at mberry@libertyinstitute.org, or directly at [972-941-4445](tel:972-941-4445).

Respectfully,



Michael Berry
LIBERTY INSTITUTE

Copy to:

Ronald A. Crews
CH (COL) USA Retired
Endorsing Agent,
Grace Churches International
6627 Creek Point Way
Alexandria, VA 22315