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March 29, 2006

The Honorable Donald C. Winter
Secretary of the Navy
1000 Navy Pentagon
Washington, D.C. 20350-1000

VIA FACSIMILE (703-693-1165)

Re: Constitutional Concerns Over SECNAV INSTRUCTION 1730.7C
Navy Prayer Policy for Chaplains

Dear Mr. Secretary:

According to SECNAV INSTRUCTION 1730.7C,[1] which was issued on February 21, 2006, "Other than Divine/Religious Services,[2] religious elements[3] for a command function, absent extraordinary circumstances, should be non-sectarian in nature." Interpreted broadly, this policy prohibits Navy chaplains from using sectarian language in prayers in most situations other than formal worship settings. Furthermore, the policy places the responsibility for determining what is and is not appropriate in such prayers on Navy commanders.[4]

By placing itself in the position of regulating prayer services and the content of chaplains' prayers, the U.S. Navy through this prayer policy is in violation of federal law and the First Amendment to the United States Constitution.

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[1] http://neds.daps.dla.mil/Directives/1730_7C.pdf

[2] *Id.* The Navy defines "Divine Services" as "public worship and religious services conducted afloat, in the field, or on military bases and installations by a military chaplain."

[3] *Id.* The Navy's definition of "Religious Elements" includes "prayers, invocations, reflections, meditations, benedictions, or other religious or faith-based features traditionally or customarily incorporated in command functions other than Divine or Religious Services."

[4] *Id.* "Anyone accepting a commander's invitation to provide religious elements (which include prayer, invocations, meditations and benedictions) at a command function is accountable for following the commander's guidance."

Since 1860, it has been the Navy's policy to allow chaplains to conduct public worship according to the manner and forms of their respective religious beliefs. The new policy, however, reverses more than a century of historic military tradition in favor of ecumenical theism and/or deism. Instead of showing neutrality toward religion, the policy interferes with the free exercise of religion of chaplains and servicepeople.

Furthermore, because the policy's language is unclear, it has the potential to chill religious expression, affecting religious expression on ships, in battle zones and on military bases and installations. For example, if broadly interpreted, this policy could threaten a chaplain with court-martial for leading his unit in a sectarian prayer, be it Christian, Jewish or otherwise, for a wounded or dying serviceperson. Likewise, the policy could prohibit a chaplain from leading servicepersons in prayer to a specific deity for safety in battle.

The First Amendment to the United States Constitution guarantees that *all* citizens have a fundamental right to freely exercise their religious beliefs. However, by placing the military in the untenable position of editing and censoring the prayers of chaplains, the policy unconstitutionally interferes with this fundamental right. It also interferes with a serviceperson's right to have a chaplain pray with him or her in accordance with that person's particular religious belief, whether the purpose of that prayer is for healing, safety in battle, to bless a meal, guidance or anything else.

This policy also clearly undermines the express wishes of America's Founding Fathers, U.S. Supreme Court precedent and various acts of Congress. Indeed, these authorities have strongly affirmed the fundamental rights of all Americans to freely exercise their religious beliefs according to their consciences. These protections apply to members of the military as they do to civilians. As Chief Justice Earl Warren remarked, "Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (citing Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 188 (1962)).

In *Lee v. Weisman*, 505 U.S. 577, 588 (1992), the U.S. Supreme Court ruled, "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government'" (citing *Engel v. Vitale*, 370 U.S. 421, 425 (1962)). As the Court recognized, "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Engel, supra*, at 426.

In *Lee*, the Court struck down a high school prayer policy, similar to the Navy's recent missive, which directed that all prayers in school be non-sectarian. The Court addressed the inappropriateness of such government advisement by pointing out that it unconstitutionally

"direct[s] and control[s] the content of prayers" in violation of the Establishment Clause. *Lee, supra,* at 588. The Court made clear that the "central meaning of the Religion Clauses of the First Amendment" is that "all creeds must be tolerated and none favored." *Id.* at 590.

This Navy prayer policy, which obstructs the freedom of Navy chaplains to express their sincerely held religious beliefs according to their consciences, represents the kind of state entanglement in religion that the Founders and the Court in *Lee* sought to prohibit. As the Court noted in *Engel*, "It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." *Engel, supra,* at 426.

Furthermore, while cases such as *Goldman v. Weinberger*, 475 U.S. 503 (1986) seem to suggest that the military has a legitimate and constitutional interest in limiting the religious rights of soldiers, the import of these cases has been largely overshadowed by subsequent judicial rulings and legislative action. For example, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court noted that Congress had superseded cases such as *Goldman* through the legislative process. The Court wrote that after the holding in *Goldman* that the military may prevent a Jewish soldier from wearing religious clothing, "Congress responded…by prescribing that 'a member of the armed forces may wear an item of religious apparel while wearing the uniform.'"

Indeed, Congress' response to the perceived attacks on religious freedom in *Goldman* is not uncommon. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which restricts local and state governments from interfering with the religious rights of persons while on government property. Similarly, and more pertinent to the Navy prayer policy at issue, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993. In enacting this statute, Congress made a strong and resolute policy judgment that religious freedom is one of the most cherished and necessary constitutional freedoms protected by the United States Constitution. Under RFRA, any federal government action that interferes with the sincere religious beliefs of individuals must be struck down unless it is the least restrictive means of furthering a compelling governmental interest. In affirming the protections afforded by this statute, the Supreme Court ruled in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006), "Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'"

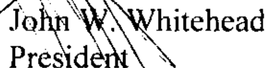
However, the Navy's prayer policy runs contrary to the Court's ruling in *Gonzales* by overtly and substantially interfering with the right of Navy chaplains and servicepeople to freely exercise their religious beliefs. Under this policy, chaplains are forbidden from expressing specific tenets of their faith, and consequently, individual servicemen and women are prohibited from affirming those tenets with the chaplain and others. For example, the language of this

policy seems to deny a soldier the right to complete a full and complete religious conversion in a battle zone or the ability of a religiously affiliated chaplain to pray at a funeral at sea in a way that honors the deceased serviceperson's religious beliefs.

Additionally, there are much less restrictive means available for the military to remain neutral in matters of religion, the most obvious of which is to simply detach itself from issues dealing with religion altogether. The Navy must remain neutral by allowing chaplains of various faiths to freely and openly present their religious points of view on a free and equal basis. Whatever a proper Navy prayer policy would require, it certainly should not, as this policy does, discriminate against religion by censoring all sectarian references. In fact, as discussed above, to do so is a blatant violation of the Religion Clauses of the First Amendment and RFRA.

In conclusion, the Navy should take immediate steps toward restoring the religious rights of Navy chaplains and servicepeople, thereby creating an environment that is neutral toward religion. To satisfy this aim, any policy the Navy adopts must sincerely affirm the right of all individuals in the Navy to freely choose their own words of faith during prayer.

Sincerely yours.



John W. Whitehead
President

cc: The Honorable George W. Bush
The Honorable Duncan Hunter, Chair, House Armed Services Committee
The Honorable Ike Skelton, Ranking Member, House Armed Services Committee
U.S. Attorney General Alberto Gonzales
The Honorable Donald Rumsfeld Secretary of Defense
Rear Admiral Louis V. Iasiello, Chief of Navy Chaplains