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A Case Law Review for U.S. Military on Religious Exemptions for Vaccine Mandates

U.S. military members have the right to pursue a religious exemption for a vaccine through a process that includes input from their commander, chaplain, medical provider and legal advisors — and in most cases, the law has upheld that right.

By [Pam Long](#)

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With an unprecedented number of service members in all branches seeking religious exemptions to the military's mandate of a [fast-tracked](#) COVID vaccine using controversial [mRNA technology](#) and [lacking long-term safety data](#), it is judicious for service members and their legal advisors, chaplains and commanders to understand legal precedent in religious accommodation decisions in the U.S. Armed Forces.

As [previously reported in The Defender](#), military members have the right to pursue a religious accommodation for a vaccine through a process that includes input from their commander, chaplain, medical provider and legal advisors.

This article summarizes details of how religious exemptions are determined to be sincere and approved.

Unless otherwise hyperlinked, all of the quotations in [this article](#) are cited from “Over Your Dead Body: An Analysis on Requests for Religious Accommodations for Immunizations and Vaccinations in the United States Air Force” by Lt. Col. Christopher J. Baker, published in The Air Force Law Review, Vol. 81, 2020, pp. 1-74.

U.S. law protecting religious freedom

Service members do not surrender all [First Amendment](#) rights when joining the military, despite the doltish input of “barracks lawyers” or unsupportive friends who allege service members do not have rights and are government property.

The protections in the [Religious Freedom Restoration Act \(RFRA\) of 1993](#) ensured that the services will allow religious accommodations which have no adverse impact on military readiness, lethality, unit cohesion, and good order and discipline, so that people of faith can choose to join the military.

Legal references regarding religious accommodation that precede 1993 may not be in accordance with full religious protections of the law. For example, a citation for [Jacobson v. Massachusetts of 1905](#) as a precedent to fine people for vaccine refusal is no longer relevant because it does not include the religious protections of RFRA 1993, nor the right to refuse medical treatment in the [Nuremberg Code of 1947](#) and the medical ethics in the [Declaration of Helsinki in 1964](#).

Despite these universal medical rights, U.S. Congress and U.S. courts adhere to a tradition of judicial deference for military authorities to enact a more narrow definition of religious accommodation, connected to deity only, while civilians have broader protections which include personal beliefs, philosophical beliefs and creeds. This difference exists to support the strict order and discipline required in military missions.

The [U.S. Department of Defense Instruction \(DoDI\) 1300.17](#), “Religious Liberty in the Military Services,” utilizes the RFRA framework for the legality of any health or hygiene mandate. Commanders must prove a compelling governmental interest, and apply it in the least restrictive way if it burdens a sincere exercise of religion (p. 8):

“The RFRA provides individuals better ability to practice their religion when the federal government’s neutral laws prevent them from doing so. Under RFRA, the individual challenging a statute has the burden of showing the government’s policy ‘implicates his religious exercise’ — i.e., that ‘the relevant exercise of religion is grounded in a **sincerely held religious belief**’ — and the government’s policy substantially burdens that exercise of religion. The burden then shifts to the government to show the policy ‘(1) is in furtherance of a **compelling governmental interest**; and (2) is the **least restrictive means** of furthering that compelling governmental interest.’ RFRA provides both broad protection of the free exercise right and a broad right of action for judicial relief” (emphasis added).

In response to the current [COVID vaccine coercion](#) in the military, such as commanders withholding leave, denial of change-of-duty locations, disapprovals for schools required for promotion, removal from leadership positions and flags as non-deployable, DoDI is clear that those actions are illegal for service members who are applicants in the religious accommodation process:

“Significantly, in addition to utilizing the RFRA framework, the DoDI also states, ‘[a] Service member’s expression of such beliefs may not, in so far as practicable, be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment’ (p. 10).

“...if an applicant has an approved accommodation, he or she would be coded as having an administrative exemption to the requirement and would not be considered ‘non-deployable’” (p. 13).

If a religious accommodation is disapproved, the service member can appeal it to the Surgeon General of the appropriate branch of service. If the appeal is denied, the service member can request nonpunitive separation from the military based on the military’s inability to accommodate his or her religious beliefs.

How are religious beliefs defined?

What is a religious belief in the military?

“For purposes of the RFRA, it does not matter whether a religious belief itself is central to the religion, but only that ‘the adherent have an honest belief that the practice is important to his free exercise of religion.’ The RFRA defines ‘religious exercise’ as ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’ A ‘religious exercise’ under RFRA ‘involves “not only belief and profession but the performance of (or abstention from) physical acts” that are “engaged in for religious reasons.”’ However, conduct that is claimed to be an ‘exercise of religion’ must be based on a religious belief rather than a philosophy or way of life, and the belief must be sincerely held by the applicant” (pp. 13-14).

Case law has established authorities cannot question the centrality of beliefs or practices of faith, and inquiry is limited to whether a person sincerely holds a belief, and whether the belief is religious in nature.

Courts have ruled that religious beliefs are not limited to established or recognized religions. In [United States v. Meyers \(1996\)](#), the court adopted the following factors to consider in determining if a belief is religious and not secular:

1. Ultimate Ideas (such as life, purpose, death)
2. Metaphysical Beliefs (such as spirits, souls, forces, deity)
3. Moral or Ethical System (such as good and evil)
4. Comprehensiveness of Beliefs (such as an overreaching collection of teachings and not one single

teaching)

5. Accoutrements of Religion (such as a teacher or prophet, sacred writings, gathering places, ceremonies, clergy or ministers, organization, holidays, diet or fasting, appearance and clothing, and discipleship

In [Friedman v. Southern California Permanente Medical Group \(2002\)](#), the court applied these guidelines to distinguish between a religious belief and philosophy, and ruled that a medical employer did not discriminate based on religion by terminating an employee who was a vegan with a philosophical belief against chicken embryos in the measles-mumps-rubella vaccine and who refused the vaccine.

In [Galinsky v. Board of Education of New York \(2000\)](#), the courts distinguished between religious beliefs and personal fears of adverse reactions, and ordered the parents to vaccinate their child despite the parents' objections. While these are civilian legal cases, these precedents indicate the standards which are applied to validate religious beliefs, and suggest that avoidance of [adverse reaction](#) that could lead to death or disability may not be considered a credible religious belief.

An astonishing realization in reading case law is that vaccines are commonly referred to as safe, effective and more beneficial than prophylactic treatments. This is a judicial bias with a posture of an infallible drug for all people resulting from the civil liability immunity and protection from legal discovery that vaccine manufacturers lobbied to have in place since [National Childhood Vaccine Injury Act of 1986](#).

The [anthrax vaccine](#) harmed thousands of service members, but there is no indication or measure of that in case law. The magnitude of the harm is hidden in Congressional oversight reports and unpublicized Veterans Administration compensations.

As a consequence, vaccine risk is deemed negligible in a court of law, despite the contrary evidence in the government-run U.S. vaccine injury surveillance system, the [Vaccine Adverse Event Reporting System](#) (VAERS) database.

Both the [Bible](#) and [Qur'an](#) include scriptures that oppose many unclean, non-kosher, non-halal ingredients in vaccines: human cells from aborted fetuses; animal cells, including pigs, dogs, chickens, cows; toxic chemicals, including [formaldehyde](#), [polysorbate-80](#), [polyethylene glycol](#); and neurotoxic heavy metals including [mercury](#) and [aluminum](#).

Christians, Jews and Muslims all have valid religious beliefs against these ingredients, [despite some religious leaders who advocate in favor](#) of using vaccines with these ingredients.

The Bible teaches that the body is God's temple indwelled with the Holy Spirit and sacred, and the life of every creature is in its blood and the blood is life and sacred. The Qur'an teaches that only Allah removes afflictions. Christians who oppose abortion would be complicit in abortion if using products with aborted fetal cells.

Moreover, RFRA does not limit exercise of religion to a mainstream religion or "system of belief." Service members only have the burden to demonstrate that their belief is sincerely held and substantially burdened.

Determining sincerely held beliefs

"Questions of religious sincerity are an 'intensely fact-based inquiry.' It is not for courts to say one's religious beliefs are mistaken or insubstantial. However, '[n]either the government nor the court has to accept the defendant's mere say-so.' Determining sincerity is a factual inquiry within a trial court's authority and competence, and 'the [claimant's] "sincerity" in espousing that practice is largely a matter of individual credibility.' 'Repeatedly and in many different contexts, [the Supreme Court has] warned that courts must not presume to determine ... the plausibility of a religious claim.' 'To be certain, in evaluating sincerity a court may not question "whether the petitioner ... correctly perceived the commands of [his or her] faith.'" Nor does a court 'differentiate among bona fide faiths.' Instead, the "'narrow function ... in this context is to determine"

whether the line drawn reflects “an honest conviction” (p. 25).

An adherent’s belief would not be sincere if he or she acts in an inconsistent manner with the belief, or if he or she gains by fraudulently portraying secular beliefs as religious beliefs.

However, courts do not require religious beliefs that are perfect in observance. A person applying for a religious accommodation can have sincere beliefs, even when he or she previously participated in an act he or she later seeks an accommodation for.

An applicant can apply for an exemption to the [COVID vaccine](#), even if he or she consented to other vaccines or other pharmaceutical drugs. A person can oppose injected drugs into the blood, while accepting ingested medications or supplements.

A person can become religious at any time in his or her life — religious practice may become more important to a person with new life experiences. A person who strays from consistent observance of restrictions or holidays does not establish insincerity, nor does that person forfeit his religious rights.

These rights are important to understand in the context of an increasing number of inappropriate religious inquisitions regarding vaccine exemptions.

Page 27 of “[Over Your Dead Body](#)” states this: “The court stated, ‘[t]hough the sincerity inquiry is important, it must be handled with a light touch, or judicial shyness.’” Courts are forbidden to engage in religious inquiry, or in demanding people prove their religion, because faith believes what it cannot prove.

Requirements for clergy verification of religious beliefs have been struck down by courts. Commanders make a sincerity determination by assessing honesty and credibility. Is the applicant making a flippant request? Or has the applicant been steadfast in the face of discipline? Has the applicant demonstrated intensive study and reflection on the matter? Does the applicant have credible supporters who substantiate the religious belief?

The commander, chaplain and medical provider are not required to agree with the applicant’s beliefs. They are only required to counsel the applicant of health and career consequences of the religious accommodation.

When is a law ‘substantially burdensome?’

“A law is substantially burdensome when it places ‘significant pressure’ on an adherent to act contrary to her religious beliefs, meaning that it ‘directly coerces’ the religious adherent to conform ... her behavior. Thus, the government imposes a substantial burden when it places ‘pressure that tends to force adherents to forgo religious precepts” (p. 29, footnote).

The Armed Forces is actively engaged in widespread coercion with the COVID vaccine, with the only available vaccines under voluntary [Emergency Use Authorization](#) while being [portrayed as approved](#) by the U.S. Food and Drug Administration.

There are reports of commanders threatening service members with separation as alleged “religious extremists” for declining an [experimental](#) drug.

“An Airman asking to not receive vaccines for religious reasons has two options: (1) submit to the vaccination, in contradiction to his or her religious beliefs; or (2) request a temporary exemption. If the request is denied, that Airman is then in an even more precarious situation to choose between (1) submitting to the vaccination, again in contradiction to his or her religious beliefs; or (2) disobeying an order and rendering himself or herself susceptible to administrative actions, discipline and separation. In such cases, the government will be placing a substantial burden on such an Airman to receive a vaccine in violation of his or her religious beliefs” (p. 31).

What is the ‘compelling interest’ test?

“If the applicant meets the requirements to show there is a substantial burden on his or her sincerely held religious belief, this burden must pass the compelling interest test. To satisfy the compelling-interest requirement, the government must do more than identify ‘broadly formulated interests justifying the general applicability of government mandates.’” (page 31)

The military has a compelling interest to prevent its members from contracting or spreading disease for both rapid deployment and daily operations. However, the government must prove that it has a compelling interest to mandate a vaccine that has [not demonstrated](#) prevention or transmission of a virus.

Furthermore, the government must prove the vaccine mandate will not risk the health and fitness of the force. The director of the Centers for Disease Control and Prevention publicly stated that [herd immunity cannot be achieved](#) with the COVID vaccine, therefore natural immunity must be deemed equivalent, being similarly situated.

Targeting at-risk groups for disease prevention with effective, established prophylactic therapies must be applied in policy, which delegitimizes a force-wide vaccine mandate.

While other longstanding vaccines may be viewed by the courts as presumed effective in disease prevention, there is insufficient evidence that the fast-tracked COVID vaccines with new mRNA technology have demonstrated superior or equivalent efficacy or long-term safety compared to other therapeutics.

If the entire force is now at risk of [antibody-dependent enhancement](#) associated with mRNA vaccine animal trials, then the courts could determine the security of the nation is more compelling than the vaccine mandate.

In [Singh v. McHugh \(2015\)](#), the court ruled in favor of a religious accommodation for an observant Sikh who sought to join an ROTC program who did not cut his beard or hair and wore a turban. The Army denied the religious accommodation, citing a need for uniformity that would adversely impact cohesion, identity and heritage.

However, the Army could not cite any evidence of actual negative effect on unit cohesion, morale, good order and discipline. The Army had also allowed other Sikhs to serve with religious accommodations for hair, beards and turbans.

Additionally, the Army had made 49,000 permanent and 57,000 temporary shaving accommodations for medical reasons of service members over the years without any impact on unit cohesion and morale.

The Army emphasized that uniformity is the primary means to build a military identity. However, the court ruled that the Army’s compelling interest was undermined by the fact the Army “routinely grants soldiers exceptions to its grooming and uniform regulations.”

Further, “[w]here a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law, as applied, furthers the compelling interest” (p. 43).

This is significant for religious accommodations for the COVID vaccine as the military has routinely granted several categories and types of vaccine exemptions listed in joint [Regulation AR40-562](#). Furthermore, “the court found the Army had not shown it considered the least restrictive means of achieving its interest...” (p. 43).

Is vaccine the ‘least restrictive’ option?

“The government can only deny an RFRA accommodation if there are no less restrictive means to accomplish

the compelling governmental interest. The government also bears the burden of showing that ‘application of the burden to the person ... is the least restrictive means of furthering’ its compelling interest” (p. 46)”

With regard to vaccine exemptions in the Armed Forces, the military has the burden to provide scientific evidence that the vaccines are the least restrictive means to ensure the health of the force. This has no legal precedent. Government health officials have opined that many known prophylactic therapeutics for COVID are less effective than the vaccine, and yet also have cited contrary data-based evidence of efficacy with [breakthrough cases](#), [inability to achieve herd immunity](#), and risks of blood clots and [myocarditis](#).

In addition to the [600,000-plus adverse events](#) reported in VAERS for the COVID vaccines, [myocarditis](#) is a life-limiting risk that does not promote the health of the force, with a “poor prognosis” and “high risk of deteriorating cardiac function” according to [Nature](#).

An epidemic of myocarditis does not serve the compelling interest of preserving the lethality of the force. Several scientific sources have data showing that natural immunity is [stronger and longer lasting than vaccine response](#), with broad immune memory [lasting up to 8 months](#), antibodies lasting [up to a year](#), immunity by bone marrow plasma cells possibly for a [lifetime, with protection against variants](#), and with an [almost zero risk of reinfection in the unvaccinated](#).

Although this is medical evidence, this data could be the basis that a religious accommodation can be approved with alternatives such as therapeutics and/or naturally acquired immunity in the provisions of the least restrictive means.

The least restrictive means needs to be tailored to the applicant. A young, healthy, fit service member does not have the same increased risk of disease demonstrated in older, unhealthy persons.

“If there are other, reasonable ways to achieve those [interests] with a lesser burden on ... protected activity, [the government] may not choose the way of greater interference.” Accordingly, a decision or action may constitute the least restrictive means of furthering the government’s compelling interests if ‘no alternate forms of regulation’ would accomplish these interests without infringing on a claimant’s religious-exercise beliefs” (p. 46).

Joint Regulation AR40-562 allows vaccine exemptions with serological proof of immunity. The government must show it lacks other means of achieving its desired goal, or it must use alternatives that serve the compelling interest equally well.

As a minor tangent regarding the routine [RT-PCR testing](#) currently burdened on the unvaccinated, [Jolly v. Coughlin \(1995\)](#) decided that a policy was illegal to put a prisoner in isolation from the general population for three years for refusing a TB test containing chemicals that violated his religious beliefs, while he never developed TB in three years. Instead the government was ordered to allow the man to re-enter the general population with a non-invasive spit test and periodic checks for clinical symptoms.

Least restrictive means to immunization must recognize that vaccine status and [immune status](#) are not equal. Vaccination will not guarantee immunity. There are members who are currently serving who are not immune to diseases they were vaccinated for, yet they remain able to serve and deploy.

The DOD does not verify immunity to other diseases it vaccinates for, but instead accepts various rates of infection. Infected service members are encouraged to not report to work until they recover. Therefore, COVID policies cannot not be implemented with an unattainable policy goal of zero COVID.

Furthermore, 100% vaccination rate is not attainable as thousands of pregnant soldiers are given vaccine exemptions, and many other service members deployed worldwide have medical exemptions.

Despite the military's perception of an extreme need for uniformity, medical treatment is very individualized. For litigation purposes, a service member with a religious accommodation for a vaccine is similarly situated to a service member who did not develop immunity from a vaccine, but rather from infection, or has a medical exemption for the vaccine.

Commanders should exercise caution

Commanders have many options for COVID vaccine refusers that they could exercise under least restrictive means in accordance with exemptions permitted in AR40-562 that also benefit accession, retention and diversity goals.

Commanders can grant sanctuary to members within 180 days of retirement.

Commanders can approve temporary or administrative exemptions, then reevaluate those exemptions when the member is tasked to deploy.

The Armed Forces does retain some members who are not qualified to deploy, to include security teams and instructor pilots. Enlisted soldiers who are designated as conscientious objectors are allowed to serve in non-combat duties for the remainder of their service. Personnel Command can also reassign members to positions and locations where the vaccine is not critical to the mission.

This article intended to highlight that commanders should exercise caution in disapproving religious accommodation for vaccines, in the absence of understanding the legal requirements for disapproval.

Certainly, the military COVID vaccine mandate will be challenged in courts similar to how the experimental anthrax vaccine was challenged, with challenges posed by pending dishonorable discharges (under [Uniform Code of Military Justice Article 92](#) "Failure to Obey an Order or Regulation") and other-than-honorable discharges (if separated for religious refusal).

Service members need to be informed on the religious accommodation application criteria in the hostile command climate towards vaccine exemptions in the military.

Ultimately, Congress and the Pentagon urgently need leadership to analyze the impact on military readiness if the zero COVID goal to reduce short-term, mild illness counterbalances the long-term loss of hundreds of thousands of trained, experienced service members.

Currently [37% of service members have refused](#) the COVID vaccine and have endured months of [coercion and threats](#) from a vaccine-only strategy which recklessly exposes the entire force to an experimental drug without sufficient long-term safety data.

A responsible risk management strategy by DOD would be to retain these unvaccinated members out of necessity for a healthy control group in order to mitigate a contingency of catastrophic drug failure associated with fatal antibody-dependent enhancement.

However, DOD has demonstrated it is not capable of discerning evidence-based health policies as it implemented mask wearing, quarantines for healthy people and "social distancing."

As a protection, Congress should amend the statute in the [FY2022 National Defense Authorization Act](#) to prohibit any discharge but honorable for service members who choose not to receive the COVID-19 vaccine.

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the views of Children's Health Defense.

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Pam Long is graduate of USMA at West Point and is an Army Veteran of the Medical Service Corps.

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