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SEP 17 2014

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MEMORANDUM FOR THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

SUBJECT: Administration of Oaths

On September 8, 2014, you requested an opinion of this office concerning whether the Department of Defense may allow an individual to strike or omit the words "So help me God" from an enlistment oath under 10 U.S.C. § 502 or an oath of appointment as a military officer under 5 U.S.C. § 3331. For the reasons discussed below, I conclude that an individual taking such an oath – specifically, one opting to provide an affirmation as permitted by statute – may exclude the words "So help me God," and that the Department may not compel the individual to include those words as a condition of enlistment or officer appointment. An otherwise properly administered oath, in the form of an affirmation without the words "So help me God," is lawful and effective. This opinion reaffirms the longstanding interpretation and general practice with respect to these statutory oath requirements.

i.

You indicate that this issue arose recently when an airman refused to sign the oath under section 502 for re-enlistment unless he was permitted to strike the words "So help me God" from the oath. You also indicate that, prior to this year, the Air Force permitted individuals to strike those words from both the enlistment and officer appointment oaths. You have provided a copy of the opinion of your office that contained the legal rationale for the change in policy by the Air Force earlier this year, OpJAGAF 2014/1 (Feb. 26, 2014).

In preparing this opinion, this office consulted with senior legal leadership of the other Services. We found that the Army, the Navy and the Marine Corps have long interpreted section 502 as providing those who choose to provide an affirmation rather than an oath (as explicitly permitted in the relevant statutes) the option of excluding the words "So help me God." See AR 601-270, *Military Entrance Processing Station*, para. 6-7 (Sept. 13, 2011) (joint regulation); COMNAVCRUITCOMINST 1130.8J, *Navy Recruiting Manual – Enlisted*, para. 010203.b(5) (May 17, 2011); MCRCO 1100.1, *Marine Corps Recruiting Command Enlistment Processing Manual*, Appendix D, para. 3.e(1) (Nov. 9, 2011). The Coast Guard similarly allows those words to be omitted. In addition, we have reviewed a memorandum of the Office of Legal Counsel, Department of Justice, that is directly on point (discussed below).

ii.

The United States Supreme Court in 1961 found unconstitutional a provision in the Maryland Constitution that made "a declaration of belief in the existence of God" a qualification for public office. *Torcaso v. Watkins*, 367 U.S. 488 (1961). The Court stated, "We repeat and again affirm that neither a State nor the Federal Government can constitutionally force a person



'to profess a belief or disbelief in any religion.'" *Torcaso*, 367 U.S. at 495. The Court continued:

Neither [the Federal Government nor the States] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Further, the Court stated, "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by . . . criteria forbidden by the Constitution." More recently, a U.S. Circuit Judge, citing *Torcaso*, noted that "[a]n officer or employee of course may decline to say 'so help me God' on free exercise, anti-coercion grounds." *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (emphasis added). See also *Ferguson v. Commissioner of Internal Revenue*, 921 F.3d 588 (5th Cir. 1991) (court abused its discretion in refusing testimony of taxpayer who refused on religious grounds to swear or affirm and instead offered to testify accurately under penalty of perjury); *Nicholson v. Board of Commissioners*, 338 F. Supp. 48 (M.D. Ala. 1972) (three-judge court) (state violated First Amendment by requiring an applicant for bar admission to take an oath containing the phrase "So help me God").

Prohibiting an enlistee or appointee from striking "So help me God" from the oath raises a significant risk of violating the prohibition on religious tests in Article VI of the Constitution and the Free Exercise Clause of the First Amendment. Given that significant risk, we follow the basic legal tenet that governs when interpreting a statute that raises constitutional concerns, and look for a way to construe the statute to minimize those constitutional concerns. 2A Sutherland Statutory Construction § 45:11 (7th ed. 2014); *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (reasonable presumption that Congress did not intend an interpretation raising serious constitutional doubts). If there were no permissible interpretation of the statute that avoids significant constitutional concerns, then we would have to decide whether application of the statute is constitutionally permissible. In this instance, there is a readily available – indeed, common – interpretation of the statute itself that obviates any constitutional concerns.

Both the House Armed Services Committee and the Senate Armed Services Committee provided reports on the bill, H.R. 218, that amended section 502 in 1962. The House report discussed the addition of the words "So help me God" generally, but did not specifically address how the oath may be administered. See H.R. Rep. No. 782 at 1-8 (July 25, 1961). The Senate report, which was issued prior to enactment but more than a year after the House report, is particularly instructive. See S. Rep. No. 2063 (Sept. 18, 1962), reprinted in 1962 U.S.C.C.A.N. 2794-2798. That report squarely addressed the issue raised here. It expresses the understanding that "both the Justice Department and the Ninth Circuit Court of Appeals construe 1 U.S.C. § 1 as authority to omit the words 'So help me God' when a person chooses to affirm rather than to swear" the oath (referring to the case of *Petition of Plywacki*, 107 F. Supp. 593 (D. Haw. 1952); 205 F.2d 423 (9th Cir. 1953), in which on appeal the Department of Justice confessed error in insisting that an applicant for naturalization recite the words "So help me God" in the naturalization oath despite a conscientious objection to doing so, and the Ninth Circuit ruled for the applicant). S. Rep. No. 2063, reprinted in 1962 U.S.C.C.A.N. at 2795. The Senate report

concludes that the historical difference between an "oath" and an "affirmation," coupled with the understanding of the Justice Department and the Ninth Circuit Court of Appeals, "clears up any ambiguities which might exist as to the inclusion or omission of the words 'So help me God.'" *Id.*, reprinted in 1962 U.S.C.C.A.N. at 2795-2796.

Interpreting section 502 as allowing an individual to omit the words "So help me God" from the oath or affirmation of enlistment is consistent with the understanding of how those words would be implemented as expressed by the Senate Armed Services Committee in its report.

On September 26, 1962, the Office of Legal Counsel, Department of Justice, provided its views on enrolled bill H.R. 218. The Office of Legal Counsel summarized the House and Senate Reports discussed above and advised, "We believe that if the officers of the federal government and the National Guard who will administer the new oaths are instructed to interpret them as discussed in the Senate Committee report as described below, and to administer them accordingly, there will probably be no constitutional problem. Under this interpretation, recitation of this phrase ["So help me God"] would not be compelled." Office of Legal Counsel Memorandum, *Enrolled Bill H.R. 218, to provide that individuals enlisted into the Armed Forces of the United States shall take an oath to support and defend the Constitution of the United States* (Sept. 26, 1962) at 1. In discussing the Senate Report, the Office of Legal Counsel said, "The Senate report, No. 2063, seems to indicate that the recitation of the words, 'So help me God' by the enlistee is optional." *Id.* at 2. The Office of Legal Counsel concluded, "[t]he bill is constitutional if interpreted and applied in the light of established tradition in these matters, with the phrase 'So help me God' included, but with its recitation at the option of the individual." *Id.* at 3.

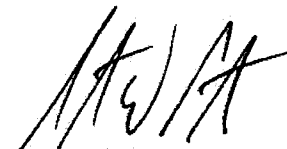
The view of this issue in the Senate report and the Office of Legal Counsel memorandum is also consistent with the view taken during the revision of what is now 28 U.S.C. § 951, Oath of clerks and deputies. The revision notes for section 951 indicate that the last sentence of its predecessor statute read, "The words 'So help me God' shall be omitted in all cases where an affirmation is admitted instead of an oath." The revision notes further state that the quoted sentence was "omitted as unnecessary because on affirmation such words would not be included" and that, as revised, section 951 would be consistent with the judicial oath found at 28 U.S.C. § 453 (which includes the words "So help me God"). Thus, there appears to be a broader understanding that those who provide an affirmation may omit the words "So help me God."

iii.

When confronted with statutes of the sort presented here, the Department is not precluded from addressing constitutional concerns in the absence of a legislative amendment or court order. The President is responsible for "tak[ing] Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it is the role of Executive Branch attorneys to interpret and apply the law to ensure its faithful execution, relying on established canons of statutory construction as appropriate, and bound ultimately by the Constitution.

In this instance, for the reasons discussed, I conclude that an individual taking an enlistment oath or officer appointment oath in the form of an affirmation may exclude the words "So help me God," and that the Department may not compel the individual to include those words as a condition of enlistment or appointment. An otherwise properly administered oath, in the form of an affirmation without the words "So help me God," is lawful and effective.

In accordance with 10 U.S.C. § 140 and DoD Directive 5145.01, this opinion is controlling within the Department of Defense. Accordingly, OpJAGAF 2014/1 is superseded and should be withdrawn. The Department of the Air Force is to administer oaths in a manner consistent with this opinion, which will bring it in line with the existing practices of the other Services.



Stephen W. Preston

cc:
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