CULTURE WARS

THE CLASH BETWEEN RELIGION AND THE RIGHTS OF SAME-SEX MEMBERS IN THE UNITED STATES AIR FORCE

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In kinetic wars, the Air Force has weapon systems at its disposal. In culture wars, we have the law. We must use it correctly.

The Air Force is used to fighting kinetic wars. We're pretty good at it. We're maybe not so good, however, at culture wars. The most recent example of this is the April 2018 decision to reverse action against Colonel Leland Bohannon for his refusal, on religious grounds, to sign a certificate of appreciation for the spouse of a retiring member of his command.

Colonel Bohannon's reason? The spouse was the same sex as the retiree. In effectively endorsing Colonel Bohannon's action, this decision ran counter to the Air Force's own instruction and controlling case law, and puts Air Force commanders and legal practitioners in a difficult position for future cases. Recognizing no one can put the proverbial toothpaste back in the tube, my goal in writing this article is to articulate the hope that this case won't be used as precedent for wholesale legitimization of "religious freedom" as a stalking horse for discrimination that would otherwise be unlawful. In kinetic wars, the Air Force has weapon systems at its disposal. In culture wars, we have the law. We must use it correctly.

WHAT HAPPENED WAS…

The media accounts of the events surrounding Colonel Bohannon's decision not to sign the certificate of appreciation for his retiring noncommissioned officer's (NCO) spouse aren't clear. After consulting several sources, this is my understanding of what happened.

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A few hours before the retirement ceremony at issue, Colonel Bohannon was presented with the spouse appreciation certificate for signature. Colonel Bohannon considered his signature on the certificate would be an endorsement of same-sex marriage in opposition to his Christian beliefs. As Commander of the Air Force Inspection Agency, Colonel

Bohannon's immediate superior was The Inspector General, U.S. Air Force. He called the Deputy Inspector General and informed him of his decision not to sign the certificate. The Deputy Inspector General asked whether Colonel Bohannon would sign if he were ordered to do so. Colonel Bohannon replied he would not. The Deputy Inspector General then said he would sign the certificate in Colonel Bohannon's stead.

All this happened on such short notice that the Deputy Inspector General was unable to sign a certificate and transmit it in time. So, at the ceremony—which Colonel Bohannon did not attend—the retiring NCO's spouse received a certificate without anyone's signature.

At some point, Colonel Bohannon sought advice from a chaplain, who advised him to request a religious accommodation under **Department of Defense Instruction (DoDI) 1300.17**. Colonel Bohannon did so, but after he had already decided not to sign the certificate and had informed the Deputy Inspector General he wouldn't sign even if ordered. It's unclear what purpose the request for accommodation served other than seeking *post hoc* approval of Colonel Bohannon's decision. In any case, the accommodation request didn't reach The Inspector General until after the retirement ceremony was over. Because the request was moot, The Inspector General returned it with no action.

At some point after the ceremony, Colonel Bohannon explained to the retiree why he didn't sign the certificate. While this may have been a well-intentioned gesture, its effect was the opposite and virtually guaranteed a formal complaint.

The resulting discrimination complaint was found to be substantiated, the report noting that, while Colonel Bohannon may have been expressing his religious beliefs, he was still unlawfully discriminating against the NCO and his spouse on the basis of sexual orientation. The Inspector General suspended Colonel Bohannon from command, and issued an adverse Promotion Recommendation Form (PRF) to Colonel Bohannon's upcoming promotion board for brigadier general.

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Colonel Bohannon appealed his PRF to the Air Force Board for Correction of Military Records (AFBCMR),[1] arguing his decision was a protected expression of his religious beliefs and, accordingly, the adverse actions against him were an injustice. AFBCMR agreed and, pursuant to authority delegated by Act of Congress and Air Force Instruction (AFI) 36-2603, the Director of the Air Force Review Boards Agency granted Colonel Bohannon relief on behalf of the Secretary of the Air Force.[2] Notwithstanding these delegations, the Secretary of the Air Force has plenary authority to overturn this decision.[3] She did not, and the relief granted to Colonel Bohannon stands.[4]

Following the AFBCMR decision, the Secretary sent a letter in response to a Congressional inquiry on Colonel Bohannon's behalf. In her reply to the Member of Congress, the Secretary said, as reported in ***Air Force Times***, "the director [of the Air Force Review Board Agency] concluded Colonel Bohannon had the right to exercise his sincerely held religious beliefs and did not unlawfully discriminate when he declined to sign the certificate of appreciation for the same-sex spouse of an airman in his command," and the Air Force's duty to treat people fairly without discrimination on the basis of sexual orientation was met "by having a more senior officer sign the certificate."[5] The Secretary's letter did not mention the certificate was unsigned at the time of the ceremony. Although the letter said the decision "applied current law and policy,"[6] it did not cite any of that law or policy, or explain the legal reasoning behind the conclusions that Colonel Bohannon had a right to refuse to sign and, in doing so, did not commit an act of prohibited discrimination.

THE LAW

There are two areas of law in play here that are important for today's practitioners. First, discrimination law: specifically, is discrimination based on sexual orientation unlawful in the Air Force? Second, religious accommodation law: that is, did Colonel Bohannon have a legal right to use religion as a reason to refuse to sign the appreciation certificate? The answers are, respectively, yes and no. With all due respect to those involved, the AFBCMR decision and the Secretary's failure to overturn it were misapplications of law and policy.

SEXUAL ORIENTATION AS THE BASIS OF UNLAWFUL DISCRIMINATION

The issue of whether **Title VII of the Civil Rights Act of 1964**[7] includes sexual orientation when it condemns discrimination on the basis of "sex" has been, and will continue to be, before the courts.[8] The Supreme Court has yet to rule whether straight-up discrimination based on sexual orientation violates Title VII. No doubt the Court will eventually engage on this issue. This litigation, however, is irrelevant to Colonel Bohannon's case. That's because the Secretary of the Air Force has expressly decided **discrimination based on "sexual orientation" is unlawful** in the Air Force.[9] And before someone opines that this is based on an Obama Administration interpretation of Title VII, it is noteworthy that the Air Force Guidance Memorandum implementing this decision and its reissuance are dated after the current administration began. Accordingly, one would infer that no change is in the offing. Regardless, there's no question this was the Air Force instruction at the time of Colonel Bohannon's actions.[10]

The Secretary's conclusion that there was no discrimination because Colonel Bohannon's superior, after the retirement ceremony, replaced the unsigned spouse certificate with a signed one is unsupportable. The Secretary's instruction on the subject is written in active voice, not passive—"It is against Air Force policy for [an] Airman, military or civilian, to unlawfully discriminate against…another Airman on the basis of…sex (including…sexual orientation)."[11] The legal duty of nondiscrimination belongs to every Airman, not the "Air Force." Was Governor Orval Faubus innocent of unlawful discrimination in 1957, even though he deployed the Arkansas National Guard to prevent racial integration of Little Rock Central High School in defiance of a court order, just because President Eisenhower federalized the Guard and ordered them back to their barracks? Would anyone argue that, because the black students got to go to school, there was no "discrimination?" Do we give a pass to Alabama's then-Chief Justice Roy Moore for exceeding his lawful authority in ordering the state's probate judges to defy the **U.S. Supreme Court's *Obergefell***[12] decision legalizing same-sex marriage nationwide just because most of the probate judges ignored him? Would anyone say that gay couples in Alabama got married, so there really was no harm for which Moore was accountable?

RELIGIOUS ACCOMMODATION LAW

In ***Employment Division v. Smith***,[13] the Supreme Court held the First Amendment's Free Expression Clause[14] may not be invoked to evade the effect of a "neutral, generally applicable regulatory law."[15] Anti-discrimination regulations certainly qualify as such, and the Supreme Court's recent ***Masterpiece Cakeshop*** decision hasn't changed that.[16] The same is true with dereliction of duty and conduct unbecoming an officer under the Uniform Code of Military Justice.[17] So, when Colonel Bohannon or his surrogates talk about his "Constitutional" right for free expression that trumps everything else, they're off the mark, as a matter of law.

Any right to religious accommodation Colonel Bohannon has is rooted in statute, not the Constitution. The Religious Freedom Restoration Act (RFRA),[18] which Congress passed in response to *Employment Division v. Smith*, states:

> In general. Government shall not ***substantially burden*** a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> **Exception.** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—is in furtherance of a compelling government interest; and is the least re-

strictive means of furthering that compelling governmental interest.[19]

With RFRA, Congress has ***not*** given *carte blanche* to individuals to require the United States to demonstrate a compelling interest every time a law of general application offends someone's religious sensibilities. RFRA's strict scrutiny test is only invoked when governmental action puts a "substantial burden" on someone's exercise of religion.

"SUBSTANTIAL BURDEN"… WHAT IT IS. AND ISN'T

In the Supreme Court's famous ***Hobby Lobby*** case,[20] the Court held a Department of Health and Human Services (HHS) regulation, which mandated inclusion of contraceptive methods in the "preventive care and screenings" requirement of the Patient Protection and Affordable Care Act of 2010,[21] violated RFRA in the case of closely-held corporations whose owners objected on religious grounds. That the HHS regulation imposed a "substantial burden" was not a serious issue; the question was whether a corporation like Hobby Lobby or the other plaintiffs—as opposed to human beings—have religious beliefs that can be substantially burdened. A majority of the Court said it can, at least in the case of a closely-held corporation. Notwithstanding, the Court's majority opinion provides a clear statement of what constitutes a "substantial burden" under RFRA when we're talking about acts by others to which a protagonist objects: "… a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of *enabling or facilitating* the commission of an immoral act *by another*."[22]

"Substantial burden" comes in when someone is required to do something that "enables or facilitates" someone else to do the act which the first someone finds religiously objectionable.

This is the critical point distinguishing *Hobby Lobby* and Colonel Bohannon's actions from the more common case under RFRA, where the religious nature of the protagonist's *own actions* are in issue—either he wants to do something of religious significance that the United States says he can't do, or she wants to refrain from doing something of religious significance that the United States says she must do.[23] In cases like *Hobby Lobby*, the "substantial burden" comes in when someone is required to do something that "enables or facilitates" *someone else to do the act* which the first someone finds religiously objectionable. In the case of Colonel Bohannon's retiree, that ship had sailed—the marriage that Colonel Bohannon disapproved of was already in existence. A signature on a certificate of appreciation for his Airman's spouse no more "enabled" or "facilitated" that marriage than would the act of eating a handful of mints left over from the wedding reception.

The most we can say about Colonel Bohannon's refusal to sign the spouse appreciation certificate is it was "religiously motivated," which the Court of Appeals for the Armed Forces (CAAF) has held does not make out a *prima facie* case under RFRA requiring strict scrutiny. ***United States v. Sterling*** [24] involved a dispute between a junior enlisted Marine and her supervisor over the former's work performance. Lance Corporal Sterling thought her supervisor was "picking on" her and, in response, posted copies of a Bible verse (although not identifying it as scripture on the postings) facing outward from three places inside her work station so passers-by—in particular, her supervisor—could read them. The supervisor told Sterling to take them down. She did not. The supervisor then removed them. Sterling replaced them. These incidents, plus other disobedience, resulted in a special court-martial. During the trial, for the first time, Sterling identified the postings as scripture and claimed religious accommodation as a defense to the specifications related to the postings. She claimed the postings were free expression of her religion and cited DoDI 1300.17, which implements RFRA in the military. Lance Corporal Sterling was convicted. Her conviction and sentence were affirmed by the Navy and Marine Corps Court of Criminal Appeals. She then appealed to CAAF, asserting RFRA provided a defense to the pertinent charges.

CAAF rejected Lance Corporal Sterling's arguments, holding that Sterling did not make out a *prima facie* case for religious accommodation under RFRA and DoDI 1300.17. The court held that, on the facts presented, the government did not impose a "substantial burden" on Sterling's free exercise of religion. Key portions of the opinion follow:

> We decline Appellant's invitation to conclude that any interference at all with a religiously motivated action constitutes a substantial burden, particularly where the claimant did not bother to either inform the government that the action was religious or seek an available accommodation.[25]
>
> [N]o court interpreting RFRA has seemed that *any* interference with or limitation upon a religious conduct is substantial interference with the exercise of religion. Instead,…courts have focused on the subjective importance of the conduct to the person's religion, as well as on "whether the regulation at issue 'force[d claimants] to engage in conduct that their religion forbids or …prevents them from engaging in conduct their religion requires.'"[26]
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> [G]overnment practice that offends religious sensibilities but does not force the claimant to act contrary to her beliefs does not constitute a substantial burden.[27]

In a nutshell, *Sterling* tells us that, if an action is not identified as religiously motivated or if there's no accommodation requested, this is an open invitation for a military supervisor to conclude there has been no substantial burden placed on someone's free exercise. But even if the religious motivation is apparent and a member requests accommodation, a supervisor does not have to conduct the strict scrutiny required by RFRA and DoDI 1300.17 in the absence of a restriction that forces the member to engage personally in something forbidden by their religion or prevents them from doing something required by their faith. Put another way, offense to religious sensibility isn't enough to mandate strict scrutiny.[28]

OF SENSE AND SENSIBILITIES[29]…AND PRECEDENT

No one required Colonel Bohannon to officiate at any same-sex wedding. No one asked him to sign any marriage certificate as a witness. No one even asked him to grant his Airman leave so the Airman could get married. No objective reading of the Bohannon case reveals anything more than Colonel Bohannon's religious sensibilities were offended by signing a paper that acknowledged his Airman's already-existing marriage. Religion-based offense is not enough to legally justify an act of discrimination that's otherwise barred by Air Force instruction. Practitioners, beware: the impact of this case can be far-reaching; the AFBCMR decision and the Secretary's failure to overturn it open the door for more religious rationalization of discrimination.

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Much has been made by some that the Bohannon decision is not "judicial precedent."[30] True, but irrelevant. The AFBCMR and Secretary's decisions are ***executive*** precedent. Unless the Air Force is prepared to act arbitrarily and capriciously, which it may not lawfully do,[31] we're stuck with the Bohannon decision as a marker for all future objections to routine acts that don't require the actor to do anything contrary to religious faith but still might offend religious sensibilities. As noted by Justice Kennedy in his *Masterpiece Cakeshop* opinion, the "possibilities seem all but endless."[32] Let's take a look at just a few in the military context:

- A commander refuses, on religious grounds, to appoint a same-sex spouse as a unit's Key Spouse, notwithstanding

the spouse is the consensus best choice for the role or the only spouse willing to serve.

- The commander of a major command rejects someone as a wing commander because, for religious reasons, he objects to a same-sex spouse having the important representational role traditionally taken by a wing commander's spouse.

- An Airman assigned to the Military Personnel Flight refuses, on religious grounds, to enter a same-sex spouse into the Defense Enrollment Eligibility Reporting Systems—DEERS—database because that would constitute an endorsement of same-sex marriage.

- And perhaps the worst case scenario: for religious reasons, a commander refuses to participate in a casualty notification for an Airman killed in action because the Airman's spouse is the same sex as her dead wife.

The potential consequences of the Bohannon decision aren't limited to issues of same-sex marriage. Consider these:

- A Roman Catholic commander refuses to sign the spouse appreciation certificate for the second spouse of a Roman Catholic retiree because the retiree is divorced from her first spouse and signing the certificate would be an endorsement of the remarriage, contrary to Church doctrine.

- A commander refuses to appoint someone as a Key Spouse because the marriage was a civil one and not presided over by a clergy person, and the commander's faith only recognizes marriages performed in religious ceremonies.

Before you dismiss these potential consequences as Chicken Little rhetoric, remember how emotionally charged this issue can become. In today's climate, there is a readily-available, active advocacy for Air Force leaders to make decisions contrary to custom or policy as a way to promote religious beliefs and establish dominion over secular institutions. These advocates are no doubt emboldened by the Supreme Court's *Masterpiece Cake* decision despite the razor-narrow grounds supporting it.[33] On the other hand, others are willing to focus intense scrutiny on Colonel Bohannon and other Air Force leaders that have vocally supported him. If a commander is known to oppose same-sex marriage on religious grounds, it is possible that members of the command could tee him up at every opportunity to choose between supporting his troops and his religious sensibilities. For example, recall the case of Kentucky clerk of court Kim Davis who, in the wake of *Obergefell*, refused on religious grounds to issue marriage licenses to same-sex couples. For a while, it seemed like every gay couple in Kentucky was lined up in her office (with TV camera crew in tow), demanding a marriage license even though there were many other Kentucky clerks of court available and willing to issue the licenses.

> The outcome should not be a statement that he had a right to do what he did when every relevant legal authority says otherwise.

With the Bohannon decision, the Air Force walked into this culture war crossfire. Instead of applying "current law and policy," the Bohannon decision did the exact opposite and ignored Colonel Bob Bosler's—my Professor of Aerospace Studies at Washburn University in 1973—first rule of problem solving: if you have a can of worms, whatever you do, don't turn it into a barrel of snakes. Instead of solving one problem, the Bohannon decision created precedent for many more that may not, indeed cannot, be resolved the same way without sanctioning open season for discrimination against same-sex marriage, something forbidden by the Air Force's own instruction and contrary to the Supreme Court's declaration that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[34]

THE SOLUTION

It is possible that the Secretary of the Air Force or the Secretary of Defense could change the decision.[35] If the "Do Not Promote" PRF against Colonel Bohannon was too harsh, fine—a competent authority could perhaps substitute something more lenient, but the outcome should not be a statement that he had a right to do what he did when every relevant legal authority says otherwise. Even if the Air Force doesn't change the Bohannon decision, our leaders should make clear that it's not precedent. If a similar case comes up, it must be decided differently. It's not arbitrary or capricious if you change your mind because you've realized a prior decision was a mistake.[36] However we get there, the Air Force ought to make clear Colonel Bohannon's action is not a signpost for future decisions. This case led us down the wrong road. We need to back up and take the right one. The Air Force culture war capability needs to match its kinetic capability and that starts with correctly applying the law. And maybe it ends there, too.

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ENDNOTES

[1] U.S. Dep't of the Air Force, Instr. AFI 36-2603, Air Force Board for Correction of Military Records (AFBCMR), (18 Sep. 2017) [hereinafter AFI 36-2603].

[2] 10 U.S.C. §1552; AFI 36-2603, para. 1.2.

[3] 10 U.S.C. §8013(b) (Secretary has "authority necessary to conduct, all affairs of the Department of the Air Force…"); Bonewell v. United States, 2012 U.S. Claims LEXIS 8 (Fed. Cl. 2012) ("[T]he only official with the authority to overrule the AFBCMR's recommendation and deny plaintiff's application is…the Secretary").

[4] The Secretary of Defense also has plenary authority to overturn the Bohannon decision but, as of this writing, has not done so. *See* Schwalier v. Hagel, 776 F.3d 832, *cert. den.* 2015 LEXIS 4104 (2015) (Secretary of Defense determined Secretary of the Air Force did not have legal authority to "correct" individual's records to reflect promotion).

[5] Kyle Rempfer, *Air Force Colonel's Career Restored after Same-Sex Marriage Discrimination Incident,* A.F. Times (3 Apr. 2018), **https://www.airforcetimes.com/news/your-air-force/2018/04/03/air-force-colonels-career-restored-after-same-sex-marriage-discrimination-incident/**.

[6] *Id.*

[7] 42 U.S.C. section 2000e *et seq*.

[8] *See, e.g.,* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir., 2018) (sexual orientation discrimination is sex discrimination under Title VII when based on **employer's gender stereotypes**); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir., 2017), *cert. den.,* 2017 LEXIS 7377 (employer's **perceived gender nonconformity** of employee may be basis for sex discrimination claim); Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339 (7th Cir., 2017) (*en banc*) (holding discrimination on the basis of **sexual orientation** is itself a form of discrimination based on "sex" under Title VII). *See also* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (**harassment** based on sexual orientation violates Title VII under "hostile environment" theory).

[9] AFI 36-2706, *Equal Opportunity Program Military and Civilian,* 5 Oct 10, Incorporating Change 1, 5 Oct 11.

[10] Some of the people I've spoken with concerning this case attach significance to the view that a certificate of appreciation for a retiree's spouse is not a required action. AFI 36-3203, *Service Retirements*, para. 6.3 (18 Sep 2015), incorporating Change 1 (30 Aug 2017) ("If appropriate, the spouse of [a qualifying retiree] ***may*** be issued the certificate" (emphasis added)). The AFI goes on to specify three situations when the spouse certificate will not be issued; none of these exceptions references religious objection. As a former administrative law judge, I can tell you that when a statute or regulation says an agency "may" take an action, and then specifies the situations where the action isn't appropriate, the accepted interpretation is the agency ***must*** take the action unless one of those specified exceptions applies; otherwise, it's an invitation for the agency to act arbitrarily. See, e.g., *Gold Diggers, LLC v. Town of Berlin*, 469 F. Supp. 2d 43, 63 (D. D.C. 2007) ("may" means "must" when context permits and such interpretation is necessary to effect legislative intent). My interpretation of AFI 36-2203 is the certificate was required for this retiree's spouse. Regardless, there's no authority for the remarkable proposition that commanders may discriminate contrary to Air Force instruction as long as it's a discretionary act.

[11] AFI 36-2706, para. 1.1.1.

[12] *Obergefell v. Hodges,* 135 U.S. 2584 (2015), 2015 LEXIS 4250 (2015) (striking down state laws defining "marriage" as between a man and a woman as denying same-sex couples the fundamental right to marry, in violation of the Equal Protection Clause of the 14th Amendment).

[13] 494 U.S. 872 (1990).

[14] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…").

[15] 494 U.S. at 880-1.

[16] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm.,* 138 U.S. 1719 (2018), 2018 U.S. LEXIS 3386 (2018). In ruling in favor of a bakery owner who declined to provide a wedding cake for a gay couple, asserting his religious opposition to gay marriage, the Court had an opportunity to revisit *Employment Division v. Smith* but declined. Instead, the Court focused on the Colorado Civil Rights Commission's handling of the administrative complaint against the baker, finding the Commission's decision inconsistent with the State's obligation of neutrality when it came to religion. Slip op. at 9, 30. Specifically, the Court found that the Commission acted with "impermissible hostility" toward the owner's religion thereby denying him the "neutral and respectful consideration" of his beliefs to which he was entitled. Slip op. at 23. *See also Arlene's Flowers, Inc. v. Washington,* 138 U.S. 2671 (2018), 2018 LEXIS 3950 (2018) (case involving florist's refusal to supply flowers for a gay wedding remanded to Supreme Court of Washington for further consideration in light of *Masterpiece Cakeshop*). If *Masterpiece Cakeshop* had been decided earlier, it wouldn't have been much help in resolving the Bohannon controversy. That's because as it was a state-action case decided under the First and Fourteenth Amendments and not the Religious Freedom Restoration Act, which governs the federal government's decisions in this area (*see* fn. 14 and associated text). *Masterpiece Cakeshop* also had significant issues of artistic expression under the First Amendment's Free Speech Clause in play, as well as other decisions by the Colorado Civil Rights Commission that the Court saw as evidence of hostility toward the shop owner's religious beliefs. That said, there are lessons from *Masterpiece Cakeshop*

that are worthy of discussion in the context of the Air Force's culture war over same-sex marriage. I'll note a few near the end of this piece. The rest will have to wait for a future article.

[17] *See,* respectively, Art. 92(3), Art. 133, UCMJ; 10 U.S.C. §§982(3), 933.

[18] 42 U.S.C. § 2000bb *et seq.*

[19] 42 U.S.C. §2000bb-1 (emphasis added). Although RFRA, by its terms, applies to "government" whether federal, state, or local, the Supreme Court has held RFRA's application to state and local governments is unconstitutional. *City of Boerne v. Flores,* 521 U.S. 507 (1997).

[20] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), 2014 LEXIS 4505 (2014).

[21] 42 U.S.C. §300gg-13(a)(4).

[22] *Hobby Lobby,* 2014 LEXIS at 70 (emphasis added).

[23] For example, the facts of *Employment Division v. Smith*, which prompted RFRA: Smith **herself** used peyote in violation of state law and her employment contract. *See also United States v. Vasquez-Ramos* 531 F.3d 997 (9th Cir. 2008), *cert. denied*, 555 U.S. 1154 (2009) (U.S. had compelling interest to regulate possession of eagle parts and feathers **by defendant** notwithstanding removal of bald eagle from endangered species list); *Watson v. Boyajian*, 403 F.3d 1 (1st Cir., 2005) (bankruptcy debtors argued RFRA required trustee to approve payments of parochial school tuition from **debtors'** disposable income); *Klingenschmitt v. United States*, 119 Fed. Cl. 163 (2014), *aff'd* 2015 LEXIS 22032 (Fed. Cir. 2015), *cert. denied,* 137 U.S. 93 (2016), 2016 LEXIS 5084 (2016) (former Navy chaplain argued poor fitness report violated RFRA because it was based on **chaplain's statements** during services), and many more.

[24] 75 M.J. 407 (CAAF, 2016).

[25] 75 M.J. at 415.

[26] *Id.* at 417 (emphasis original; citations omitted).

[27] *Id.* at 418.

[28] Space limitations and a desire to focus on the "substantial burden" issue deter me from addressing the legal significance of Colonel Bohannon's attempt to request an accommodation. Suffice to say his failure to timely use the process set out on DoDI 1300.17 and his express determination to disregard any decision that went against him do not help his arguments.

[29] Apologies to Jane Austin.

[30] Rempfer, *supra* note 5.

[31] *Hensley v. United States,* 2018 U.S. Dist. LEXIS 29024 (2018) ("decisions by boards for correction of military records are typically reviewed under 'an unusually deferential' application of the arbitrary or capricious standard," *quoting Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989).

[32] *Masterpiece Cakeshop*, *supra* note 16, slip op. at 9.

[33] *Supra* note 16.

[34] *Id.,* slip op. at 18.

[35] *Supra* note 4.

[36] *See, e.g., American Training Services, Inc., v. Veterans Admin.,* 434 F.Supp. 988 (D. N.J. 1977) (Veterans Administration may change its interpretation of a statute).