

Paul Clement, On Unfamiliar Ground, Makes Religious Freedom Case in Military Court

Dispute over U.S. Marine's posting of Bible-inspired text in her work space tests religious freedom law in the military.

Zoe Tillman , The National Law Journal

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Bancroft partner Paul Clement has argued more than 80 cases in the U.S. Supreme Court, and dozens of cases in federal appeals court across the country. But on Wednesday he found himself on new turf: the U.S. Court of Appeals for the Armed Forces.

It was the first time Clement argued in the military's highest court of appeals.

His pro bono client, U.S. Marine Corps Lance Corporal Monifa Sterling, was court-martialed after disobeying a commanding officer's order to remove three pieces of paper posted around her workspace that featured Bible-inspired text. Sterling claimed her religious rights were violated.

It was a new forum, but Clement was no stranger to the subject matter. He has argued some of the most significant religious freedom cases to reach the Supreme Court in recent years, including *Hobby Lobby v. Burwell*, in which the court ruled, 5-4, that the Affordable Care Act's contraception mandate violated the religious rights of corporate owners. Last month, he argued in *Zubik v. Burwell* on behalf of religious nonprofits challenging the mandate.

In an interview with The National Law Journal after arguments, Clement said he had some experience with the military justice system from his time in the U.S. Office of the Solicitor General, but still faced a learning curve. Members of Sterling's legal team with military experience helped prep Clement on the procedural "quirks" and different language of the military justice system, he said.

It's a different community than Clement is used to. He knows the Supreme Court justices' backgrounds and personalities. He said that when he asks lawyers about the judges on a federal or state court he's preparing to argue in, there's usually discussion of which president or governor appointed them.

This time, the conversation turned to which to arm of the military the judges served in.

"That was an interesting dynamic unique to this court," Clement said, noting that there are

differences in how justice systems operate depending on the branch.

Clement faced a five-judge panel—more than the three-judge panels in federal appeals courts, and less than en banc circuit court panels or the nine-justice (or eight, since the death of Justice Antonin Scalia) Supreme Court bench.

“It was a learning experience for us, but it was also fun to be in a collaborative system where you have a lot of lawyers and they all have their own distinct value-add,” Clement said.

First Liberty Institute, an advocacy and legal defense group, recruited Clement to Sterling’s case. First Liberty got involved after Sterling lost her appeal of the court-martial guilty finding and sentence—a rank reduction and bad-faith discharge—in the Navy-Marine Corps Court of Appeals in February 2015.

Michael Berry, First Liberty Institute’s senior counsel and director of military affairs, said they wanted Clement because of his appellate track record and experience with religious freedom cases. There was strategy at play as well. Similar to the Supreme Court, the Court of Appeals for the Armed Forces decides which cases to take. The judges only hear about five to 10 percent of cases put up for review, Berry said.

“Those are not great odds. We felt we needed to highlight, or raise the attention of the court to the importance of this case,” Berry said. “One of the ways you can do that is bringing in a very high-profile litigator like Paul Clement.”

‘Substantial burden’ tested

Sterling’s case turns on how the federal Religious Freedom Restoration Act applies to the military. It’s the same law at the heart of the *Hobby Lobby* and *Zubik* cases.

During arguments on Wednesday, the judges probed whether the order that Sterling remove the pieces of paper from her workspace placed a “substantial burden” on the exercise of her Christian faith.

Judge Scott Stucky pointed to a finding by a lower court that the text printed on the pieces of paper—“No weapon formed against me shall prosper”—may have been intended by Sterling in part to “thumb her nose” at her supervisor.

“What are commanders to do?” Stucky asked, citing the “unique” importance of obedience in the military. Clement disputed that there was a mixed motive behind Sterling’s decision to place the pieces of paper around her workspace. The text was a first-person version of the biblical quote, “No weapon that is formed against thee shall prosper.” Sterling had said that she put up three copies to symbolize the trinity.

Clement argued that the lower court misinterpreted the Religious Freedom Restoration Act in a way that left the religious rights of military service members “unprotected.” The burden on Sterling’s religion wasn’t just the order to remove the pieces of paper, he said, but that she faced a court-martial for not doing so.

The judges also focused on the fact that Sterling never requested a religious accommodation. After Sterling’s commanding officer asked her to take them down, Sterling did not. When the commanding officer removed them, Sterling replaced them. Clement said that the religious

freedom law didn't require Sterling to exhaust the accommodation process in order to claim a violation of her religious rights. He said it also wasn't clear to her that was an option.

'Garden-variety' insubordination

Brian Keller, deputy director of the appellate government division of the U.S. Navy-Marine Corps Appellate Review Activity, argued that this was a case of "garden-variety" insubordination. Sterling was not punished for her religion, he said.

The judges appeared to push back at Keller's assertion that Sterling waived a defense under the Religious Freedom Restoration Act because she initially didn't specifically invoke it by name at trial—a "magic words" standard, as Judge Kevin Ohlson referred to it. Ohlson and Chief Judge Charles "Chip Erdmann" noted that Sterling originally handled her case without legal representation, and did make references to a religious defense.

Contact Zoe Tillman at ztillman@alm.com. On Twitter: [@ZoeTillman](https://twitter.com/ZoeTillman)

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