Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy

Julie B. Kaplan

INTRODUCTION

Despite James Madison's admonition that "three pence" is too much for the government to spend on religion, the United States maintains a military chaplaincy program at an annual cost of eighty-five million dollars. According to the Second Circuit Court of Appeals, this is money well-spent: In the recent case of Katcoff v. Marsh the court stated that "the morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for our national defense rests in substantial part on the military chaplaincy, which is vital to our Army's functioning." The establishment clause, however, prohibits governmental support and control of religion, no matter how beneficent. To date, no court, including the Katcoff court, has subjected the military chaplaincy program to the rigorous scrutiny required by the establishment clause.

Although standing problems and a tradition of deference to the military have allowed the Supreme Court to avoid considering the issue, sev-
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eral Justices have cited the military chaplaincy as an example of permissi-
ble government accommodation of religion.7 In holding that the existence of the military chaplaincy does not violate the establishment clause, the Second Circuit in Katcoff explicitly focused on the free exercise interests of military personnel, concluding that the current program is a permissi-
ble means of reaching a constitutionally required end.8 The means—the chaplaincy—meets the “appropriate standard of relevancy to our national defense and reasonable necessity.”9 Applying this standard, the court upheld “the great majority of the Army’s existing chaplaincy activities.”10 Because the plaintiffs, to gain standing, formulated their case as a chal-
lenge to government use of tax money to fund the program,11 the court concentrated its assessment on the funding question. In reaching its holding that private funding could not maintain the current program, the court did not examine the feasibility of changing other elements of this program to make it conform more strictly to establishment clause principles.12

See also infra note 96 for a discussion of the principle of military necessity. Compare United States v. Burry, 36 C.M.R. 829, 831 (C.G.C.M.S. 1966) (no First Amendment right to refuse military order to cook on Sabbath) with Sherbert v. Verner 374 U.S. 398, 403 (1963) (disqualification for unemployment compensation solely because of refusal to work on Sabbath imposes unconstitutional burden on free exercise). See generally Note, Judicial Review of Constitutional Claims Against the Military, 84 COLUM. L. REV. 387 (1984) (arguing that courts should review constitutional claims against military except when political doctrine would bar review). Cf. Hirschhorn, The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights, 62 N.C.L. REV. 177, 253 (1984) (political process, not courts, should be responsible for balancing military efficacy against individual constitutional rights). These problems suggest that the more promising forum for confronting and acting upon the constitutionally problematic nature of the current military chaplaincy may be Congress.

7. Some Justices use the chaplaincy example to support other government recognitions, if not subsidies, of religion, Lynch v. Donnelly, 104 S. Ct. 1355, 1360 (1984) (public funding of military chaplaincies cited to support public funding of creche); Engel v. Vitale, 370 U.S. 421, 449 n.4 (1962) (Stewart, J., dissenting) (same, to support prayer in public school); Abington School Dist. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) (same); McCollum v. Board of Education, 333 U.S. 203, 254 (1948) (Reed, J., dissenting) (same, to support using public schools for students’ religious instruction), while other Justices use it to deny such recognition and subsidy, Abing-
ton, 374 U.S. at 296–98 (Brennan, J., concurring) (although government provisions for military chaplaincy are arguably justifiable by military depriving free exercise opportunity, providing for prayer in public schools is not justifiable by any analogous deprivation to students); see also Marsh v. Chambers, 103 S. Ct. 3330, 3346 (1983) (Brennan, J., dissenting) (restating support for military chaplaincy, but denying support for legislative chaplaincy). But see id. at 3337 & n.2 (Brennan, J., retracting his earlier endorsement of legislative chaplains in Abington concurrence).


9. Id. at 235, 237.

10. Id. at 237. Some practices of the program, however, such as advertising chaplain activities to the civilian public, DEPARTMENT OF THE ARMED SERVICES, THE CHAPLAIN FIELD MANUAL 16-5, ch. 2-19 (1977) [hereinafter cited as THE CHAPLAIN], seem neither relevant to nor reasonably necessary for military defense.

11. The plaintiffs argued that they came within the Flast v. Cohen taxpayer standing require-
ments, 392 U.S. 83 (1968) (taxpayer standing requires challenge to congressional exercise of its con-
stitutional taxing and spending power, and nexus between taxpayer status and constitutional infringement).

12. Katcoff, 755 F.2d at 235, 236. This implies that standing requirements are still an impedi-
ment to comprehensive judicial consideration of the issue.

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This Note assumes that some military chaplaincy program would be an appropriate means of protecting service persons' free exercise rights. But because military involvement with religion implicates grave establishment clause concerns, it is essential that the chaplaincy program be finely tailored to minimize the establishment offense. This Note measures the current chaplaincy program against the two central establishment clause principles: neutrality and nonentanglement. After demonstrating that the current program offends both principles, this Note proposes an alternative system that would significantly diminish these offenses.

I. THE STRUCTURE AND FUNCTIONS OF THE MILITARY CHAPLAINCY TODAY

While justified as a means of meeting service persons' free exercise needs, the military chaplaincy is also designed to encourage religion and to implement a military vision of religion that enhances secular military values such as morale, patriotism, and the national interest. This

13. See infra notes 93-94.


15. The Chaplain Field Manual specifies: "Service members should be returned to civilian life, upon the conclusion of their tour of duty, strengthened in their religious outlook and more devoted citizens." The Chaplain, supra note 10, at ch. 2-12. See id. at 2-3 (chaplain activities to encourage troops' religious interest); id. at ch. 5-15; supra note 18 (discussing of Navy Chaplains' duties); see also Department of the Army, The Reserve Components Chaplain Program 1A Pam 165-2(4) 2 (1977) [hereinafter cited as The Reserve Chaplain] (chaplains' presence, in unique, visible way, "indicates to all that religion is a part of all life. . . . Religion is not something to be compartmentalized, or reserved for some special, often irrelevant, segment of life."). The pamphlet on the Catholic chaplaincy notes that an estimated "70 to 80 percent of those [Catholics] who had been neglecting the practice of their faith return to the Mass and Sacraments during their recruit training. An amazing gift of grace . . . ." Military Vicariate, Catholic Chaplains 2 (Sept. 1984) (emphasis in original).

16. See infra note 20. The military's enthusiastic encouragement of religious activity lends support for the suspicion that the military appropriates the chaplaincy for its own secular interests. The
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design has both permitted significant military influence over religion and generated conflict between the chaplains' allegiance to religious and military interests.

A. Military Regulation of the Commissioned Chaplaincy

A chaplain's religious and military duties are both described in the Army Regulations as "those which normally pertain to the clergy profession and those which are prescribed by law, modified by the mission and distinctive conditions and circumstances of the Department of the Army." Army regulations do not specify the effect that the "distinctive conditions" and the "mission" of the Army have on religion, but the chaplaincy system is designed to promote a vision of religion that is pluralist, ecumenical, and patriotic, minimizing the distinctions within and between religious groups.

military views chaplains as leaders in "humanitarian services, and in such cultural undertakings as may contribute to the strengthening of the moral program of the unit . . . . The CHAPLAIN, supra note 10, at ch. 1-1. See supra text accompanying note 3. The Chaplain Field Manual instructs chaplains that "[t]he liaison and rapport that the chaplain is able to effect with indigenous religious groups and leaders may be of inestimable value . . . to the national interests of the United States." The CHAPLAIN, supra note 10, at ch. 4-2. It is clear that the military perceives the chaplaincy, including the secular duties, as enhancing national security. In Katcoff, this benefit implicitly added to the present program's credibility: The court asserts that a failure to satisfy a soldier's free exercise rights would "diminish morale, thereby weakening our national defense." Katcoff, 755 F.2d at 228.

18. UNITED STATES, DEPARTMENT OF THE ARMY, ARMY REGULATION § 165-20 ¶ 2-1a (1976) [hereinafter cited as ARMY REG.]. The chaplain's mission includes religious services and education, pastoral care, and "human self development" programs. Id. at ¶ 2-3. Mandatory religious duties include performance of burial services, sacraments, rites, and ordinances; performing marriages is permitted. All must conform "to the respective beliefs and conscientious practices of all concerned." 32 C.F.R. § 510.1 (1985). See also 10 U.S.C. § 3547 (1982) (Army chaplains, "when practicable," hold appropriate religious services on Sundays and perform burials). While this inquiry will focus on the status of the Army's military chaplaincy, other military service branches face similar problems. Air Force chaplains have religious duties identical to those of their Army counterparts. 10 U.S.C. § 8547 (1982). While Navy chaplains' duties are also similar, the Navy takes an even more encouraging approach to religion by "earnestly recommend[ing] to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God." 10 U.S.C. § 6031(b) (1982).

19. For example, although in civilian society there are at least three distinct Jewish movements in the United States—Orthodox, Conservative, and Reform, in the military, the three movements are merged into one. Major Marc Abromowitz, West Point's full-time Jewish Chaplain explains, "It's a military service, . . . [m]ilitary means it meets the needs of all Jews. We don't ascribe [sic] any particular denomination." N.Y. Times, Sept. 26, 1984, at B1, col. 5.

20. Chaplains are to be "qualified to provide for the free exercise of religion by all members of the Military Services . . . ." 32 C.F.R. § 65.4(a)(iii) (1985). Although chaplains cannot be required to participate in ecumenical or interfaith services when prohibited by denominational or ecclesiastical law, ARMY REG. 165-20 ¶ 2-2(b) (1976), "[a]n appreciation for and emphasis on plurality in ministry will be cultivated in every educational setting." U.S. ARMY CHAPLAIN CENTER AND SCHOOL, FORT MONMOUTH, NEW JERSEY, CHAPLAIN OFFICER BASIC PROGRAM 21 (in use in 1984) [hereinafter cited as BASIC HANDBOOK]. To accomplish this, chaplains are trained in "developing teamwork and a spirit of cooperation and unity among chaplains of diverse faith groups and denominations." U.S. ARMY CHAPLAIN CENTER AND SCHOOL, FORT MONMOUTH, NEW JERSEY, CHAPLAIN OFFICER BASIC PROGRAM 14 (in use in 1984) [hereinafter cited as BASIC INSTRUCTION]. Requiring the Director of Religious Education to use the Unified (Cooperative) Curriculum, ARMY
The government also influences religious exercise by dictating who may become a chaplain. The Department of Defense promulgates criteria for both the agencies that endorse chaplains and the applicants they endorse. Regulations require that prospective chaplains be endorsed by religious endorsing agencies, be able to meet the requirements established by military departments, and be able to provide professional staff support in the military. Finally, a chaplain must have a college degree and three years of seminary training. Aside from these “objective” endorsement criteria, applicants must be “qualified spiritually, morally, intellectually, and emotionally to serve as a chaplain of the Military Services.”

These criteria systematically exclude large sectors of various religious groups.

After entering the military, the chaplain’s work not only blurs distinctions between religions, but often merges or conflates religious and military functions. Chaplains participate in military and patriotic ceremonies.
nies which, though marked by invocations, prayers, readings and benedictions, are defined in the regulations as military exercises, not religious services. In addition, some chaplain duties are overtly secular, such as “assist[ing] the commander and staff in the integration of the principles of good moral conduct and citizenship into the training program and the total life of the command.”

The military further influences chaplain activity and allegiance by integrating the chaplain into the military chain of command. The chaplain is a uniformed, ranked officer who may not exercise command. The

“(a) To safeguard and to strengthen the forces of faith and morality of our Nation; (b) to perpetuate and to deepen the bonds of understanding and friendship of our military service; (c) to preserve our spiritual influence and interest in all members and veterans of the armed forces; (d) to uphold the Constitution of the United States; and (e) to promote justice, peace, and good will.” 36 U.S.C. §§ 311, 313 (1982) (title covers “Patriotic Societies and Observances”).

30. ARMY REG. 165-20 ¶ 2-2(f) (1976). This characterization protects the military from free exercise violations: Military personnel attend religious services voluntarily, id. at ¶ 3-4b (1977), but may be required to attend military exercises. Although chaplains are not required to take part in such ceremonies, the military’s training of chaplains to conduct portions of these ceremonies, BASIC INSTRUCTION, supra note 20, at 11, and the chaplains’ dependence on the commander, see infra text accompanying notes 37–40, encourage chaplains to participate. See infra note 78 and accompanying text.

31. The military rationalizes its appropriation of chaplain resources for secular duties, claiming: “[T]he chaplain, because of his close relationship with the soldiers in his unit, often serves as a liaison between the soldiers and their commanders, advising the latter of racial unrest, drug or alcohol abuse, and other problems affecting the morale and efficiency of the unit, and helps to find solutions.” Katoff, 755 F.2d at 228. The UCC REPORT, supra note 26, at 75, objects to using religion “to control the perennial problems generated by military life itself,” claiming it “inhibits the chaplain from focusing religion and ethics on the system . . . .”

32. THE CHAPLAIN, supra note 10, at ch. 1-2. See also ARMY REG. 165-20 ¶ 2-3, 2-4(12) (1976). The senior chaplain advises the commander and staff on moral and ethical dimensions of leadership and human self development. Id. at ¶ 2-4(2). See also THE RESERVE CHAPLAIN supra note 16, at 2 (commander may ask chaplain to teach “classes which help unit members deal with problems of identity, separation from family, personal problems, self-fulfillment, etc.”); BASIC INSTRUCTION, supra note 20, at 18 (chaplain to acquire skills “for effectively identifying and confronting unjust procedures and actions”). The military’s design for chaplain training—“to produce a comprehensive chaplaincy motivated in support of the basic mission of the Army,” ARMY REG. 165-20 ¶ 2-4(11)—may encourage chaplains to substitute secular criteria for their own criteria in judging these standards. Chaplains also contribute to crime prevention programs. THE CHAPLAIN, supra note 10, at ch. 2-2(8).

33. ARMY REG. 165-20 ¶ 2-2 (1976).

34. 10 U.S.C. §3528 (1982). Chaplains were not given ranked status until the end of World War I. Rycoft, Is the Military Chaplaincy Constitutional?, 37 CHURCH & STATE 20 (1984). All chaplains are officially addressed as “chaplain” regardless of military grade or professional title. The military grade is indicated in writing in parentheses, though religious title is not. ARMY REG. 165-20 ¶ 2-1(g) (1976).

35. 10 U.S.C. §§ 3581, 3073 (1982). The effects of the chaplain’s rank and uniform on his or her ability to minister to military personnel is controversial. The UCC REPORT, supra note 26, at 43, found that the chaplain’s officer status widens the gap between enlisted youth and the chaplains. See also UPC REPORT, infra note 73, at B-31 (calling for study on effects of chaplains’ rank and uniform on soldiers’ perception of them). Alexander de Tocqueville observed: “In democratic nations, the man who becomes an officer severs all ties . . . to civil life. . . . His true country is the army, since he owes all he has to the rank he has attained in it; he therefore follows the fortunes of the army and rises or sinks with it.” De Tocqueville, Democracy and the Army, in GARRISONS AND GOVERNMENT 59, 62 (McWilliams ed. 1967).

commanding officer has significant influence over chaplain activities. Commanding officers write the report upon which each chaplain's promotion depends, \(^{37}\) "based solely on [the chaplain's] military performance and not on his effectiveness as a cleric." \(^{38}\) Staff chaplains are responsible to the commander for chaplain related activities within the command, \(^{39}\) while commanders, in turn, are responsible for chaplain activities under their command. \(^{40}\) Finally, political and military authorities choose the Chief of Chaplains, \(^{41}\) whose responsibilities include approving chaplain applicants, overseeing resource allocation, and developing programs concerning religious and moral needs of military personnel. \(^{42}\)

The commander's stamp of approval—promotion—brings authority over subordinates and greater respect from military ranks, \(^{43}\) and, at the rank of Captain or Major, requires the chaplain to receive additional training in military doctrine and organization. \(^{44}\) Hence, the chaplain's role in the military is colored both by an incentive for advancement based on military standards of performance, and by a training program for advancement that emphasizes military concerns.

Military control over the availability of religious items and facilities also affects the chaplain's religious mission. Regulations mandate fair and equitable scheduling of chapel services between religious groups, but give general Protestant services, which appeal to a wide range of Protestants,
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priority over denominational Protestant services. Religious items are appropriate for a majority of chaplains within one of the major faith groups are authorized for purchase with appropriated (use-specific) government funds, while items that are restricted to a specific denomination’s use and governed by liturgical law can be purchased by non-appropriated (donated and use-general government) funds. Commanders, relying on staff chaplain recommendations, maintain extensive authority over how appropriated and non-appropriated funds are spent to support chaplaincy programs.

B. Auxiliary and Contract Chaplains

The majority of chaplains serving military personnel perform their ministry as commissioned officers. When chaplain coverage is inadequate, however, the Army employs auxiliary chaplains who perform duties of a “purely religious nature,” do not wear uniforms, and are individually appointed on a yearly basis. The endorsing agency must provide ecclesiastic endorsement and the Chief of Chaplains must approve each individual appointment. Commissioned chaplains, or if there are none, commanding officers, supervise these auxiliary chaplains.

If auxiliary chaplains are also unavailable, the military may contract “with a recognized religious organization or individuals on a ‘nonpersonal basis’” for the provision of religious services alone, leaving the organization to choose the individual, with the sole criterion that this person “must be a fully ordained or accredited clergyperson.” The contract chaplain system, which removes control of individual appointments from the military, leaves little opportunity for military influence upon religious exer-

45. ARMY REG. 165-20 ¶ 2-2d(1) (1976).
46. ARMY REG. 165-20 ¶¶ 4-13, 4-14 (1977).
47. The commander establishes program objectives for chaplaincy activities and allocates funds based on whether the chaplain’s budget matches these objectives. THE CHAPLAIN, supra note 10, at ch. 5-8, ¶¶ 1, 2; see also ARMY REG. 165-20 ¶ 2-4a(6) (1976) (as part of responsibility to commander, staff chaplain will “[p]repare estimates and requests of funds for religious activities”). The commander also has the power to approve the purposes for which non-appropriated, “designated” funds can be collected in chapel services or activities, ARMY REG. 230-36 ¶ 1-4f(2) (1980); and to establish, operate, and dissolve the non-appropriated chaplain’s fund, which includes the power to appoint members to chaplain fund councils, id. at ¶ 2-1b, 2-1c.
48. ARMY REG. 165-20 ¶ 2-8(4) (1976) (duties include “conducting religious services and providing private ministrations necessary to the religious welfare of individuals within the . . . command.”
50. ARMY REG. 165-20 ¶ 2-8c(6) (1976).
51. Id. at ¶ 2-8c(5).
52. Id. at ¶ 2-8a(3).
54. Id. at ¶ 2-9(2).
cise. Regulations authorize the hiring of such contract chaplains only as a last resort, however. While recognizing that civilian chaplains are effective in providing religious and spiritual support, the military rejects the idea that civilian, non-government funded chaplains could replace the current chaplaincy program. This longstanding military policy may reflect the military's desire to maintain authority over chaplains. Military authorities fear that extensive use of civilians to provide services otherwise performed by military chaplains will suggest that civilian chaplains can, in fact, replace military chaplains. Currently, the military is able to implement its view of the military chaplaincy by controlling who may be a chaplain, delineating his or her responsibilities, and requiring him or her to be part of the military command structure. Yet many of these controls are contrary to the religious beliefs of some groups, and impermissibly subordinate religious interests to military concerns.

II. RELIGIOUS VIEWS OF THE CHAPLAINCY

Religious views of the chaplain's role in the military vary. A religion's willingness or reluctance to relinquish its authority over the chaplain in the name of national security reflects the particular effects of the current chaplaincy program on that religion. Because religious views vary, the free exercise of some religions is burdened to a greater extent than is that of others. These different views also demonstrate the extent to which the current system fails to accommodate religions' independent visions of the chaplaincy program, forcing all religions to conform identically to the military's program.

55. Id. at ¶ 2-9a(1).
56. Katcoff, 582 F. Supp. at 477-78; infra note 57.
57. Katcoff, 582 F. Supp. at 477-78 (citing Declaration of Chaplain (Major General) Patrick Hessian in Opposition to Plaintiff's Motion). The military, in rejecting the replacement of existing military chaplains with auxiliary civilian chaplains, claims that smaller denominations would be unable to fund a civilian chaplaincy, and that these chaplains, not trained in military subjects, would be unable to function effectively in the field. Katcoff, 755 F.2d at 236.
59. In an Issue Paper on guidelines for utilizing contract clergy, Chaplain (LTC) Edgren based his assertion that "[e]xtensive utilization of civilians to provide services normally expected of chaplains is detrimental to the chaplaincy's interest" on the observation that "[s]uch actions merely reinforce the plaintiff's [Katcoff] argument that civilians can do the job in place of military chaplains." Edgren, 51107 Issue Paper on Contract Clergy, DACH-AMB (late 1982 or early 1983). The Second Circuit has rejected as controlling military officers' opinions on matters concerning the tension between religious freedom and military necessity. Anderson v. Laird, 466 F.2d 283, 304 (D.C. Cir. 1972), cert. denied, 403 U.S. 1076 (1972) (Leventhal, J., concurring) (conclusory opinions of military "do not suffice for the extraordinary showing of military necessity that is required for justification to override religious freedoms") (footnote omitted). But see Goldman v. Weinberger, 54 U.S.L.W. 4299, 4300 (Mar. 25, 1986) (respecting appropriate military officials' professional judgment on desirability of dress regulations that proscribe exemptions for the wearing of religious apparel).
60. This examination uses "religious views" to refer to views expressed by religious institutions. These views do not include the full range of views within a religious tradition. See infra note 65.
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To demonstrate the differential impact of the chaplaincy program on various religions, I will examine the views of three religious bodies on the program. The Jewish community is representative of religions whose goals for ministry in the armed forces render the military's program acceptable. The United Presbyterian Church (UPC) is representative of those religions that participate reluctantly, realizing that they sacrifice some religious integrity by conforming to the military's vision of religion. The Wisconsin Evangelical Lutheran Synod (WELS) is representative of groups which, finding that the chaplaincy program unacceptably contravenes their concept of a military chaplaincy, attempt to minister to military personnel outside the current program.

A. Jewish Views of the Chaplaincy

Traditional Jewish sources, acknowledging the state's authority to provide a military and the citizen's obligation to serve, do not expect the military to accommodate all of Jewish law. Jewish chaplains similarly defer to military interests and limit religious demands in light of the "welfare of the country." The Jewish Welfare Board Commission on Jewish Chaplaincy (CJC) accepts the current military chaplaincy program, stressing the need for religious guidance in the military, the challenge that ministry in the military offers to rabbis, and the chaplain's importance in

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61. Examples of other religions' views which correspond with those of the representative bodies will also be indicated. The main source of information about these views is material distributed by the religious agencies responsible for chaplains. Because the views focus on the current chaplaincy system, they are reacting to the present system, rather than proposing their ideal system. This discussion does not include religions, such as Quakers, whose principles preclude them from participating in the military, as either soldiers or chaplains, see Cadbury, Peace and War, in The Quaker Approach to Contemporary Problems 3 (J. Kavanaugh ed. 1953), or religions whose leaders often cannot meet the government's endorsement requirements, such as the Black Muslims, and hence are excluded, see Pearce, Black Muslims and the Military Chaplain, 2 Military Chaplains' Review 35, 36 (Aug. 1973) (advanced secular education not important for Muslim ministers, but Muslim education important for all members).

62. See infra notes 65-72 and accompanying text.

63. See infra notes 73-82 and accompanying text.

64. See infra notes 83-88 and accompanying text.

65. See generally L. Landman, Jewish Law in the Diaspora 144-46 (1968) (Jewish duty to serve in the military). But see Gendler, Therefore Choose Life, in Jewish Peace Fellowship, Roots of Jewish Nonviolence 7, 10 (1981) (arguing that Jewish tradition does not sanction either modern nuclear or conventional warfare).

66. Landman, supra note 65, at 145-46 (once military attack has begun, Sabbath and certain other religious commands, such as dietary laws, may be set aside; in peacetime, however, when provisions are made for Jewish soldiers to abide by rituals, they must do so); see also Deutsch, Kosher Kitchens in Military Camps, in American Reform Responsa 131 (W. Jacob ed. 1983) (military exigencies justify breaking dietary laws).

67. See Deutsch, supra note 66, at 134.


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preserving the American way of life. The CJC emphasizes the chaplain’s religious goals and extols the challenge of offering spiritual guidance to Jews of different backgrounds and convictions while not violating the rabbi’s own conscience. Despite this encouragement, from 1950 to 1969 the three major rabbinical bodies, Orthodox, Conservative, and Reform, had to require that all qualified, newly ordained rabbis serve for a limited period, if needed, as military chaplains.

B. Views of the United Presbyterian Church

Not all religious institutions agree that the military chaplaincy does not threaten religious principles. The United Presbyterian Church is critical of the current chaplaincy program, but accepts it as a necessary compromise between church and government that engenders “unresolved conflict in the church.” The military’s ability to usurp church authority over the chaplain and to undermine the chaplain’s allegiance to the church concerns the UPC. To ensure that “chaplains . . . remain loyal church members” in the face of tension between military and religious demands, the church relies on its power to revoke chaplain endorsement.

The UPC’s publications emphasize chaplains’ religious function and
ties to the endorsing institution. The application brochure describes the chaplain as an “ordained minister in uniform; 'on loan' by the Church to the Army,” and emphasizes that “it is imperative that [a] close relationship be maintained with the parent presbytery and with the Presbyterian Council.”

Administrative and counseling duties are secondary to the chaplain’s “primary calling as a servant of Jesus Christ.” The UPC strenuously objects to those features of the chaplaincy system that may undermine the chaplain’s independence, such as participation in military ceremonies. The UPC notes that such performances can be perceived as “‘blessing’ war or weapons of war.”

The UPC Report’s resolution to continue in the chaplaincy program is based primarily on practical considerations, such as lack of funds and problems of access. Its policy statement stresses, however, that “[r]eform in the structures of ministry of the government-supported chaplaincies should stress freedom from state control, insofar as possible, while maintaining access to enlisted personnel . . . .” Its recommendations call for research into the impact of the uniform and rank on pastoral effectiveness and urge that only chaplains should serve on boards that evaluate and promote chaplains. The UPC suggests that it, along with other denominations, should develop chaplain training courses covering issues such as each “denomination’s position on war, peace, and conscience, the Christian’s right and responsibility to dissent from practices or orders believed to be immoral or illegal, and the chaplain’s role as moral counselor.”

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77. Id. at 6. See also UPC REPORT, supra note 73, at B-18 (commending recent strengthening of chaplains’ religious image, role, and identification with endorsing churches in new Navy Chaplains Manual).

78. Id. at B-22-B-23, B-32 (independence also undermined by chaplain’s uniform, rank, and promotion system). The UCC REPORT, supra note 26, at 74, describes “turning the chaplain into a morale officer” as “an abuse of his or her clerical calling,” because “morale is fraught with enough ambiguities to render it a military rather than a religious function,” and warns against “the danger of . . . sacrificing faith to the fighting spirit.” Id.

79. UPC REPORT, supra note 73, at B-22. The UCC Report, supra note 26, at 91, describes such participation as “a blatant exploitation of the chaplaincy for obvious military purposes of the command . . . .”

80. UPC REPORT, supra note 73, at B-31.

81. Id. at B-31.

82. Id. at B-32-33. The UPC views its role as including the duty to keep “careful watch on the state and its secular institutions for the first signs that they are becoming inhumane or destructive of human persons or that they are creating a ‘theological rationale’ of their own.” UPC, THE PRACTICE OF HAVING MINISTERS OF OUR CHURCH SERVE AS MILITARY CHAPLAINS PAID BY THE STATE 4 (May 24, 1965).
C. Wisconsin Evangelical Lutheran Synod's Views

Since the outbreak of World War II, the Wisconsin Evangelical Lutheran Synod (WELS) has refused to recommend its ministers to the military, on the ground that pastors "would not be free to obey the direction of Christ its Head alone; but would also . . . be subject to the direction of the Government . . . ." Although WELS accepts government responsibility for military members' physical fitness, it maintains that their spiritual welfare is solely the Synod's concern: "We want our members to be loyal citizens and good soldiers, but we also pray that they remain faithful Christians and loyal soldiers of the Cross." WELS has tried to find alternate means to minister to its members in the military, including providing one or two civilian chaplains to forces overseas, referring military personnel to "contact pastors" near military installations, and sending "ministry-by-mail" literature and worship services on tape to military members. Yet the success of WELS efforts to develop alternatives to the chaplaincy program depends on contingencies that are unpredictable and outside its control. Access to members on bases depends on military cooperation; no set military policies govern such access. Contact pastors may use chapels and other military resources only when military chap-

83. Herrmann, Some Considerations on the Constitutionality of the United States Military Chaplaincy, 14 Am. U.L. Rev. 24, 33 & n.32 (1964) (citing The Conference of Presidents of the Evangelical Lutheran Joint Synod of Wisconsin and Other States, The Chaplaincy Question 2, 3 (1954) ("[T]o close an eye to Christ in order to carry out the Government's direction, to sacrifice faithfulness to Christ for loyalty to the Government's intention: these Government-fostered tendencies in the chaplaincy give birth to a religious practice that is displeasing to Christ and harmful to his Church."). Refusal to participate is based upon "scriptural principles and established Lutheran practice," which include the beliefs that the Army chaplaincy application and appointment process conflict with WELS' "doctrinal stand on the divinity of the pastoral call;" that duties imposed by governmental regulations "are in direct violation of the divine call of a Lutheran pastor;" that governmental regulation and remuneration "is not in harmony with Scripture" because it violates the principle of separation of church and state; and that the "spirit of doctrinal indifferentism pervades the regulations governing Army Chaplains and fosters unionism and panprotestantism." Affidavit of Rev. Carl H. Mischke [President and spiritual leader of WELS], Katcoff v. Marsh, 582 F. Supp. 463 (1984). WELS' belief in church-state separation rests on Martin Luther's resistance to efforts of human authorities to rule people's souls. Ruff, What Is a Lutheran?, in RELIGIONS IN AMERICA 112, 120 (L. Rosten ed. 1963).

84. The WELS Military Services Committee, A History of Spiritual Services for Military Personnel 3 (1982) [hereinafter cited as WELS History].

85. Id. at 16. As of September 1982, WELS has maintained two full-time chaplains in Europe and has referred military personnel in Asia to WELS missionaries. While the U.S Army spends about forty-three dollars yearly per member of the military community, WELS spends only approximately six dollars and eighty cents on each member per year. Id.; Katcoff, 755 F.2d at 226, 229.

86. Chaplain Renz, a civilian chaplain in Europe from 1973-1982, explained that WELS civilian chaplains in Europe were denied the access privileges they had been granted in Vietnam. WELS History, supra note 84, at 13. Censorship restrictions on periodicals during wartime may make ministry by mailings unreliable.

87. The chaplain's ability to establish a schedule of services at U.S. military chapels depends on cooperation of key military personnel. Id.
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Chaplains are not using them. Although the Synod has some control over funding and contact between home pastors and their soldier members, these contingencies may significantly limit pastoral services.

III. Establishment Clause Analysis

Because military life could deprive personnel of the opportunity to practice their religion, it seems appropriate, and indeed constitutionally required, for the government to provide some military chaplaincy program. That program, however, must be constrained by the Constitution's prohibition of the establishment of religion, which requires that government action neither intrude upon religion's proper domain nor allow religion to infringe upon government's domain. The courts have drawn two principles from this requirement of nonestablishment. The first forbids excessive government entanglement with religion. The sec-

88. Id.
90. In Katcoff, however, the plaintiffs argued against government funding of any such system. See supra note 11 and accompanying text.
92. The Court in Engel v. Vitale asserted: “[The] first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.” Engel v. Vitale, 370 U.S. 421, 431 (1962). The Court has attempted to implement Jefferson's 1802 declaration that the First Amendment's purpose was to build “a wall of separation between Church and State,” Padover, The Complete Jefferson 518-19 (1943). See, e.g., Everson v. Board of Education, 330 U.S. 1, 15-16 (1947) (establishment clause prohibits government from aiding religions, influencing person's religious beliefs, taxing to support religious activities, and participating in affairs of religious organizations); see also Engel, 370 U.S. at 429 (freedom of religion depends on separation principle); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (core rationale of Establishment Clause is to prevent fusing of governmental and religious functions); McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948) (public school arrangement which released students to attend religious classes in those schools violated separation principle).
93. The test for excessive entanglement requires that programs that bring about administrative relationships between public and religious bodies preserve “the autonomy and freedom of religious bodies while avoiding any semblance of established religion.” Walz v. Tax Comm., 397 U.S. 664, 672 (1970). Programs that require government administration, planning, or surveillance of religion engender two risks: one, the risk of government direction of churches, Lemon v. Kurtzman, 403 U.S. 602, 621-22 (1971) (state supervision of aid to parochial schools entangles government with religion, threatening government direction of churches); see also N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) (Congress did not intend N.L.R.B. to have jurisdiction over parochial school teachers because government could then intrude into religious concerns); Larson v. Valente, 456 U.S. 228, 255 (1982) (state charitable solicitation act's reporting requirements present dangers of excessive government direction of churches); Walz, 397 U.S. at 675 (emphasizing danger of continuing surveillance); and two, the risk of politicizing religion, thus creating undue political fragmentation along sectarian lines, Walz, 397 U.S. at 695 (Harlan, J.); see also Larson, 456 U.S. at 253 (statute imposing reporting requirements on some religious organizations but not others engenders risk of politicizing religion). Justice Brennan emphasizes that the dangers of entanglement threaten to subvert both religious liberty and the strength of secular government. Lemon, 403 U.S. at 649 (Brennan, J., concurring). The excessive entanglement standard also prohibits infusing religious bodies with secular power. See infra note 113 and accompanying text.
Commentators have for centuries been concerned about the corruptive influence government exerts on religion when these principles of nonentanglement and neutrality are compromised. This concern is par-

94. Justice Marshall described the central purpose of this clause as "ensuring government neutrality in matters of religion." Gillette v. United States, 401 U.S. 437, 449 (1971) (statute limiting conscientious objectors to those objecting to all wars reflects neutral secular purpose); see also Walz, 397 U.S. at 694 (Harlan, J.) ("Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion"). Justice Brennan, writing for the Court in Larson, has said: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244, 246-47 (1982) (though facially neutral, charitable solicitation statute produces non-neutral effects, implying preference for or against certain denominations). See Epperson v. Arkansas, 393 U.S. 97, 106-08 (1968) (anti-evolution statute enacts fundamentalist convictions in violation of neutrality principle); infra notes 118, 123, 124; see also Pfeffer, Freedom and or Separation: The Constitutional Dilemma of the First Amendment, 64 Minn. L. Rev. 561, 566 (1980) (antiestablishment is generally considered to prohibit "laws setting up a church, preferring one religion over another, or aiding religion"); Giannella, supra note 13, at 517-18 (explaining establishment clause principle of government neutrality in religious matters as including twin values of religious voluntarism and political non-involvement; suggesting that government neutrality in religious matters may justify or even compel aid to religion to relieve burdens upon free exercise created by government regulation). But see P. Kurland, Religion and the Law 18 (1962) (arguing for principle of strict neutrality, which would prohibit using "religion" as category to direct governmental action).

The principles of neutrality and nonentanglement are, with some variations in terminology, discussed together in both cases and scholarship. Walz v. Tax Comm., 397 U.S. 664, 676 (1970) (tax exemption reflects government's benevolent neutrality and does not excessively entangle government with religion); see also id. at 695 (Harlan, J.) (discussing need for both neutrality and nonentanglement to achieve purposes of First Amendment). Justice Brennan cites the principles of separation and neutrality as serving the purposes of the establishment clause. Marshall v. Chambers, 436 U.S. 806, 93-94 (1978) (separation and nonentanglement); see also Tilton v. Richardson, 403 U.S. 677, 677 (1971) (legislature may act regarding religion only in neutral areas where government does not sponsor, financially support, or actively involve itself with religion); Note, Toward A Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1058 (1978) (distinguishing between voluntarism and separation as two fundamental principles of religion clauses); Comment, A Non-Conflict Approach to the First Amendment Religion Clauses, 131 U. Pa. L. Rev. 1175, 1192-93 (1983) (establishment clause prohibits government advancement of and undue involvement with religion).

95. Roger Williams, the founder of Rhode Island, "believed that separation was necessary in order to protect the church from the danger of destruction which he thought inevitably flowed from control by even the best-intentioned civil authorities." Engel v. Vitale, 370 U.S. 421, 434 n.20 (1962). See also M. Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History 1-31 (1965) (establishment clause motivated as much by concerns about potential for government interference in religious affairs as fear of religious corruption of government); P. Miller, Roger Williams: His Contributions to the American Revolution 89 (1953) (discussing Williams' vision of church unyielding to politics or expediency as "only reliable measure of the Christian community"). For a relatively recent analysis of the establishment clause reflecting Williams' view, see Katz, Radiations from the Church Tax Exemption, 170 Sup. Ct. Rev. 93, 96-97 (establishment clause allows government aid to, but not infringement on, religion).

Both Madison and Jefferson interpreted the purposes of the establishment clause differently than did Williams. Madison thought that ensuring religion and government's freedom from each other would advance both of their interests by preventing a corrupting coalition and by ensuring competition between religious sects. J. Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in part in Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947). Jefferson believed that the establishment clause requires a strict separation of church and state to protect the state from religion's corrupting influence. Kurland, The Irrelevancy of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 11 (1978). Scholars
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particularly appropriate in the context of the military chaplaincy, where government’s authority creates the potential for extensive influence over religious activity. While the permissibility of the degree and nature of government involvement with religion is also colored by the principle of military necessity, this military necessity principle—though permitting some restrictions on the free exercise of religion—does not permit transforming religion to comport with military interest in discipline and uniformity. The D.C. Circuit has likewise stated that only the free exercise mandate, not secular interest, can justify maintaining religious personnel and institutions in the military, a phenomenon which is otherwise proscribed by the establishment clause.97

have noted that the Supreme Court’s analyses at first favored the Jeffersonian and Madisonian approaches, L. Tribe, American Constitutional Law § 14-4, at 818 (1978), but seem to have "veered to . . . Williams’ argument in Walz v. Tax Commission, and [have] wobbled ever since." Kurland, supra at 12 (footnote omitted). See also Comment, supra note 94, at 1192 (1983) (though modifying strict separation into accommodation approach, Court is still concerned with undue involvement of government with religion).

96. According to this principle, although military personnel are not excluded from First Amendment protection, "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Parker v. Levy, 417 U.S. 733, 758 (1974); see also Chappell v. Wallace, 462 U.S. 296, 300-04 (1983) (judiciary accords Congress great deference over military affairs). The extent to which the military necessity principle permits constitutional rights to be restricted, and the fact that the military has the authority to determine this issue, is controversial. See Note, Goldman v. Secretary of Defense: Restricting the Rights of Military Servicemembers, 34 Am. U.L. Rev. 881, 899 & nn.78-80 (1985) (Supreme Court has not consistently stated the degree of judicial deference that doctrine requires); Note, Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine, 95 Yale L.J. 992 (1986) (arguing courts should recognize former service person’s causes of action alleging intentional or constitutional torts, mediated by deference to dual concerns of limited adequacy of intramilitary remedy and military’s need for obedience). Compare Olof v. Wollughby, 345 U.S. 83, 93-94 (1953) (Congress and President have authority to set up channels to resolve grievances in the military; judiciary is not to interfere with legitimate Army matters just as the Army is not to intervene in judicial matters); Chappell, 462 U.S. at 304 (1984) (unique disciplinary needs and structure of military argue for judicial abstention from fashioning a remedy in military case); and Goldman v. Weinberger, 54 U.S.L.W. 4298 (Mar. 25, 1986) (First Amendment does not require military to accommodate wearing of religious apparel "in the face of its views that [it] would detract from uniformity sought by the dress regulations); with Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (Court maintains ultimate responsibility to decide constitutional questions in area of military affairs, but Constitution requires deference to Congress in military context) and Goldman, 54 U.S.L.W. at 4304 (Brennan, J., dissenting) (Constitution requires “rational foundation for assertions of military necessity when they interfere with the free exercise of religion”) and Anderson v. Laird, 466 F.2d 283, 295 (D.C. Cir. 1972), cert. denied, 403 U.S. 1076 (1972) (military interests may not abolish constitutional rights). See generally Hirshhorn, supra note 6; Note, supra note 6; Comment, Free Speech in the Military, 65 Marq. L. Rev. 660 (1982); Warren, The Bill of Rights in the Military, 37 N.Y.U. L. Rev. 181, 188 (1962) (military personnel should not have to sacrifice basic rights in military); Levine, The Doctrine of Military Necessity in Federal Courts, 89 Mil. L. Rev. 3, 23-24 (1980) (under doctrine of military necessity, significant governmental interest in upholding discipline may override constitutional considerations).

97. Anderson, 466 F.2d at 290 & n.36. On the issue of restraint on free exercise, see id. at 296 (free exercise test applied to military interests is no less rigorous). The Department of Defense’s recent policy statement "that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline," DEPARTMENT OF DEFENSE, DIRECTIVE ON ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN MILITARY SERVICES, No. 1300.17 (June 18, 1985), illustrates the mill-
Courts routinely apply the three-part Lemon test—which requires that government action have a secular purpose, neither advance nor inhibit religion as a primary effect, nor excessively entangle government with religion—to establishment clause cases. Although this test incorporates the neutrality and nonentanglement principles, it cannot cogently address these problems in the context of the military chaplaincy. Unlike most areas of government involvement with religion, it is the religious purpose of the chaplaincy that makes the program constitutional. But to the extent that the chaplaincy serves secular interests that do not coincide with religious interests, government is using religion for its own purposes.

Scholars have suggested that courts adopt a two-tiered approach to examine challenged military regulations. This approach, if applied to the chaplaincy program, would require extreme judicial deference to regulations necessary to the military's primary defense function, but would mandate full scrutiny of those regulations that only tangentially affect the military's ability to function. See Note, Goldman v. Secretary of Defense, supra note 96, at 917; cf. Note, Federal Judicial Review of Military Administrative Decisions, 51 Geo. Wash. L. Rev. 612, 622 (1983) (courts should review purely administrative military decisions, but not decisions closely related to military's defense function). I would argue that the chaplaincy would fall into the second tier; for its alleged function of providing for free exercise does not pertain to the military's primary defense function. Such approaches that allocate deference according to the proximity of the regulation to the military defense function provide no guidance for drawing lines, however.


In Marsh v. Chambers, 103 S. Ct. 3330, 3336 (1983), the Court considered the “unambiguous and unbroken history” of using legislative chaplains and the lack of controversy throughout this history in determining that such use did not violate the establishment clause. In contrast to legislative chaplains, however, the military chaplaincy has been controversial throughout its history. See, e.g., Abington v. Schenapp, 374 U.S. at 296 n.71 (1963) (Brennan, J., concurring) (comparing opinions throughout American history on advisability of government-financed military chaplaincy); see also Note, The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society, 59 Notre Dame L. Rev. 181, 199-200 & nn.78-77 (1983) (lack of consistent historical acceptance of chaplaincy); Herrmann, supra note 83, at 26-29 (opposition to chaplaincy has historically been from religious advocates). However, the Marsh criteria of historical status has not emerged generally as a prominent criteria for establishment clause analysis. See, e.g., Wallace v. Jaffree, 105 S. Ct. 2479, 2492 (1985) (majority opinion does not consider historical status of voluntary school prayer in rendering statute unconstitutional, instead considers whether state "intended to characterize prayer as a favored practice").

100. The Supreme Court has recognized that establishment clause principles formulated on a case-by-case basis may have limited meaning as general principles. Walz v. Tax Comm., 397 U.S. 664, 669 (1970). The military context of the chaplaincy program must be considered in developing appropriate establishment clause analysis. The Katcoff court recognizes that if the chaplaincy were evaluated without considering its military context, it would fail the Lemon test. The court, therefore, considering the context of the program, does not apply such a test. Katcoff, 755 F.2d at 232-33.

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in violation of the establishment clause.\textsuperscript{102} Further, the chaplaincy permissibly advances religion in the limited sense that, without some provisions for religious practice, much religious exercise would be inhibited in the military. The third prong of the \textit{Lemon} test is useful in evaluating the chaplaincy, however. Avoiding government entanglement with religion is just as important in the context of the military chaplaincy as in other contexts.

The unique goal of meeting military personnel’s religious needs requires establishment clause analysis both to recognize the need for government involvement with religion and to scrutinize the neutrality of that involvement and the extent to which that involvement succeeds in keeping secular and religious realms distinct.\textsuperscript{103}

A. \textit{The Entanglement Prohibition}

The nonentanglement principle prohibits government involvement with religion that creates illegitimate influence or authority of one over the other.\textsuperscript{104} In the military chaplaincy, government influence threatens the religious independence of chaplains,\textsuperscript{105} impermissibly subsuming religions’ goals within the military’s agenda.\textsuperscript{106}

Intrusive government monitoring and administration, which pervade the military chaplaincy system, violate the establishment clause entanglement prohibition by undermining religious independence.\textsuperscript{107} The government

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{103} As the text suggests, the entanglement and neutrality problems raised by the military chaplaincy program are not completely independent; at some points, neutrality may be limited by a desire to avoid entanglement or the entanglement principle may be relaxed to achieve greater neutrality. For analytic clarity, however, the two will be discussed separately.
\item \textsuperscript{104} However, “[n]o perfect or absolute separation is really possible.” \textit{Walz}, 397 U.S. at 670. \textit{See also} id. at 692 (Brennan, J., concurring) (“[w]hether Government grants or withholds the exemptions, it is going to be involved with religion”). Recognition of the limits of any nonentanglement policy has led to the “excessive entanglement” standard. \textit{Walz}, 397 U.S. at 670. \textit{See supra} note 93 (discussing this standard). The Court has recognized that in parochial schools the government can set minimum standards to further the secular purpose of quality education, \textit{Everson} v. Board of Educ., 330 U.S. 1, 18 (1947), but cannot regulate the ideological character of the schools’ instruction, \textit{Lemon} v. Kurtzman, 403 U.S. 602, 617 (1971).
\item \textsuperscript{105} The UCC REPORT, \textit{supra} note 26, at 94 concludes “[t]he military milieu is bound to transform the chaplain when the chain of command exerts the strongest controls, officer status offers attractive rewards, the military community becomes his support system, and certain dimensions of his ministerial role are repressed or penalized.”
\item \textsuperscript{106} The United Church of Christ notes that the cost to the churches of the government’s care of religion may be “the perversion of its unique mission,” UCC REPORT, \textit{supra} note 26, at 36, and that, if the church’s purpose conflicts with the Army’s mission, the purpose will be modified, \textit{id.} at 72.
\item \textsuperscript{107} \textit{Larson} v. \textit{Valente}, 456 U.S. 228, 255 (1982) (state inspection and evaluation of religious content of religious organization threatens to produce excessive government direction of churches).
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decides which religious institutions may endorse chaplaincy candidates, develops its own criteria for those chaplains, appoints the Chief of Chaplains, decides what religious "equipment" is "authorized," how funds should be allocated, and when facilities are available. The commander, a secular authority, supervises chaplain activities within his or her command. The authority of commanding officers to write chaplain promotion recommendations constitutes government control over religion and engenders a conflation of religious interests into secular military interests. Finally, government administered and required chaplain training courses orient the chaplain's focus toward the military's agenda.

The entanglement principle also prohibits government from delegating secular responsibilities to religious institutions. It is intended to prevent
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religious institutions from becoming enmeshed with political decision-making powers and government from abdicating its reasoned decision-making powers to religious institutions.113

In the military, government delegates to the chaplain a range of non- and quasi-religious functions,114 such as advising the commander on the moral basis of command policy and teaching Human Self Development courses.115 The military’s authority over promotion compounds the entanglement danger of committing military responsibilities to religious authorities. Even if chaplains were granted the authority to evaluate the morality of the command policy, they might find it difficult to make this judgment within the military structure based upon religious criteria.116 In addition, commanders have the discretion to decide whether or not to follow the advice of religious authorities on this policy.117 Therefore, the pretense of chaplain judgment may merely legitimize the moral basis of the military process.

B. The Neutrality Principle

The military chaplaincy program permits involvement between government and religion in the unique military context. While the neutrality principle generally mandates that government should avoid expressing a preference either between religion and non-religion or among various sects,118 the government’s unique ability to provide opportunities for religious exercise in the military justifies limiting the neutrality inquiry. to


114. Whether or not a function is perceived as religious may vary among denominations. Clearly, however, religions could better sustain their integrity if they themselves decided which functions were appropriately religious.

115. ARMY REG. 165-20 ¶ 2-3d (1976). The United Church of Christ task force found that assigning chaplains to teach Human Self Development courses was problematic. “The chaplain is assigned to teach a compulsory educational program run by the commander, using a secular orientation and intended to increase military efficiency, discipline, and well-being.” UCC REPORT, supra note 26, at 73. Other secular functions required of chaplains include participation in military or patriotic ceremonies, and ensuring that chaplains foster chaplain officer recruiting.

116. The UCC REPORT, supra note 26, at 47, argues, for example, that the chaplain, closely identified with the military and its mission, will not be able to make balanced judgments about the religious sincerity and moral integrity of youth claiming conscientious objection. Additionally questionable is, as the UPC asks, whether the chaplain’s voice about the morality of “structural and procedural matters affecting the entire condition of the military [can] be heard within a total institutional matrix.” UPC REPORT, supra note 73, at B-23-24.

117. Commanders may choose between different chaplains’ potentially diverging advice, which could both foster political divisiveness and constitute preference of one religion over another.

118. See Thorton v. Caldor, Inc., 105 S. Ct. 2914, 2918 (1985) (state statute providing employees with absolute right not to work on their chosen Sabbath impermissibly advances particular religious practice); Wallace v. Jaffree, 105 S. Ct. 2479, 2492 (1985) (state statute endorsing “voluntary prayer” in school characterizes prayer as favored practice, violating establishment clause neutrality principle); see also id. at 2501 (O’Connor, J., concurring).
consideration of the latter concern for neutrality among religions. The neutrality principle must guard against two dangers produced by the military context: First, the military can easily manipulate its discretionary authority as defender of the nation\textsuperscript{119} to discriminate among religious groups; and second, the program's funding and religious benefits,\textsuperscript{120} as well as its lack of program alternatives, threaten to induce religious institutions to join the chaplaincy on terms that they would otherwise find objectionable.

The susceptibility of the soldier to religious indoctrination increases the importance of government neutrality in the chaplaincy program. Uprooted from their homes, soldiers are subjected to new stresses and are particularly susceptible to religious influences.\textsuperscript{121} Here, as in public schools, the audience is captive and susceptible; state-accommodated religious activities that could appear to favor one religion over another are therefore particularly intolerable.\textsuperscript{122}

Government neutrality requires that government action neither intend\textsuperscript{123} nor effect\textsuperscript{124} the advancement or inhibition of one religion over

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  \item \textsuperscript{119} See supra notes 17, 37-40, 96 and accompanying text.
  \item \textsuperscript{120} See supra notes 16, 72, and text accompanying note 80.
  \item \textsuperscript{121} Katcoff, 755 F.2d at 227; see also The Reserve Chaplain, supra note 16, at 5 (chaplains "assist [reservists,] many of them very young adults, [to] achieve a richer and more complex life") (emphasis added). The more susceptible the soldier, the greater the effect of non-neutral action.
  \item \textsuperscript{122} If the claimants are children, avoidance of sectarianism is axiomatic because primary school children are presumably susceptible both to "religious indoctrination," Tilton v. Richardson, 403 U.S. 672, 686 (1971) (college students are less impressionable than elementary and secondary school children to religious indoctrination) and to peer pressure, Abington School Dist. v. Schempp, 374 U.S. 203, 290 (1963) (Brennan, J., concurring) (children, tending to conform, unlikely to exercise right to be exempt from school prayer). See also Wallace, 105 S. Ct. at 2503 (O'Connor, J., concurring) (distinguishing Presidential proclamations from school prayer on basis that former are received in non-coercive atmosphere and directed at adults, "who presumably are not readily susceptible to unwilling religious indoctrination"); Marsh v. Chambers, 103 S. Ct. 3330, 3335 (1983) (adult state legislators not susceptible to indoctrination).
  \item \textsuperscript{123} If the Court discerns that despite a professed secular purpose the intent of a statute is really to advance or burden religion, or that the professed purpose could be achieved without affecting religion, the challenged action violates the establishment clause. See, e.g., Larsen v. Valene, 456 U.S. 228, 246 (1982) (valid secular purpose of statute limiting draft exemptions to draftees objecting to all wars justifies potential non-neutral effects between religions); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) (local school boards' lending textbooks to all children in public and parochial schools constitutional because benefits flow to all children). Actions that harmonize with but do not favor beliefs held by some religions may be permissible. McGowan v. Maryland, 366 U.S. 486 (1961) (Frankfurter, J., concurring) (regulation that harmonizes with religious canon does not always violate establishment clause); see also Marsh v. Chambers, 103 S. Ct. at 3335-36 (considers fact that Founding Fathers perceived legislative

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others. Hence, the intent and effect of the military chaplaincy program must be to provide, to the greatest possible extent, equal opportunity for religious exercise within the constraints of military security and the entanglement prohibition. Some disparate effects may be inevitable, but they can only be justified constitutionally if necessary to further military security interests or to avoid excessive entanglement.

The coercive structure and specific regulations of the military chaplaincy program affect different religions differently. The structure inhibits the exercise of many distinctive practices in religious doctrine and belief. The disparate religious views about the chaplaincy program discussed above call the program's neutrality into question. The government coerces chaplain identification with the military by integrating chaplains into the command structure. Because religions differ in their perceptions of the military, the effects of this implicit identification with a military patriotic agenda vary. Because promotion is based on commander evaluations of chaplains, religious institutions may have minimal authority over chaplains' relationship to this agenda. Similarly, religions may differ in their acceptance of the secular duty requirements.

The military chaplaincy system likewise infringes on religions disparately by promoting a pluralist, ecumenical religious environment. The program's structure—where commanders control religious resource allocation and hence access to ministry—may encourage chaplains to participate in the favored ecumenical services. This offends the neutrality principle both by its preference for ecumenism as a religious principle and by its disparate impact—some religions are more accepting of ecumenicism than others. Other potentially discriminatory effects flow more subtly from invocation as harmonizing with tenants of some or all religions in holding practice constitutional).
the chaplaincy program's structure. For example, the integration of the chaplain into the military may dissuade those leaders of religious groups who do not want to be closely identified with the military agenda from applying.

The specific regulations themselves also discriminate among religions, create non-neutral effects,\textsuperscript{131} and provide an opportunity for secular authorities to discriminate.\textsuperscript{132} Government power to approve both the religious agencies and the applicants they endorse\textsuperscript{133} likewise grants power to differentiate between religions. The system's applicant endorsement criteria makes it harder for religions that do not encourage advanced secular education to provide qualified applicants.\textsuperscript{134} The regulations hinder the ability of some denominations more than others to maintain their distinctive practices.\textsuperscript{135} Other regulations, such as those that prefer ecumenical Protestant services,\textsuperscript{136} are themselves facially discriminatory.

IV. CONTRACT CLERGY: A PROPOSAL FOR STRUCTURAL REFORM

Only a structural change in the current system can alleviate its unconstitutional lack of neutrality and excessive entanglement. Piecemeal modifications of regulations will not significantly loosen the military's grip on religion. Clearly, no system that seeks to meet religious needs of military personnel can completely eliminate these problems. Military constraints make impossible a replication of the religious opportunities available in civil society: At a minimum, ministry schedules must be coordinated with military schedules. However, alternative systems could more fairly mediate government's potentially conflicting goals—providing for personnel's religious needs; maintaining neutrality and non-entanglement; and ensuring military security. A civilian contract clergy system could accomplish

\textsuperscript{131} Some regulations, such as prohibiting distribution of literature that attacks other religions' beliefs and practices, Army Reg. 165-20 ¶ 4-15 (1977), may, in order to protect fundamental rights of some religions, have disparate effects.

\textsuperscript{132} See supra notes 27-28, 45 and accompanying text.

\textsuperscript{133} The Armed Services Chaplains Board has the power to reject those applicants who do not possess the "degree of demonstrated aptitude for the military service and . . . the personal attributes considered requisite to a successful career as a Regular Army chaplain." ACLU Report, supra note 27, at 5-8 (citing Army Reg. 601-26(8)(f)).

\textsuperscript{134} See supra notes 26, 61.

\textsuperscript{135} While some of these regulations may simply result from limited military resources, they may also reflect the military's encouragement of homogeneity and conformity in its system. See supra notes 19-20, 45-46 and accompanying text.

\textsuperscript{136} While the facially discriminatory regulations that prefer general Protestant services over Protestant denominational ones may be justifiable in terms of maximizing efficiency in providing religious opportunity, such government action that actively prefers some religions over others is particularly offensive to establishment clause concerns. A less offensive means to accomplish the same end may be for regulations to prioritize the services that the greatest number of military personnel would attend. This would not, however, eliminate the problem of equal access for minority religions.
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this fairer mediation by cutting the tendon—the integration of the chaplain into the military command structure—which sustains the grip. Limiting military authority to that necessary for security would allow chaplains to focus on their legitimate role of providing for military personnel's religious needs.

Precedents for such a system exist in the military's current use of auxiliary and contract clergy, illustrating the potential of a civilian contract clergy system. The mechanisms through which the current system functions can be modified to accommodate a full-scale contract clergy system. As with any attempt to provide for religious opportunity in the military, both entanglement and military security concerns will constrain this provision. Nonentanglement precludes religious authority over secular military functions, as well as any secular military regulation of religious functions that is not mandated by military security. Likewise, religious participation in patriotic ceremonies should be restricted. Rough guidelines for developing a contract clergy system are outlined below.

Religious bodies should select their contract terms from a "cafeteria" plan. This would minimize problems of entanglement, because religious and military authorities would not bargain for contract terms, and would allow religions to structure their desired ministerial role in the military. The cafeteria "menu" would contain a range of ministerial roles and resource provisions with corresponding military security provisions, so that the religious institutions could choose those that conform to both the religion's desired ministry role and its willingness to withstand the corresponding security provisions. The contract would be the composite of terms that the religious personnel select.

137. See supra notes 48-56 and accompanying text.
138. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (establishment clause restricts government delegation of secular functions to religion). For example, this would preclude the current system's requirement that chaplains evaluate the spiritual and moral health of the command, including the ethical dimensions of command policies, ARMY REG. 165-20 ¶ 2-4(12) (1976), but would not preclude the military from requesting religious institutions to evaluate religious welfare to ensure that adequate ministry is provided.
139. While certain religions or clergy may claim that participation in patriotic ceremonies falls within the scope of their free exercise rights, permitting such participation leaves chaplains vulnerable to military pressure to participate.
140. The "menu" would be composed of a range of program options from which religions could choose a combination, the composite of which would become that group's "meal," or ministry program.
141. Religions should be able to choose the extent to which they want to rely on their own, or government funds; however, to maintain governmental and religious integrity, the funding term should not be tied to any other requirements. The funding provision should not go beyond compensating religions for the added costs of their ministry in the military, as compared to the civilian environment.
142. If a religious body concludes that the military terms are too intrusive, it may choose alternative terms that would warrant less intrusions, but still assure access to ministry. While such a choice may entail a sacrifice of opportunity to minister, the military should have an incentive to offer reason-
An association of religious and military representatives should work together to develop the range of contract term options. Representatives from religious bodies would initially formulate terms relevant to their ministerial goals; military representatives would initially compose corresponding components of terms necessary for providing both military access to ministry within the military community and military security. Once this definitional process is complete, religious representatives will select the terms of the contract and be responsible for the implementation of its terms. The representatives from the religious bodies would form a contract clergy association; government sources would appoint civilian personnel to oversee the administrative needs of the contract clergy system in conjunction with this association. Based upon the contract terms and criteria developed by the religious personnel and military representatives for allocation and procurement of religious resources, such personnel would allocate resources and channel requests from military units for religious services to appropriate religious bodies. These personnel would also work with civilian Coordinators of Religious Ministry who would be stationed in military units. These coordinators would facilitate the implementation of contracts by consulting with military and religious personnel.

The ministerial effectiveness of civilian clergy is demonstrated by the military’s current use of civilian clergy. Because the military currently employs a wide range of civilian personnel, it already has the means to administer civilian workers in the military context. Finally, the contract

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143. Presumably these bodies will consist of current endorsing agencies, plus other groups who are precluded under the present system, but whose applicants could meet more lenient standards.

144. The limited cooperation between religion and government envisioned in this plan will not require the continuous involvement that the excessive entanglement standard finds particularly offensive. See supra note 93.

145. To fulfill the contract terms, the representatives can provide full-time clergy or utilize local civilian religious leaders. Chaplains currently are encouraged, with commander’s consent, to contact local clergy “to assist in providing complete religious ministry for the command ....” THE CHAPLAIN, supra note 10, at ch. 2-10.

146. See infra note 152 and accompanying text.

147. The Army’s current use of civilian “religious education personnel,” ARMY REG. 165-20 ¶ 2-10 (1977), provides precedent for such coordinators. The Directors of Religious Education, who normally are not ordained clergy but who have been trained for religious education, id. at ¶¶ 2-10(4), (7), are responsible for supervising, coordinating, and administering the religious education program, under the supervision of staff chaplains, id. at ¶ 2-10(9).

148. See supra note 56 and accompanying text.

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terms can provide the military with the minimum restraints necessary to maintain its security.\footnote{150}

While the new contract clergy system may raise concerns about the means of determining denominational representation and coverage, this issue could easily be resolved. Establishment clause principles mandate a method of deciding representation that avoids secular discretionary decision-making power over religion and that accounts for the societal support for the religious denominations.\footnote{151} Religious representation based initially on the religious preferences of the military community would address both of these principles.\footnote{152} This basis should be modified in two ways: First, members of denominations should be able to supplement their allocation with their own resources; and second, because the resources required to meet an individual's religious needs may be greater if there are fewer individuals in the group, the amount allocated to the first, for example, 500 individuals of a religious denomination should be greater than the amount allocated to each subsequent member.

Ministry in a contract clergy system, freed from excessive military control, should provide greater free exercise opportunities for military personnel. Religions could more readily maintain their integrity if they could choose the forms through which they provide ministry in the military. The integrity of the military would likewise be enhanced by precluding it from appropriating religious resources to sustain its own well-being.

The establishment clause problems inherent in providing ministry in the military do not all disappear with the civilian contract clergy system. While alleviating the ideological entanglement problem of the military's grip on religion, this system would still require mechanisms to coordinate its ministry with the military. Decisions about administration, regulation, and allocation of resources must be made. Such decisions cannot be made unilaterally by religious institutions or the military, and hence must raise

\footnote{150. This contract system may raise questions of how disputes over the interpretation of contract terms are to be resolved. One option would be for the civilian personnel to act as mediators in the dispute; the second, perhaps if the mediators have failed to resolve the dispute, would be to bring the dispute to the courts. Courts have managed to apply secular, neutral principles to church property disputes, Jones v. Wolf, 443 U.S. 595 (1979), and should similarly be able to apply secular contract terms here.}

\footnote{151. Madison maintained that government should not "interfer[e] with religious belief or behavior so that each religious faction could compete on its own for adherents." Kurland, supra note 95, at 11. The Court repeated this principle in Zorach v. Clauson, 343 U.S. 306, 313 (1952): "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."}

\footnote{152. The military's concern that "in the event of war or total mobilization the denominational breakdown . . . accurately reflect that of the larger-sized Army," Katcoff, 755 F.2d at 226, can still be met with this system: Just as the Reserve Components Chaplain Program, The Reserve Chaplain, supra note 16, at 1, currently provides for total mobilization, such a program, modified to the contract clergy plan, and with quotas reflecting the general population, can still meet the need for clergy and resources in the event of total mobilization.}
entanglement and neutrality concerns. These administrative establishment concerns, however, do not compare in magnitude to the current program’s neutrality and ideological entanglement offenses.

CONCLUSION

The military’s dominance over religion in the current chaplaincy program mars the establishment clause values of neutrality and nonestablishment. Rather than respecting Jefferson’s vision of a wall separating the church and state, this dominance allows the military’s image of religion—which reflects its secular interests—to be projected through the wall, and mirrored in the chaplaincy program. The legitimate purpose of the chaplaincy program—to protect service personnel’s free exercise rights—should not be an excuse to distort these establishment clause values. While in a program such as the military chaplaincy the wall, practically speaking, may not stand tall and wide, the values this image has come to reflect should still be respected, to the greatest possible extent. The proposed contract clergy system, unlike the current program, does squarely address the fundamental purpose of the chaplaincy program—to permit military personnel to exercise their religions—while respecting the establishment clause values of neutrality and nonentanglement.

153. See supra note 92.