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Picking Up Where Katcoff Left Off: Developing a Framework for a Constitutional Military Chaplaincy

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PICKING UP WHERE *KATCOFF* LEFT OFF: DEVELOPING A FRAMEWORK FOR A CONSTITUTIONAL MILITARY CHAPLAINCY

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Abstract

Under existing precedent, portions of the military chaplaincy program are unconstitutional. Although presenting at least the appearance of the "establishment" of religion, the military chaplaincy program has never been successfully challenged on constitutional grounds—despite its history of more than two centuries. The only court that has directly confronted the issue upheld the military chaplaincy based on what appears to be a counter-intuitive application of the Free Exercise Clause. Namely, the military chaplaincy program ensures the free exercise rights of service members who, because of their military service, would otherwise be deprived of access to religious services. And indeed, when a military assignment takes a service member to rural or international locations, that military assignment may reduce or eliminate the service member's access to religious services. Consequently, the Free Exercise Clause at least allows the government to take action to alleviate those hindrances, which the government does by providing the military chaplaincy program. But those obstacles simply do not exist for many service members, for instance those assigned to non-deployable units in the urban United States who benefit from ready access to local religious resources. And with respect to these service members, the military's chaplaincy program amounts to an impermissible advancement of religion and, as such, cannot survive constitutional muster. Thus because government-sponsored (or supported) religious accommodation is permissible only when government action encumbers religious free exercise, service members' access to government religious resources must be more carefully circumscribed to those circumstances in which it is genuinely a government-imposed burden that the government's military chaplains relieves. Therefore, to meet its constitutional obligations, the Department of Defense (DoD) must make some effort to distinguish between units that are and units that are not

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subject to a government-imposed burden on its members religious free exercise.

Introduction

The U.S. military chaplaincy is, perhaps, the quintessential (or, viewed from a different perspective, the oldest continuous) example of government-sponsored religion. Pursuant to congressional command, the military selects, trains, equips, and ultimately commissions chaplain candidates, and then pays for those chaplains' operating expenses, monthly salaries, benefits, and retirement with congressional appropriations.[1] Military chaplains are required by statute to provide weekly religious services to military personnel[2]—a mandate that those chaplains meet in government-funded buildings using government-purchased hymnals to sing hymns while sitting on government-owned pews on nearly every military base in the world.[3] In short, the military chaplaincy is exactly the type of government sponsorship of religion that the First Amendment's "Congress shall make no law" Establishment Clause purports to prevent.[4]

Despite the apparent constitutional infirmity inherent to such a program, only one federal case has directly confronted this issue.[5] In 1985, two Harvard Law students, Joel Katcoff and Allen Wieder, challenged the Army chaplaincy on Establishment Clause grounds.[6] In *Katcoff v. Marsh*, the Second Circuit held that the U.S. Army chaplain corps was a constitutionally permissible exception to the Establishment Clause and that the U.S. Constitution may even require the establishment of the Army chaplaincy to ensure the free exercise rights of soldiers.[7] After losing at the appellate level and facing the possibility of paying the U.S. government's court fees, Katcoff and Wieder cut a deal with the government: in exchange for discontinuing the litigation, the U.S. government would not seek to recoup its legal fees.[8] Thus, the only federal court case that litigated the

1. *See infra* Part III.

2. *See infra* notes 104-106 and accompanying text.

3. Katcoff v. Marsh, 755 F.2d 223, 228-29 (2d Cir. 1985) (noting that the Army had more than 500 chapels and purchased religious texts and other religious accouterments).

4. U.S. CONST. amend. I.

5. *See Katcoff*, 755 F.2d at 233.

6. *Id.* at 224-25.

7. *Id.* at 237.

8. ISRAEL DRAZIN & CECIL B. CURREY, FOR GOD AND COUNTRY: THE HISTORY OF A CONSTITUTIONAL CHALLENGE TO THE ARMY CHAPLAINCY 203-05 (1995).

military's chaplaincy corps on the merits settled, never making it to the U.S. Supreme Court.

To date, there has been no further litigation on this issue, leaving critical, lingering constitutional questions. Was the *Katcoff* court correct in deeming the military chaplaincy a constitutionally permissible accommodation of service members' free exercise rights? And if so, should the expanse of this "establishment" be more narrowly tailored? More specifically, do urban military bases need military chaplains to provide for the religious needs of service members? And if they do not, is the assignment of chaplains to those installations unconstitutional?

Because most court challenges to the military chaplaincy after *Katcoff* have been on other issues, such as personnel policy in the Navy or public prayer,[9] this article will re-examine some of the issues raised but never resolved in *Katcoff*. Part I provides an overview of *Katcoff v. Marsh*. Part II examines the applicable constitutional law, statutory law, and federal case law involving the Religion Clauses and the U.S. military. Part III provides an overview of the structure and purpose of the military chaplaincy. Part IV examines potential facial attacks to the military chaplaincy as an accommodation of free exercise. Part V focuses on whether the military chaplaincy is a mandatory, permissible, or prohibited accommodation of service members' free exercise rights. And Part VI discusses several potential solutions to the constitutional issues raised in the foregoing parts.

I. Katcoff v. Marsh

Katcoff v. Marsh is the only federal appellate court case ever to address a constitutional challenge to the Army chaplaincy.[10] In the opinion, the Second Circuit began its constitutional discussion with a historical examination of the Army chaplain corps.[11] The court noted that military chaplains were similarly situated to legislative chaplains, who the Supreme Court deemed constitutional in *Marsh v. Chambers*,[12] finding specifically that both military and legislative chaplains shared a comparable history.[13]

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9. *See, e.g.*, Veitch v. England, 471 F.3d 124 (D.C. Cir. 2006); Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006).

10. *Katcoff*, 755 F.2d at 225.

11. *Id.*

12. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

13. *Katcoff*, 755 F.2d at 232. The author respectfully disagrees with the court's findings. There are critical differences between legislative and military chaplains. The Supreme Court upheld the constitutionality of legislative chaplains in *Marsh v. Chambers* due to the unbroken history of legislative chaplains, the briefness of the nonsectarian invocations, and the setting

But not content with the similarity to the legislative chaplaincy, the Second Circuit proceeded to examine the chaplaincy under the *Lemon* Test. The *Lemon* Test is a conjunctive test that is used to determine whether a government action may contravene the Establishment Clause.[14] Under that test, to uphold a government action, the action must: (1) be for a "secular legislative purpose," (2) have a primary effect that "neither advances nor inhibits religion," and (3) create a result that does not "foster excessive governmental entanglement with religion.'"[15] In a mere three sentences totaling eighty-four words of analysis, the court held that the Army chaplaincy flunked the *Lemon* Test.[16]

Despite the chaplaincy's failure to pass the *Lemon* Test, the court turned to other factors, holding the Army chaplaincy could not be considered "in a sterile vacuum."[17] Specifically the court went on to state that the

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that allowed legislatures to come and go freely. 463 U.S. at 792. Taken together, these were enough for the Supreme Court to uphold the constitutionality of legislative chaplains. *Id.* at 793-94. But none of those factors is present in the military chaplaincy. First, though the military chaplaincy has a long history, predating the U.S. Constitution, it is not an "unambiguous and unbroken" history of acceptance. *Id.* at 783; *see also* George Washington, General Orders (July 9, 1776), *in* 5 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 244 (John C. Fitzpatrick ed., 1932). For a more exhaustive history, see *In re England*, 375 F.3d 1169 (D.C. Cir. 2004), or *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997). In fact, James Madison, often referred to as the "Father of the Constitution," opposed the military chaplain corps. James Madison, Detached Memoranda, *in Madison's "Detached Memoranda,"* 1946 WM. & MARY Q. 534, 558-60 (Elizabeth Fleet, ed.) (condemning public money for military chaplains); *see also* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 511 (1991). Second, the *Chambers v. Marsh* Court placed a premium on the belief that legislative chaplains were not a "real threat" to the Establishment Clause. 463 U.S. at 791. There are relatively few legislative chaplains and the total outlay of funding for them is small. For example, in 2003 the U.S. Senate Chaplain's salary was $134,000 a year and the U.S. House Chaplain's salary was $153,200 a year. MILDRED AMER, CONG. RESEARCH SERV., RS 20427, HOUSE AND SENATE CHAPLAINS 2 (2003). In contrast, the *Katcoff* court found the Army chaplaincy cost over $80 million annually in the 1980s. 755 F.2d at 229. Additionally, the military chaplaincy employs almost 4,000 government-funded clergy. Jennifer H. Svan, *Troops: Loss Will Be Felt When Air Force Cuts Chaplain Corps by 15 Percent*, STARS & STRIPES, May 17, 2010, *available at* http://www.stripes.com/news/troops-loss-will-be-felt-when-air-force-cuts-chaplain-corps-by-15-percent-1.102746 (identifying over 4,000 chaplains across service branches without including Navy Reserve or Air National Guard chaplains). Finally, in the author's experience, military chaplains regularly give invocations at official, mandatory military events, such as change of commands, at which a service members' presence can be required.

14. *Katcoff*, 755 F.2d at 232.

15. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

16. *Id.*

17. *Id.* at 232-33.

Establishment Clause must be interpreted in light of other parts of the Constitution, namely the Free Exercise Clause and the War Powers Clause.[18] Regarding the Free Exercise Clause, the court held that the military chaplaincy was actually necessary to avert any violation of service members' free exercise rights when those service members were transplanted by government order to areas in which they could not freely practice their religion, such as rural parts of the United States and foreign countries.[19] In this light, the court held that the Army chaplaincy was not so much an Establishment Clause violation but a means to prevent a potential infringement of the Free Exercise Clause.[20]

Using the Establishment Clause as a foundation—and relying on the Supreme Court's traditional deference to military policies regarding readiness and national security under the War Powers Clause[21]—the Second Circuit developed a novel test to determine the constitutionality of the Army chaplaincy: "whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense."[22] Under that test, the court rejected the appellants' alternate proposal—a volunteer, deployable civilian clergy—concluding that the volunteer chaplain corps was not viable (or practical).[23] The court then held that the Army chaplaincy readily met the standards of the new test.[24] Taken together, the War Powers Clause, Free Exercise Clause, and the historical pedigree of the Army chaplaincy, overcame the limitations of the Establishment Clause, and the Second Circuit upheld the Army chaplaincy as facially constitutional.[25]

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18. *Id.* at 233 (discussing the War Powers Clause, U.S. CONST. art. I, § 8, cl. 11, and Free Exercise Clause, U.S. CONST. amend. I).

19. *Id.* at 234.

20. *Id.*

21. *Id.* at 233-34.

22. *Id.* at 235. As described by the Court, "[C]aution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion." *Id.* at 234-35 (citing Rostker v. Goldberg, 453 U.S. 57, 64-68 (1981)).

23. *Id.* at 236.

24. *Id.* at 236-37.

25. *Id.* at 235.

That holding did not end the case, however. The Second Circuit remanded the matter in part to determine in which areas the Army chaplaincy was perhaps not "relevant to and reasonably necessary for the conduct of our national defense"—namely, the chaplaincy's presence in D.C. and other urban population centers.[26] The court specifically directed the district court to determine the necessity of Army chaplains at military bases near these large population centers, as well as the necessity of the provision of religious services to retired military personnel.[27] But faced with the prospect of paying the U.S. government's legal fees, the appellants settled, agreeing not to continue the case in return for a waiver of the government's legal-fees claim.[28] Ultimately, that settlement left this as-applied challenge to the chaplaincy yet unanswered.[29]

II. Religion Clauses Law

An evaluation of the military chaplaincy in light of the requirements of the Religion Clauses requires an understanding of the constitutional tests courts have developed to enforce those clauses. This section provides an overview of those sometimes contradictory and conflicting tests.

A. Establishment Clause

The Establishment Clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion."[30] Despite the apparent simplicity of this mandate, the Supreme Court's holdings on this ten-word declarative sentence are in (perhaps hopeless) disarray.[31] Indeed, one legal commentator cited ten different judicial approaches to the Establishment Clause.[32] Another legal commentator observed that "[t]hese judge-made tests have proved to be of little use in predicting how actual cases before the Court will be decided, as well as to be of limited durability,

26. *Id.* at 238.

27. *Id.* at 237-38.

28. DRAZIN & CURREY, *supra* note 8, at 203-05.

29. *Id.*

30. U.S. CONST. amend. I.

31. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (noting that "our Establishment Clause jurisprudence is in hopeless disarray"); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled . . . by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions.").

32. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006).

as the test in current favor waxes and wanes even among individual Justices."[33]

The perhaps aptly named *Lemon* Test[34] is the most commonly known and—historically speaking—the most widely used test in Establishment Clause jurisprudence. This test, summarily applied in *Katcoff*, has largely fallen out of favor at the Supreme Court level and is no longer applied in many relevant cases,[35] but it has not been expressly overruled.[36] The inconsistent application of the test has prompted some expressions of frustration from the justices themselves. For example, as Justice Scalia observed: "When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely."[37] And in 2005, a dissenting Justice Breyer, perhaps despairing of any legal standard, stated: "I see no test-related substitute for the exercise of legal judgment."[38]

Because the Court's threshold question in evaluating the constitutionality of the military chaplaincy must be which Establishment Clause test to apply, and because it is not clear which Establishment Clause test the Court would ultimately invoke, the constitutionality of the chaplaincy must ultimately be considered in light of *all* of the tests. With this in mind, I review some of these tests below.

1. The Lemon *Test*

The basic aim of the *Lemon* Test is to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity."[39] The *Lemon* Test is a "strict-scrutiny-lite" test. To sustain an action, the test demands the presence of all the following factors: (1) the government action must have a "secular legislative purpose," (2) the government

33. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 11 n.38 (1998).

34. Lemon v. Kurtzman, 403 U.S. 602 (1971).

35. *See, e.g.*, *Weisman*, 505 U.S. 577; Marsh v. Chambers, 463 U.S. 783 (1983).

36. *See* Van Orden v. Perry, 545 U.S. 677, 686 (2005) (upholding a Ten Commandments display in Texas and stating that *Lemon* was "not useful" in dealing with the display).

37. Lynn S. Branham, *"The Devil Is in the Details": A Continued Dissection of the Constitutionality of Faith-Based Prison Units*, 6 AVE MARIA L. REV. 409, 412 (2009) (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment)).

38. *Van Orden*, 545 U.S. at 700 (Breyer, J., dissenting).

39. *Lemon*, 403 U.S. at 612 (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 668 (1970)).

action's "primary effect must be one that neither advances nor inhibits religion," and finally, (3) the action "must not foster excessive government entanglement with religion."[40]

To amplify these requirements, the "secular-purpose" prong evaluates the action objectively in light of the surrounding circumstances, including the action's implementation, history, and logical effects.[41] If there is more than one plausible purpose, the primary purpose must be secular.[42] Second, the "primary-effect" prong seeks to prevent government action that results in the promotion of religion either intentionally or unintentionally. To put it another way, as long as the inhibition or advancement of religion is only a secondary effect of the government action, it is permissible under this prong.[43] Finally the "excessive-entanglement" prong evaluates the duration and depth of the government's continued involvement in the action's beneficiary in order to administer the action.[44] In determining excessive entanglement, courts examine the type of institution benefitted, the nature of the government aid, and the resulting relationship between the government and religious institution.[45]

2. Endorsement Test

Justice O'Connor's Endorsement Test is one of many alternatives to the *Lemon* Test. This test is based on the premise that the fundamental social ill that the Establishment Clause seeks to cure is the government's endorsement of a religion, which, according to Justice O'Connor, "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[46] Using this view, the Endorsement Test examines whether a reasonable and informed observer would view the government's action as an endorsement of religion.[47] In evaluating such claims, the Court assumes that this reasonable and informed observer "embod[ies] a community ideal of social [and

40. Katcoff v. Marsh, 755 F.2d 223, 232 (2d Cir. 1985) (quoting *Lemon*, 403 U.S. at 612-13).

41. McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 861-62 (2005).

42. *Id.* at 862-63.

43. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

44. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 688 (1971).

45. *Lemon*, 403 U.S. at 615.

46. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (holding city's inclusion of a crèche, among many secular objects in holiday display in a private shopping area, was constitutional).

47. *Id.*

rational] judgment" and is aware of the government action's history and "place in our Nation's cultural landscape"[48]—perhaps an "idealized" depiction of a Supreme Court justice. Some judges have taken to folding the Endorsement Test into the *Lemon* Test, using it to analyze the neither-inhibit-nor-advance-religion factor.[49] Still, the federal appeals courts generally continue to prefer the *Lemon* Test alone.[50]

3. Coercion Test

The Court has also applied a Coercion Test to the Establishment Clause. The Coercion Test holds that, at a minimum, the "government may not coerce anyone to support or participate in religion or its exercise."[51] Courts most often use this test in school-prayer cases. In 2000, for example, the Court cited students' susceptibility to peer pressure when it struck down a student-led but government-sanctioned prayer at a nonmandatory high school football game.[52]

4. Neutrality Test

The Neutrality Test holds that a government action is permissible if it is neutral; the government action may neither favor nor disadvantage religion.[53] Despite its apparent simplicity, the Supreme Court has used this test only once.

B. The Free Exercise Clause

Heavily relied upon by the *Katcoff* court, the Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise

48. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring).

49. *See* Wallace v. Jaffree, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring in the judgment); ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1486-87 (3d Cir. 1996).

50. *See, e.g.*, Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 279-80 (5th Cir. 1996).

51. Lee v. Weisman, 505 U.S. 577, 587 (1992).

52. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

53. *See* McCreary Cnty., Ky. V. ACLU of Ky., 545 U.S. 844, 860 (2005) ("The touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.").

[of religion]."[54] But as the Court has held, the clause does not require "that in every and all respects there shall be a separation of Church and State,"[55] nor does it permit the action to completely prohibit the free exercise of religion.[56] In analyzing free exercise claims, the Court employs one of two tests depending on whether the government action targets religion or is neutral toward religion.[57]

The Constitution prohibits government action that is aimed at hindering religion unless that action can survive a strict-scrutiny analysis, which means the action is only permissible if it is narrowly tailored to advance a compelling government interest.[58] If the action's purpose is to suppress religion or a religious practice, the action targets religion and is therefore subject to strict scrutiny.[59] To determine the government's purpose in an action, courts examine the plain language of the statute, the historical context of the case, and the effect of the law.[60] If, after applying those factors, the Court determines that the action targets religion, it is subject to strict scrutiny.[61] These types of claims are uncommon.

Government action not specifically aimed at religion can still implicate the Free Exercise Clause if that action burdens religion by either prohibiting religious conduct that the religion requires or compelling conduct that the religion prohibits.[62] To uphold a government action imposing such a burden, the action must be neutral and generally applicable. A government action is neutral if it advances a legitimate government interest and is not

54. U.S. CONST. amend. I.

55. Zorach v. Clauson, 343 U.S. 306, 312 (1952).

56. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the free exercise Clause is dispositive in our analysis.").

57. *See*, *e.g.*, *id.* at 577 (law aimed at Santeria religion); Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877-78 (1990) (law neutral toward Native American religion), *superseded by statute*, Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651 (2011).

58. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32.

59. *Id.* at 533.

60. *Id.* at 533, 535, 540.

61. *Id.* at 531-32.

62. *See Smith*, 494 U.S. at 879 (law prohibiting polygamy limits religious practice of those whose religion require polygamy); Reynolds v. United States, 98 U.S. 145 (1878) (law requiring tax limits practice of those whose religion opposes certain government programs).

targeted at religion.[63] A government action is generally applicable when the burden is not solely applied to those whose conduct is religiously based.[64]

C. Tension Between the Two Religion Clauses

Although there is an apparent tension between the logical extremes of the Free Exercise and Establishment Clauses (i.e., protecting the free exercise right may implicate the establishment prohibition),[65] the Court has ruled that there is space for religious-accommodation legislation.[66] Using this "play in the joints," the government may act in limited ways that facilitate religion (or religious activity) without violating the Establishment Clause.[67]

But even in this space, government accommodation can still be problematic in two situations. First, the government cannot accommodate religion if there is no "special" burden on religion, as when the government exempts religious organizations from a publication sales tax of general applicability.[68] Such treatment prefers religion to non-religion. Second, the government's accommodation cannot favor some religions over others, as when gerrymandering a particular school district for a particular sect with no indication that it would be done for any other school district.[69] But when conflicts do arise between the Free Exercise and Establishment Clause concerns, *Cutter v. Wilkinson* gives the Free Exercise Clause a "'preferred position' in our constitutional order"[70] and the upper hand over establishment considerations.[71]

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63. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

64. *See id.* at 542-43.

65. Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 668-69 (1970) (describing the tension in finding a "neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other").

66. Locke v. Davey, 540 U.S. 712, 717-18 (2004) (holding that a scholarship program prohibiting recipients from pursuing a theology degree is permissible under the Establishment Clause and does not violate the Free Exercise Clause).

67. *Id.* at 718-19 (quoting *Walz*, 397 U.S. at 669).

68. *See* Tex. Monthly v. Bullock, 489 U.S. 1, 23 (1989).

69. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994).

70. Steven Goldberg, Cutter *and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403, 1416 (2006) (citations omitted).

71. *See id.* at 1404; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1201 (2d ed. 1988) ("[T]he free exercise principle should be dominant when it conflicts with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment.").

D. Religious Accommodation in the Military

Like most constitutional rights, the courts have been reluctant to fully extend the principles of the Religious Clauses case law to the military.[72] Historically, courts have upheld military restrictions on service members' individual rights[73] based largely on the War Powers Clause[74] and on the perceived judicial inability to determine the impact a court's decision will have on military discipline.[75] The Supreme Court has deemed the military a "special context" where burdens on free exercise rights are permissible if rationally related to a legitimate military objective.[76] This means a service member in the military retains his free exercise right, but this right can be reasonably limited due to military necessity.[77]

In determining what military objectives are legitimately classified as "military necessities," the Court generally defers to the military's judgment of what constitutes a necessity.[78] During times of war, courts have usually granted more deference to military decisions.[79] Deference, however, does not mean complete acceptance of the military's opinion.[80] As illustrated by

72. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting Jewish officer's challenge to an Air Force regulation forbidding the wearing of headgear indoors, including his yarmulke, and accepting the U.S. Air Force's claim that uniformity in appearance was essential to good order and discipline); Rostker v. Goldberg, 453 U.S. 57 (1981) (holding male draft was constitutional using lesser scrutiny than in non-military gender discrimination cases); Brown v. Glines, 444 U.S. 348 (1980) (upholding Air Force regulation requiring a commander's prior approval before an airmen could circulate petitions on a military base).

73. *See, e.g.*, John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 312 (1998) (noting the grand jury provision of the Fifth Amendment and a qualification of the search and seizure protection of the Fourth Amendment to illustrate free speech protections in the military are not as broad as for civilians).

74. U.S. CONST. art. 1, § 8, cl. 11.

75. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186-87 (1962).

76. *See* Parker v. Levy, 417 U.S. 733, 743 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society.").

77. *Cf. Rostker*, 453 U.S. at 70 ("[D]eference does not mean abdication.").

78. Carlos C. Huerta & Schuyler C. Webb, *Religious Accommodation in the Military*, *in* MANAGING DIVERSITY IN THE MILITARY: RESEARCH PERSPECTIVES FROM THE DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE 85-86 (Mickey R. Dansby et al. eds., 2001).

79. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

80. *See* Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting) ("To be sure, general and admirals, not federal judges, are expert about military needs. But it is equally true that judges, not military officers, possess the competence and authority to

the Supreme Court's *Hamdi v. Rumsfeld* decision, even in war, the judiciary does not abdicate its responsibility for judicial review.[81] But military necessity does not need to be proven with live testimony at trial; instead, it may be established from affidavits and declarations of military authorities.[82] The limits of military necessity—what it entails and when it can be invoked—in this and other contexts has never been defined by the Supreme Court.[83]

Similarly, courts have also recognized that the Establishment Clause would severely limit service members' ability to exercise their religions if applied as it is in the civilian context. Unlike civilians, the government exercises far more control over service members than it does over civilians. This control includes the place of service members' assignments, travel, deployments to foreign countries, etc. Yet despite the reality of this control and its impact, if applied strictly, the Establishment Clause could prevent the government from building houses of worship, employing military chaplains, or otherwise expending federal funds in an effort to accommodate service members' religious needs.[84] Given the government's undeniable control, many members of the armed forces may have partially or completely restricted access to religious services unless the government actively supplies those services. "The religious establishments that result [from such government action] are minor and seem consistent with, and indeed required by, the overall purpose of the First Amendment's Religion Clauses, which is to promote religious liberty."[85] In short, the government can—and sometimes must—provide aid or resources to alleviate significant government restrictions on an individual's ability to freely practice his or her religion.[86]

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interpret and apply the First Amendment."); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

81. *Hamdi*, 542 U.S. at 533 (holding that an American citizen designated as an "enemy combatant" by the military retains his due process rights even in times of war).

82. John A. Carr, The Voice from the Pulpit: Can the Department of Defense Regulate the Political Speech of Military Chaplains? (Oct. 28, 1998) (unpublished manuscript), *available at* http://handle.dtic.mil/100.2/ADA358531.

83. Huerta & Webb, *supra* note 78, at 86.

84. *Cf.* Cutter v. Wilkinson, 544 U.S. 709 (2005); Katcoff v. Marsh, 755 F.2d 223, 223 (2d Cir. 1985).

85. Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988).

86. Scott Roberts, *The Constitutionality of Prison-Sponsored Religious Therapeutic Communities*, 15 REGENT U. L. REV. 69, 72 (2003); *see also Cutter*, 544 U.S. at 720.

III. The Military Chaplaincy

A. Introduction

The military chaplain corps is composed of three different departments: the Army Chaplain Corps, the Navy Chaplain Corps, and the Air Force Chaplain Corps.[87] The Navy Chaplains Corps, in addition to providing chaplain services to the Navy, provides chaplains to the Coast Guard, Marine Corps, and Merchant Marines.[88] Department of Defense Directives and Instructions provide the broad framework for the operation of each chaplain corps.[89] But to varying degrees, each of the three military departments promulgate additional regulations for their own chaplain corps.

Regarding personnel make-up, the military chaplain corps is largely male and Christian.[90] As of 2010, there were over 4,000 military chaplains across all three military departments' active, reserve, and National Guard components.[91] Roughly one-third of all military chaplains belong to either the Southern Baptist, Pentecostal, or National Association of Evangelicals denominations.[92] In 2013, less than 1% of military chaplains were not of

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87. U.S. DEP'T OF ARMY, REG. 165-1, ARMY CHAPLAIN CORPS ACTIVITIES, para. 1-4.c (Dec. 3, 2009) [hereinafter AR 165-1]; U.S. DEP'T OF AIR FORCE, DIR. 52-1, CHAPLAIN SERVICE (Oct. 2, 2006) [hereinafter AFPD 52-1]; U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1730.7B, RELIGIOUS MINISTRY SUPPORT WITHIN THE DEPARTMENT OF THE NAVY, para. 4.a (Oct. 12, 2000) [hereinafter SECNAV 1730.7B].

88. U.S. DEP'T OF NAVY, INSTR. 1730.1D, RELIGIOUS MINISTRY IN THE NAVY, para. 6.a (1) (May 6, 2003).

89. U.S. DEP'T OF DEF., INST. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (Feb. 10, 2009) [hereinafter DODI 1300.17]; U.S. DEP'T OF DEF., INST. 1304.28, GUIDANCE FOR THE APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS (Aug. 7, 2007) [hereinafter DODI 1304.28]; U.S. DEP'T OF DEF., DIR. 1304.19, APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS (Apr. 23, 2007) [hereinafter DODD 1304.19].

90. Taking the active Army chaplain corps as an example, in 2012, the Army chaplain corps is only 6% female. Sung-eun Kim, *Few of the Few to Pray*, DEP'T OF THE ARMY (April 18, 2012), http://www.army.mil/article/78042/Few_of_the_few_to _pray. But in contrast, the Active Army Commissioned Officer Corps (of which female military chaplains are a subset) as a whole was 16.9% female in 2008. DEP'T OF THE ARMY, ARMY DEMOGRAPHICS: FY08 ARMY PROFILE (Sept. 30, 2008), *available at* http://www. armyg1.army.mil/HR/docs/demographics/FY08%20Army%20Profile.pdf. Notably, as commonly known, some faiths (e.g., the Roman Catholic Church) forbid female clergy.

91. *See* Svan, *supra* note 13.

92. Tim Townsend, *Military Chaplains Are Faith Mismatch for Personnel They Serve*, ST. LOUIS POST-DISPATCH (Jan. 9, 2011, 12:05 A.M.), http://www.stltoday.com/ lifestyles/faith-and-values/military-chaplains-are-faith-mismatch-for-personnel-they-serve/article_19c66ee6-82b8-59f7-b3d5-fd3cc05bc538.html.

the Christian faith.[93] In 2009, the Army commissioned its first Buddhist Chaplain.[94] And in 2011, the Army commissioned its first Hindu Chaplain.[95]

Although the military's longstanding practice has been to attempt to apportion chaplains according to the faith demographics of the military as a whole, that practice has been mostly aspirational. The present apportionment of chaplains by religious affiliation does not match the present demographics of service members' religious affiliation.[96] For example, in 2013, 25% of service members were Roman Catholic, but Roman Catholic priests comprised only 8% of the chaplaincy.[97] Further, while Southern Baptists comprised only 1% of all military members, Southern Baptist pastors represented 16% of the chaplain corps.[98] One federal district court took it as given that "it would be 'impossible in any given military unit or community to provide a chaplain for each faith group represented by its members.'"[99] The report further determined that using proportional representation to determine the composition of the military chaplaincy was impractical, inefficient, and would create instability within

93. In August 2013, there were only a total of thirty-three military chaplains from the Jewish, Islamic, Buddhist, Baha'i, and Hindu faiths. Rita Nakashima Brock, *The Military Chaplaincy Needs to Become More Diverse*, HUFFINGTON POST (Aug. 16, 2013, 1:03 P.M.), http://www.huffingtonpost.com/rita-nakashima-brock-ph-d/the-military-chaplaincy-n_b_3759033.html.

94. Bob Smietana, *Former Marine Is First Buddhist Army Chaplain*, ARMY TIMES, Sept. 8, 2009, *available at* http://www.armytimes.com/article/20090908/NEWS/909080304/Former-Marine-first-Buddhist-Army-chaplain.

95. Chris Carroll, *Military's First Hindu Chaplain Brings a Diverse Background*, STARS & STRIPES, Jun. 2, 2011, *available at* http://www.stripes.com/news/military-s-first-hindu-chaplain-brings-a-diverse-background-1.145455. If the absence of a Hindu chaplain symbol in the military department uniform regulations is an indication, then the Air Force and Navy do not plan on having a Hindu chaplain in the near future. Neither the Air Force nor the Navy have religious symbols for chaplains beyond the cross, tablets, half moon, and dharma. *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL 173 (Mar. 1, 2013); U.S. DEP'T OF NAVY, DIR. 15665, UNITED STATES NAVY UNIFORM REGULATION, para. 4102(3) (July 2011).

96. Jeff Sharlet, *Jesus Killed Mohammed: The Crusade for a Christian Military*, HARPER'S MAG., May 2009, at 38.

97. Paul D. Shinkman, *The Catholic Crunch: Inside the Shortage of Catholic Military Priests*, U.S. NEWS & WORLD REPORT (Oct. 30, 2013), http://www.usnews.com/news/articles/2013/10/30/the-catholic-crunch-inside-the-shortage-of-catholic-military-priests.

98. Jason G. Riley, For God or Country? Religious Tensions Within the United States Military 18 (Dec. 2006) (unpublished manuscript), *available at* http://handle.dtic.mil/100.2/ADA462635.

99. Larsen v. U.S. Navy, 486 F. Supp. 2d 11, 32 (D.D.C. 2007) (citation omitted).

the chaplain corps.[100] Moreover, "[e]ven if the military chaplaincy attempted to provide a chaplain for each faith group represented in the military . . . only a few members would have access to a chaplain of their particular faith because of the highly mobile, organizationally-dependent nature of the military and its global commitment."[101] As a result, instead of focusing on a faith-group representation based chaplaincy, selections must center on practical criteria such as who is willing to sign up to serve.

Despite the relative homogeneity of the military chaplaincy, each chaplain is also expected to meet the free exercise needs of a religiously diverse group of service members. For example, the Army stipulates that "[c]haplains will administer or arrange for rites and sacraments for military personnel . . . according to the respective beliefs and conscientious practices of all concerned."[102] The Army also requires chaplains to sign a Statement of Understanding of Religious Pluralism that includes a commitment to be "sensitive to religious pluralism" and to "provide for the free exercise of religion by military personnel."[103]

B. Legal and Regulatory Scheme

The military chaplaincy functions under a complex matrix of overlapping law and regulations: Law of Armed Conflict, U.S. constitutional law, U.S. statutory law, DoD and military service regulations, and respective ecclesiastical endorsing agency religious law. Although the chaplaincy is established by statute,[104] statutes provide only a handful of required duties for military chaplains.[105] For example, the Army statute only requires Army chaplains to "hold appropriate religious services at least once on each Sunday" for members of their unit and perform "burial services" for members of their unit who die.[106] Due to this lack of statutory direction, the controlling legal authority for military chaplains is overwhelmingly based

100. STUDY OF REPRESENTATION OF RELIGIOUS FAITHS IN THE ARMED FORCES, at I-7 (U.S. Dep't of Defense, Jan. 1987).

101. *Id.*

102. 32 C.F.R. § 510.1 (2013).

103. U.S. Dep't of Army, Office of the Chief of Chaplains, Form No. 13: Statement of Understanding of Religious Pluralism in the U.S. Army (undated) (copy on file with the author).

104. 10 U.S.C. § 3073 (2012) ("There are chaplains in the Army."); 10 U.S.C. § 510 (2012) (establishing the Chaplain Corps of the Navy); 10 U.S.C. § 8067(h) (2012) (establishing Air Force chaplains).

105. *See, e.g.*, 10 U.S.C. § 3547 (2012) (Army chaplains); 10 U.S.C. § 8547 (2012) (Air Force chaplains); 10 U.S.C. § 6031 (2012) (Navy chaplains).

106. 10 U.S.C. § 3547.

on DoD and military department regulations,[107] with the majority of regulations established by each individual military department.[108]

C. Chaplain Qualification Requirements

Becoming a military chaplain is no simple task. To serve as a military chaplain, candidates must meet department-specific physical fitness and health requirements, possess a baccalaureate degree and a graduate degree (in religion), have two years of experience in religious ministry, obtain an endorsement by an Armed Forces Chaplain Board-approved ecclesiastical endorsing agency, and be willing to minister "in a pluralistic environment" by supporting directly and indirectly the free exercise of religion by all service members.[109] The ecclesiastical endorsement certifies that the chaplain candidate is qualified to minister to that faith group.[110] If the endorsing agency withdraws its certification, the chaplain must either seek an endorsement from another approved agency, transfer to another branch within the military for which he or she is qualified, or be discharged from the military.[111]

D. Providing for Free Exercise Rights in the Military

As an initial matter, DoD regulations establish a general preference for accommodating a service member's religious practices.[112] Consistent with this general preference to accommodate, regulations require military commanders to support the free exercise rights of their service members,[113] and statute requires them to furnish facilities and transportation resources to enable chaplains to facilitate religious accommodation.[114] Indeed, the

107. *See*, *e.g.*, AR 165-1, *supra* note 87, at para. 1-7(c) ("The duties of Chaplains beyond those specifically mandated by statute are derived duties assigned by the Army.").

108. *See, e.g.*, U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1730.8A, ACCOMMODATION OF RELIGIOUS PRACTICES (Dec. 31, 1997).

109. DODI 1304.28, *supra* note 89, at para. 6.1-6.1.4.

110. *Id.* at para. 6.1.1.

111. *Id.* at para. 6.5.

112. DODI 1300.17, *supra* note 89, at 2 ("The Department of Defense places a high value on the rights of members of the Military Services to observe the tenets of their respective religions. It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.").

113. *See*, *e.g.*, AR 165-1, *supra* note 87, at para. 2-1a ("Commanders will provide opportunities for the free exercise of religion through their . . . religious support members.").

114. 10 U.S.C. § 3547(b) (2012) ("Each commanding officer shall furnish facilities, including necessary transportation, to any chaplain assigned to his command, to assist the chaplain in performing his duties.").

existence of the chaplaincy itself is an indication of the degree to which the military seeks to accommodate that right.

But that preference to accommodate can be overridden when required by military necessity.[115] Military commanders, not chaplains or lawyers, are the decision-makers for determining whether to accommodate a free exercise request.[116] Accommodation decisions are made on a case-by-case basis by unit commanders after evaluating five factors:

> (a) the importance of military requirements in terms of mission accomplishment, military readiness, unit cohesion, standards, and discipline[;] (b) [t]he religious importance of the accommodation to the requester[;] (c) [t]he cumulative impact of repeated accommodations of a similar nature[;] (d) [a]lternative means available to meet the requested accommodation[; and] (e) [p]revious treatment of the same or similar requests, including treatment of similar requests made for reasons other than religious ones.[117]

The Army, for example, allows a unit commander to deny an accommodation request[118] but only when the "accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, discipline, safety, and/or health."[119] Given the five-factor analysis required in DoD regulations and the components of military necessity that are articulated in Army regulations, an Army unit commander's role is to balance the individual's religious request against concerns for the military unit, but with a presumption that the individual should be accommodated. In so doing, Army unit commanders must examine that request against military necessity, and consequently, an accommodation is not guaranteed.[120]

In this light, the fundamental role of the military chaplain, as set forth in DoD regulations and military department regulations, is to assist the unit commander in meeting the free exercise requests of service members.[121]

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115. DODI 1300.17, *supra* note 89, at 4.

116. See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 5-6f (11 Feb. 2009) [hereinafter AR 600-20].

117. DODI 1300.17, *supra* note 89, at 1.

118. AR 600-20, *supra* note 116, at para. 5-6f.

119. *Id.* at para 5-6a.

120. *Id.*

121. DODD 1304.19, *supra* note 89, at para. 4; AFPD 52-1, *supra* note 87, at para. 3.4.1; AR 165-1, *supra* note 87, at para. 4.5; SECNAV 1730.7B, *supra* note 87, at para. 5.

Chaplains do so either by performing religious services (according to the tenets of the chaplain's faith) or by providing religious services through coordination with other clergy to support the service member's faith. The Army goes one step further and conceptualizes the goal of the chaplains as nurturing the living, caring for the wounded, and honoring the dead.[122] In practice, chaplains may also perform other roles, including social services provider and Religious Leader Liaison.[123] While these practices may raise separate constitutional concerns, such issues are beyond the scope of this article.

IV. Facial Challenges

A. Introduction

The military chaplaincy is perhaps the clearest example of a positive government accommodation—or, from another perspective, an "establishment"—of religion, as the military provides government-funded religious support and clergy. Despite this fact and the reality that the chaplaincy likely fails most Establishment Clause tests, it is unlikely that a facial challenge to the program will prevail. Given the consistent favorable citing of the military chaplaincy in past[124] and more recent[125] Supreme Court dicta, the special circumstances of the military, the reality that service members may face a heavy government-imposed burden on their free exercise rights, and the lack of a viable alternative to the military chaplaincy,[126] it is simply unlikely that a court will strike down the chaplaincy. Indeed, one legal commentator observing court approval of government-sponsored prison chaplaincies, military chaplaincies, and hospital chaplaincies, noted the courts' consistent determinations that "state

122. Oscar T. Arauco, A Chaplain's Preparation for Combat: A Primer on How to Prepare for Combat Ministry 13-14 (June 17, 2005) (unpublished manuscript), *available at* http://handle.dtic.mil/100.2/ADA436460.

123. The author has had personal experience witnessing these other roles. The Religious Leader Engagement Operation (RLEO), also known as Religious Leader Liaison (RLL), is a non-doctrinal concept emerging from the wars in Afghanistan and Iraq. RLEO involves U.S. military chaplains engaging local, foreign religious leaders to further U.S. military efforts. *See also* STEVEN A. SCHAICK, EXAMINING THE ROLE OF CHAPLAINS AS NONCOMBATANTS WHILE INVOLVED IN RELIGIOUS LEADER ENGAGEMENT/LIAISON 15-21 (2009), *available at* http:// www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA539854.

124. *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 296 (1963) (Brennan, J., concurring).

125. *E.g.*, Cutter v. Wilkinson, 544 U.S. 709, 722 (2005).

126. Katcoff v. Marsh, 755 F.2d 223, 232 (2d Cir. 1985).

actors may provide religious aid to accommodate government-imposed burdens on the free exercise of religion," regardless of the test applied.[127] He further noted that "[t]he consistency of these results is significant, considering the unpredictability of Establishment Clause jurisprudence."[128]

B. The Application of the Establishment Clause Tests

1. Lemon *Test*

As in *Katcoff*,[129] a court will likely find that the military chaplaincy fails the *Lemon* Test. In fact, the *Lemon* Test's objective of preventing "sponsorship, financial support, and active involvement of the sovereign in religious activity,"[130] is squarely at odds with government institutions like the military chaplaincy.

a) Lemon*'s First Prong: Secular Purpose*

The government could easily meet the first prong of the *Lemon* Test[131] because the military chaplaincy has a primary secular purpose. Providing for a service member's spiritual welfare is necessary to ensure that service members are prepared to fight and win the nation's wars, a wholly secular task. The chaplaincy is necessary to ensure the spiritual welfare and morale of service members whose isolation, due to military service, may prevent normal opportunities for religious services. To put it another way, the secular need to have service members who are prepared to fight and—if necessary—die in combat creates the secular purpose of the chaplaincy: to provide clergy who aid those service members with that preparation. Although, as the *Katcoff* court noted, the "immediate purpose is to promote religion by making it available, albeit on a voluntary basis, to our armed forces,"[132] the primary purpose is secular, and the military chaplaincy meets the requirements of the secular-purpose prong.[133]

127. Roberts, *supra* note 86, at 75.
128. *Id.*
129. *Katcoff*, 755 F.2d at 236.
130. Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 668 (1969).
131. The elements of the *Lemon* test are described at *supra* Part II.A.1.
132. *Katcoff*, 755 F.2d at 232.
133. McCreary Cnty., Ky. V. ACLU of Ky., 545 U.S. 844, 863-64 (2005).

b) Lemon*'s Second Prong: Primary Effect*

While the chaplaincy passes the secular purpose prong, there is some basis to conclude that it fails the primary-effect prong. Indeed, the *Katcoff* court held just that and found that the primary effect of the military chaplaincy was to "advance the practice of religion."[134] However, some legal commentators have noted that there is a substantive difference between a "religious purpose" and a "purpose of accommodating religious beliefs;" the latter of these purposes may be characterized not as an effort to promote religion but, instead, as "secular respect" for religion.[135] And the government would have at least an argument that the primary effect of chaplaincy's "secular" purpose is to ensure that service members who face the rigors of very secular combat are as spiritually prepared as possible.

c) Lemon*'s Third Prong: Excessive Entanglement*

Of the three *Lemon* prongs, the chaplaincy is most likely to fail the third. The *Katcoff* court found that the military's connection with ecclesiastical endorsing agencies was an excessive entanglement of government and religion.[136] In what may be a unique case in government service, the chaplaincy allows a religious organization to determine the prerequisites for potential chaplains' service—and those chaplains may be discharged if those private religious organizations withdraw their support.[137] But unlike any other religious organization, a military commander writes a chaplain's evaluation, affecting the chaplain's potential for promotion, and the military assigns chaplains to serve in specific locations and requires those chaplains to provide religious services to a "pluralistic" society.[138] There is some significant entanglement here. And thus, a court would likely find that the military chaplaincy fails the third prong of the *Lemon* Test.

The *Lemon* Test is a conjunctive test. The chaplaincy's failure to satisfy the third prong ultimately causes it to fail the test altogether.

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134. *Katcoff*, 755 F.2d at 232.

135. Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1135-36 (1990).

136. *Katcoff*, 755 F.2d at 232.

137. U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 5-5 (Sept. 13, 2011).

138. Under the Army's evaluation system, a rater is typically the supervisor of the officer, and the senior rater is typically that rater's supervisor. For a battalion chaplain, the rater is normally the Battalion's Executive Officer and the senior rater is the Battalion's Commander. A supervisory chaplain is sometimes the intermediate rater when possible. *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (June 5, 2012).

2. Endorsement

On the other hand, a court might or might not find that the chaplaincy fails the Endorsement Test. One could conceivably view the nearly 4,000 military clergy and the outlay of public monies to fund them as an endorsement of religion.[139] And one might even regard the military chaplaincy as an endorsement of a specific religion—Christianity—as roughly 90% of military chaplains are Christians.[140] As a consequence, the approximately one-third of military members who may have no religious preference [141] might view themselves as "outsiders, not full members of the political community,"[142] especially in light of the depth of government involvement in providing religious accommodation to Christian service members. But the author of the Endorsement Test, Justice O'Connor, has noted that

> one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. . . . [T]he Court should simply acknowledge that the religious purpose of such a [statute, program, or policy] is legitimated by the Free Exercise Clause. . . . [C]ourts should assume that the "objective observer" is acquainted with the Free Exercise Clause and the values it promotes.[143]

Given this idealized objective observer—who is also presumably familiar with the fact that the chaplaincy predates the First Amendment in American history—the chaplaincy may well survive Endorsement Test scrutiny.

3. Coercion

A court will likely find that the military chaplaincy—as a means of accommodating free exercise rights—satisfies the Coercion Test. Because

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139. James Dao, *Atheists Seek Chaplain Role in the Military*, N. Y. TIMES, Apr. 27, 2011, at A1, *available at* http://www.nytimes.com/2011/04/27/us/27atheists.html.

140. *Id.*

141. Riley, *supra* note 98, at 14.

142. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

143. Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (citation omitted). Indeed, the *Wallace* court was evaluating an Alabama statute that accorded a one-minute moment of silence for meditation or "prayer"—presumably lifting the burden of voluntary school prayer during state-mandated time in school by providing for a period for that prayer to occur.

seeking out the assistance, advice, or religious services of military chaplains is voluntary, a court could find that the military chaplaincy does "not coerce anyone to support or participate in religion or its exercise."[144] After all,

> [t]he hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action. The government simply facilitates ("accommodates") the decision of the individual or group; it does not induce or direct, by means of either incentives or compulsion.[145]

But service members are sometimes compelled to attend events at which invocations are offered, and this mandatory attendance at or obligatory participation in programs in which clergy may be involved—including social-welfare programs and invocations at official military events—may run afoul of the Coercion Test.[146] Still DoD and military department regulations state that the fundamental role of a military chaplain is to assist the unit commander in meeting the free exercise requests of service members.[147] Service members' involvement with military chaplains in *this* capacity is strictly voluntary, and this capacity would likely survive the Coercion Test.

4. Neutrality Test

Finally, a Court would find that the military chaplaincy violates the Neutrality Test. The government funding of clergy, religious buildings, and religious materials—all provisions explicitly tied to the accommodation of service members' free exercise rights—clearly is based on a consideration of religion and is not a neutral action.

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144. Lee v. Weisman, 505 U.S. 577, 581 (1992).

145. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688 (1992).

146. Notably, however, the Court has indicated that the Coercion Test may be limited to primary school contexts. See, e.g., *Weisman*, 505 U.S. at 593, in which the court declined to address whether religious activity would be compelled "if the affected citizens [were] mature adults," but noted that "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." The Supreme Court has yet to address the issue of public prayer in the military context.

147. DODD 1304.19, *supra* note 89, at para. 4.1.

5. Results of This Application

Given the inconsistent use of traditional Establishment Clause tests and the Court's historic tendency to support the constitutionality of the chaplaincy, it is unlikely that any traditional Establishment Clause analysis—taken alone—would be outcome-determinative in new military chaplaincy litigation. Indeed, as in *Katcoff*, a court is likely to consider whether other factors are enough to override the Establishment Clause.

C. Free Exercise Analysis

In *Cutter v. Wilkinson*, the Supreme Court quoted approvingly, albeit in dicta, of the Second Circuit's *Katcoff* opinion.[148] The *Cutter* Court upheld a federal law that imposed strict scrutiny on government actions that burdened an inmate's religious exercise rights.[149] The Court held that the Establishment Clause allows the government to accommodate religious needs: (1) in order to "alleviate[] exceptional government-created burdens on private religious exercise,"[150] (2) when nonbeneficiaries of the program are not unduly burdened, and (3) when the accommodation is administered neutrally to other religions.[151] One law professor noted that the Court's actions were novel, elevating the requirements of the Free Exercise Clause beyond what had been allowed under previous Establishment Clause precedent: "[T]he Free Exercise Clause [now] shapes the meaning of the Establishment Clause. It makes constitutional statutes that otherwise would be unconstitutional."[152] Notably in a case about the rights of inmates, the

148. Cutter v. Wilkinson, 544 U.S. 709, 722 (2005).

149. *Id.* at 721. Prior to enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress held three years of hearings documenting barriers to religious exercise for institutionalized religious persons. *Id.* at 716. RLUIPA is one of Congress's efforts to provide additional protection for religious exercise following the Supreme Court's *Smith* decision, which held that the Free Exercise Clause is not violated by enforcement of general, neutral laws that incidentally burden religious conduct. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause did not bar Oregon from enforcing drug laws against Native Americans' religious use of peyote), *superseded by statute*, Religious Land Use & Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651 (2011). Following *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993, which imposed strict scrutiny on all federal and state law and was held unconstitutional as applied to state and local governments in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

150. *Cutter*, 544 U.S. at 720.

151. *Id.* at 722 (citing with approval Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985)).

152. Goldberg, *supra* note 70, at 1410.

Court reached this holding despite the strong opposition of correctional officials, "a group to which it typically defers."[153]

In addition to the obvious importance of the Supreme Court's favorable citing of *Katcoff*, the facts in *Cutter* are roughly analogous to those in *Katcoff*. Despite qualitative differences between service members and inmates, like inmates, service members can have "exceptional government-created burdens on private religious exercise," as when deployed to a combat zone, a rural military base in the United States, or an internationally located American military base.[154] Therefore, service members may be severely hampered when it comes to accessing civilian religious resources. Additionally service members are compelled to follow lawful government movement orders, under threat of criminal sanctions in the Uniform Code of Military Justice;[155] similarly, prisoners are required to follow all lawful orders from correctional officers.[156] And because of government-imposed restrictions, both groups cannot leave their assigned locations to find their own religious services. As a result, in both *Katcoff* and *Cutter*, notwithstanding any Establishment Clause concerns, the courts held that the respective chaplaincies were necessary to provide for the free exercise rights of those respective groups.

But *Cutter* did not answer the as-applied issue left open in *Katcoff*—whether the chaplaincy was constitutional in an area in which there was no impediment to the access of religious services. To be sure, in *Cutter*, the Supreme Court seemingly provided the Free Exercise Clause a "'preferred position' in our constitutional order,"[157] especially in conflicts with the Establishment Clause.[158] And the *Katcoff* court found that the military chaplaincy was not only permitted but constitutionally *required* to protect the free exercise rights of Army soldiers: "Unless the Army provided a chaplaincy it would deprive the soldier of . . . his right under the Free Exercise Clause to practice his freely chosen religion."[159] But neither

153. *Id.* at 1404.

154. *Cutter*, 544 U.S. at 720.

155. *See* 10 U.S.C. § 887 (2012).

156. *See* 18 U.S.C. § 3624(b)(1) (2012) (discussing good-conduct time for exemplary behavior).

157. Goldberg, *supra* note 70, at 1416, 1418 (citations omitted).

158. TRIBE, *supra* note 71, at 1201 ("[T]he free exercise principle should be dominant when it conflicts with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment.").

159. Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985). *But see* Larsen v. U.S. Navy, 486 F. Supp. 2d 11, 31-33 (D.D.C. 2007) (ruling that military chaplaincy program is not a

holding of facial constitutionality purports to resolve the issue left open in the *Katcoff* remand.

D. Katcoff *Test*

To resolve the contradiction between the Establishment Clause and Free Exercise Clause, *Katcoff* developed a novel test based largely on the War Powers Clause[160] and on the perceived judicial reluctance to impose a decision that might impact military discipline.[161] To determine the constitutionality of the Army chaplaincy, the test asks "whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense."[162] Given the deference the Supreme Court has given military policies that impact military readiness,[163] it is unlikely that a court would deem any alternative religious support model superior to the current military chaplaincy unless proven by a high evidentiary standard, possibly even "clear and convincing" evidence. And this fact means that it is likely that the chaplaincy would survive another facial constitutional challenge.

As an initial matter, it is relevant that the factual basis of the *Katcoff* holding has eroded with time. First, the argument that civilian clergy cannot effectively minister to service members has been undercut by the use of non-personal service (NPS) contracts with civilian clergy in "critically short faith groups."[164] NPS civilian clergy must be "fully ordained or

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mandatory accommodation of service members' free exercise rights but a permissive accommodation of service members' free exercise interests).

160. U.S. CONST. art. 1, § 8, cl. 11. As one legal commentator noted, *Goldman v. Weinberger*, 475 U.S. 503 (1986), acted effectively to delegate questions of religious freedom in the military to the legislative and executive branches, discouraging the courts from intervening. Michael F. Noone, *Rendering Unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces*, 18 ST. MARY'S L.J. 1233, 1261 (1987).

161. Warren, *supra* note 75, at 186-87.

162. *Katcoff*, 755 F.2d at 234, 235 ("[C]aution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.").

163. *See id.*

164. Donald G. Hanchett, Resourcing the Religious Mission of the Army to the Year 2000 and Beyond: Significant Concerns and Issues 22 (Apr. 15, 1993) (unpublished manuscript), *available at* http://handle.dtic.mil/100.2/ADA264236 *(*"In recent years the Army has found it necessary to contract the services of clergy who represent critically short faith groups in the Army. This has primarily been necessary to provide religious coverage to Catholic soldiers and family members, since the Army has less than 40% of the number of

accredited" by a DoD-approved ecclesiastical endorsing agency but otherwise do not have to meet the requirements for military chaplains (i.e., physical and health fitness, a graduate degree, and two years of religious ministry experience).[165] NPS civilian clergy are not in uniform and do not hold military rank, but they provide the same religious support to service members on military bases as their military chaplain peers.[166] And with the expansion of military jurisdiction over civilians who accompany the force during contingency operations—i.e., Afghanistan or Iraq—they may even be subject to military discipline.[167]

Second, the "embedding" of civilian journalists in Operation Iraqi Freedom undercuts the notion in *Katcoff* that civilian clergy are incapable of safely accompanying the U.S. military on a modern battlefield. To prepare the embeds for war in Iraq, the Pentagon devised a one-week "media boot camp," which eventually trained over 500 reporters and photographers in navigation, tactical marching, and combat first aid.[168] The training was designed to ensure that reporters would not "be a burden to the units" to which they were attached.[169] The success of the embed program offers a model for civilian clergy to successfully and safely integrate with military units in major combat operations.

But despite this slow erosion of the factual basis in *Katcoff*, the military chaplaincy likely remains the only viable method to provide consistent and reliable religious support to the military. There is no evidence that religious organizations would consistently send their clergy to embed in American units. Secondly, there is no evidence that religious organizations could deploy on short notice to provide such religious support, as military chaplains can. Indeed, even the closest modern-day equivalent to Katcoff's and Wieder's civilian-clergy corps (the NPS-contracted civilian clergy)

Catholic Chaplains it requires to meet the Army's need. The contract instrument used to contract Catholic Priests is the Nonpersonal Services contract.").

165. The Army, for one, does not require contracted civilian clergy to have a graduate degree, just to be "fully ordained or accredited" by a DoD recognized ecclesiastical endorsing agency. AR 165-1, *supra* note 87, at para. 5-3(g).

166. *Id.* at para. 5-3(c) to 5-3(e).

167. *See* 10 U.S.C. 802(a)(10) (2012) (subjecting civilians who accompany the force to the Uniform Code in a contingency operation). *But see* 18 U.S.C. § 212 (2012) (extending the U.S. Code to the overseas actions of, inter alia, U.S. government contractors in some circumstances).

168. Andrew Jacobs, *My Week at Embed Boot Camp*, N.Y. TIMES, Mar. 2, 2003, at SM34.

169. *Id.*

remain home when service members deploy overseas. Thus, at this point in time, only a military chaplaincy can satisfy the *Katcoff* test.

V. Overbroad Accommodation?

Assuming the continuing validity of the *Katcoff* test, the existence of the military chaplaincy is permissible—and perhaps even constitutionally required—to facilitate the free exercise rights of those service members who lack access to religious resources due to burdens imposed by their military service. As *Katcoff* pointed out, however, such burdens may not exist for the entire military community.[170] In *Carter v. Broadlawns Medical Center*, the Eighth Circuit made the same observations with respect to the Veterans Affairs' hospital chaplaincy.[171] The court stated that the hospital chaplaincy was a "permissible accommodation of at least *some* patients' free exercise rights" because "[t]here was evidence that a large percentage of [the hospital's] patients were subject to restrictions on their movement attributable to the state by virtue of the fact that [they] were prisoners or had been involuntarily committed or by virtue of hospital rules in the psychiatric ward."[172] Because "[s]uch restrictions constitute a state-imposed burden on the patients' religious practices," the Eighth Circuit held that "the state may appropriately adjust for [those restrictions]."[173]

This section first examines the extent to which the military chaplaincy may provide religious support to accommodate service members' free exercise rights even when such service members are not subject to a government-imposed burden on their religious practices. It concludes that to the extent that such accommodation is unnecessary to allow service members to exercise their free exercise rights, the accommodation is prohibited by the Establishment Clause.

A. Evaluating the Accommodation of Free Exercise Rights

Both Religion Clauses implicate the issue of whether the government must, may, or may not facilitate religious exercise. For the purpose of this article, the various requirements are characterized as mandatory accommodation, permissible accommodation, and prohibited accommodation. Under the Free Exercise Clause, the question is whether

170. Katcoff v. Marsh, 755 F.2d 223, 238 (2d Cir. 1985).

171. 857 F.2d 448, 457 (8th Cir. 1988).

172. *Id.* (emphasis added).

173. *Id.* (citing Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)).

government accommodation of free exercise—by providing benefits or removing hindrances—is constitutionally required (mandatory accommodation). Under the Establishment Clause, the question is whether such government accommodation is constitutionally permitted (permissible accommodation) but not forbidden (prohibited accommodation).

1. Mandatory Accommodation

The Free Exercise Clause "affirmatively mandates accommodation, not merely tolerance" of religious practices to the extent that government practices or policies substantially burden religious free exercise without a compelling governmental interest.[174] Such accommodation may be required even though it may have the perceived effect of advancing religion.[175] This type of accommodation is at the heart of the *Katcoff* decision.

2. Permissible Accommodation

There is considerable uncertainty as to the outer limits of permissible accommodation under the Establishment Clause. Justice Brennan has explicitly stated that the Court "in no way [suggests] that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."[176] Thus, while the Supreme Court has indicated that the government has some latitude to accommodate religion beyond the requirements of the Free Exercise Clause, it has not clarified the relationship between permissible and mandatory accommodations.

The Court has noted that the Constitution allows "'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference'"[177] but also has acknowledged that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'"[178]

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174. Lynch v. Donnelly, 465 U.S. 668, 673 (1984); *see also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

175. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (finding a statutory religious accommodation constitutional on the grounds that it sought to remove substantial government-imposed burdens on prisoners' religious free exercise); *see also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1984).

176. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989).

177. *Corp. of the Presiding Bishop*, 483 U.S. at 334 (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 669 (1970)).

178. *Id.* at 334-35 (quoting Hobbie v. Unemp't App. Comm'n of Fla., 480 U.S. 136, 145 (1987)).

The Court has declined, however, to demarcate at *what* point such action becomes unconstitutional. What can be said of these conflicting principles—the product of ill-defined legal tests—is only that when there is a burden to the free exercise of religious rights, the government may accommodate those religious practices (in some circumstances, at some times, for some reasons) even when it is not the cause of that burden.

3. Prohibited Accommodation

The government may not specifically accommodate religion if its action does not aim to relieve some burden on free exercise. As Justice O'Connor stated, "[J]udicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights."[179] In another opinion, she wrote: "In order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can said to be lifted by the government action."[180] Absent some burden, the specific accommodation of religious groups or activities impermissibly advances religion.[181]

C. Specific Barriers to Free Exercise: Determining the Necessity of Chaplain Assignments

At both the Supreme Court and circuit court levels, the justification for military chaplains is consistently tied to service members' restricted access to religious services. In *Schempp*, Justice Brennan referred to "soldiers cut off by the State from all civilian opportunities for public communion,"[182] and dissenting Justice Stewart noted that "a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion."[183]

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179. Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring) (citation omitted).

180. *Corp. of the Presiding Bishop*, 483 U.S. at 348 (O'Connor, J., concurring in the judgment).

181. *See, e.g.*, *Tex. Monthly*, 489 U.S. at 17 (finding that a generally applicable tax did not unduly burden religious publications and that a religious exemption—as opposed to a general exemption for charities or nonprofit organizations—unconstitutionally preferred religion to non-religion).

182. Sch. Dist. Of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring).

183. *Id.* at 309 (Stewart, J., dissenting).

The justification of necessity, however, does not apply universally within the military community. On the contrary, a significant number of military units are assigned to areas where service members' free exercise rights can be fully satisfied by local, private clergy. This was the precise issue in *Katcoff* that was remanded by the Second Circuit to the federal district court for examination but was never litigated.[184] The Second Circuit, however, only addressed the access of service members in "large urban centers."[185] This designation is both imprecise and insufficient in attempting to characterize the need for the accommodation of service members' right to free exercise; a broader perspective is needed.

In that broader view, it is clear, first, that some military units stationed in "large urban centers" can still deploy worldwide. Thus units must be further differentiated as either non-deployable or deployable,[186] in order to prevent service members from being "left in the lurch, religiously speaking."[187] Indeed, during the wars in Afghanistan and Iraq, even ceremonial military units, such as the Old Guard in Arlington, Virginia, which provides an honor guard for the President, have deployed to combat.[188]

Thus in order to ensure that service members have adequate opportunity to engage in religious free exercise—and therefore meet the government's free exercise obligations while also respecting the Establishment Clause's restrictions—military chaplains must be attached to virtually all "rural" units and to urbanized-area units that have the potential to deploy (even if in some such units, deployment is a remote possibility). But military chaplains should not be assigned to provide for the free exercise needs of non-deployable units that have sufficient access to religious resources, as there is no significant burden to these units' religious free exercise.[189]

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184. Katcoff v. Marsh, 755 F.2d 223, 237-38 (2d Cir. 1985).

185. *Id.* at 238.

186. A non-deployable unit is a unit that cannot be sent from its home station to another location to perform a mission. It is basically stationary. A deployable unit, on the other hand, can be ordered to other locations to perform its mission.

187. *Katcoff*, 755 F.2d at 228.

188. Robert Burns, *U.S. Plans Extra Air Power in Asia While Ground Forces Focus on Iraq*, ASSOCIATED PRESS, Jan. 19, 2004, *available at* Westlaw, 1/19/04 HSTNCHRON A14.

189. With a military chaplain corps of almost 4,000, see Svan, *supra* note 13, a portion of military chaplain assignments to non-deploying units in urban areas will still be necessary for administrative or personnel management duties unrelated to providing for the free exercise rights of service members.

1. Geopolitical Characterization of Unit Locales

Making a simple urban/rural distinction is not as straightforward as one might think. When it comes to the term "rural," for example, there are three federal agencies that have promulgated three very different definitions, which are still commonly applied: the U.S. Census Bureau,[190] the Office of Management and Budget (OMB),[191] and the Economic Research Service of the U.S. Department of Agriculture (USDA).[192] Notably, the Congress has historically declined to define "rural" or "urban" when targeting a program toward a particular area.[193]

Although what constitutes "rural" remains contested, what is urban is reasonably well defined, and it is in these "urbanized areas" (UAs) in which the likelihood of religious diversity—and corresponding religious establishments—is highest. The U.S. Census Bureau defines a UA as an area that has a core (one or more contiguous census block groups (BGs)) with a total land area of less than two square miles and a population density of 1,000 persons per square mile; UAs may contain adjoining territory with a minimum of 500 persons per square mile and must encompass a population of at least 50,000 people.[194] These are population-dense locations, also known as cities.

There are a number of military installations that are in locations where these UAs may be accessed. In his thesis analyzing the Navy chaplain corps, for instance, one Naval officer stated, "Most [non-deployable] shore billets are in populated areas with sufficient civilian religious resources

190. In 2010, the Census Bureau used the helpful "not urban" definition for rural. *2010 Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU, http://www.census.gov/geo/reference/ua/urban-rural-2010.html (last visited Sept. 16, 2013).

191. In 2010, the OMB gave up the ghost, if you will, and decided no longer to try and define rural, although it implies a definition of rural by excluding some portion of the country from the Metropolitan and Micropolitan Statistical Areas. 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas Notice, 75 Fed. Reg. 32746 (June 28, 2010).

192. *Rural Classifications*, U.S.D.A., http://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/data-for-rural-analysis.aspx (last visited July 30, 2013).

193. Although the Senate's version of the 2013 farm bill may change that, at this point, the Federal Government has at least fifteen definitions of rural but none of those definitions have been enacted by the Congress. *The Federal Definition of 'Rural' —Times 15*, WASH. POST (June 8, 2013), http://articles.washingtonpost.com/2013-06-08/politics/39832812_1_rural-area-agriculture-department-population.

194. Urban Criteria for Census 2000, 67 Fed. Reg. 11,663, 11,667 (Mar. 15, 2002).

within a reasonable distance."[195] Washington, D.C., for example, has sufficient local, private religious groups to meet the free exercise rights of service members who are assigned to the Pentagon and surrounding military installations without deployable units. Indeed, the religious diversity in the greater Washington, D.C. area (including the Pentagon) is broad; one ten-mile stretch of road in Montgomery County, Maryland, is referred to as the "Highway to Heaven" and includes twenty-nine Christian and twenty-one Protestant churches, a Buddhist temple, a Hindu Temple, and a Jewish synagogue.[196] There are at least twenty-four major American cities, ranging from Dallas to Detroit, that can be characterized as UAs and have nearby military bases.[197]

Assigning military chaplains to provide for the free exercise rights of service members in highly dense population areas relieves no government-imposed burden on religious free exercise, and the need for military chaplains on these bases should be reevaluated. In contrast, this religious diversity found in UAs is least likely to be found in "rural" areas—however that term is defined.[198] Consequently, units that are assigned to these more remote areas may not have sufficient access to religious resources to meet those service members' free exercise rights.

Of course, those installations in areas with characteristics between the urban and rural classifications pose the most difficult problems. These areas of moderate population density are characterized as Urban Clusters

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195. Kenneth G. Harris, Restructuring the United States Navy Chaplain Corps 8 (Sep. 2005) (unpublished manuscript) *available at* http://handle.dtic.mil/100.2/ADA439298).

196. Susan Levine, *A Place for Prayer*, WASH. POST (Aug. 3, 1997), http://www. washing tonpost.com/wp-srv/local/longterm/library/churches/prayer97.htm. A ten-mile stretch of New Hampshire Avenue in Montgomery County, Maryland includes a synagogue, a mosque, a Cambodian Buddhist temple, a Hindu temple, a Unitarian church, and twenty-nine Christian churches, including three Catholic, one Ukrainian Orthodox, two Seventh Day Adventist, two Jehovah's Witness Kingdom Halls, and twenty-one Protestant churches. *Id.* The Protestants range from Presbyterian, United Methodist, and Lutheran to a large and growing nondenominational Bible church. *Id.*

197. There are currently military bases near the following major U.S. cities: Seattle, Washington; Los Angeles, California; San Diego, California; Las Vegas, Nevada; Colorado Springs, Colorado; San Antonio, Texas; Dallas, Texas; Corpus Christi, Texas; Kansas City, Missouri; Chicago, Illinois; New Orleans, Louisiana; Tampa, Florida; Miami, Florida; Jacksonville, Florida; Atlanta, Georgia; Detroit, Michigan; Cleveland, Ohio; Norfolk, Virginia; Columbia, South Carolina; Washington, D.C.; New York, New York; Providence, Rhode Island; Anchorage, Alaska; and Honolulu, Hawaii. *See* 2007 GUIDE TO MILITARY INSTALLATIONS WORLDWIDE (David B. Craig ed., 2006).

198. For official definitions of rural and urban, see *supra* notes 191-195 and accompanying text.

(UCs).[199] Like a UA, a UC has a core identified with a total land area of less than two square miles and a population density of 1,000 persons per square mile.[200] But although a UC may also contain adjoining territory with, at minimum, 500 persons per square mile, it may encompass a population of only 2,500 to 50,000 persons.[201] Because of the broad range of population density within a UC, it would be difficult to determine whether or not a military unit located within or near a UC would have sufficient access to a plurality of religious establishments.

The best approach in this situation is a case-by-case one, and deference is owed to any corresponding military decision. Multiple models are available to the DoD in determining the sufficiency of service member access to local, private religious coverage. One model that could be used, at least within the United States, is the current DoD process of surveying civilian areas adjacent to military bases in order to determine the military's housing allowance benefit (Basic Allowance for Housing (BAH)) to service members. DoD contracts for an annual survey of more than 350 military housing areas across the United States, examining six different housing profiles.[202] The military could use a similar U.S. base survey or expand the current BAH contract's scope of work to evaluate the distribution and diversity of religious establishments and institutions around military bases.

Even so, the process of determining religious diversity is not as simple as counting churches, temples, and mosques, which the U.S. Census Bureau discovered in 1936.[203] The bureau first began collecting data on religion in 1850, when "census supervisors collected data on the seating capacity, value, and denomination of churches for every county in the United States."[204] These religious censuses were regarded as highly reliable until 1936 when the Bureau of the Census acknowledged serious deficiencies in that year's report.[205] The Census Bureau discovered that

> [w]ith several groups in the South and West refusing to participate . . . the 1936 religious census was a bitter

199. 67 Fed. Reg. at 11,667.

200. *Id.*

201. *Id.*

202. Rudi Williams, *DoD Slicing Out-of-Pocket Housing Costs Starting Jan. 1*, AM. FORCES PRESS SERV. (Dec. 19, 2002), http://www.defense.gov/News/NewsArticle.aspx?ID=42373.

203. *See* Roger Finke & Christopher Scheitle, Accounting for the Uncounted: Computing Correctives for the 2000 RCMS Data, 47 REV. RELIGIOUS RES. 5, 6 (2005).

204. *Id.* at 21 n.2.

205. *Id.* at 6.

> disappointment . . . . But if the 1936 census was a disappointment, the 1946 religious census was a complete failure. Facing stiff resistance from religious groups challenging its propriety, the effort was completely abandoned when Congress denied funding for the latter [sic] phases of the project.[206]

Since that time, multiple private organizations—including the Yearbook of American and Canadian Churches, National Council of Churches, Glenmary Research Center, and Association of Statisticians of American Religious Bodies—have attempted to offer alternatives to the government sponsored censuses.[207] But a lack of full religious and denominational participation, inconsistent undercounting across regions, and lack of specific local (or even regional) data, has limited confidence in the accuracy and utility of these organization's collected data.[208]

These participation problems, however, may not pose as great of a barrier to the military as they did to earlier efforts. The military, of course, likely has considerably more resources and experience in data collection and analysis than small private organizations do today or the U.S. Census Bureau did seventy-five years ago. Furthermore, religious organizations may be more amenable to cooperating in a survey designed to ensure religious free exercise and minimize unnecessary government involvement in religious affairs, especially if the continued constitutional viability of the chaplaincy rested, in part, on these efforts.

Assuming that it can obtain sufficient data on the distribution of religious places of worship, the DoD is more than capable of establishing metrics to determine the feasibility of service member access to those religious services—and thereby the necessity of assigning chaplains to those locations. One such measure could be to determine what constitutes an adequate diversity of religious services and acceptable commutes to those services. In many ways, the military already does this in other areas. For example, Tricare, the military's healthcare benefit program, has established policies dictating the maximum time and distance that beneficiaries may be required to travel in order to receive care; the Tricare manual states specifically that a beneficiary's primary care manager's (PCM) "office

206. *Id.*
207. *Id.*
208. *See id.*

[should be] within 30 minutes of [the patient's] home under normal circumstances."[209]

The consolidation of data and determination of policies discussed thus far would allow DoD administrators—or even military chaplains—to determine whether to assign additional chaplains to non-deploying units based in UCs. At many bases, this kind of coordination between military chaplains and local clergy is already occurring.[210] In fact, the Air Force regularly works with local Catholic churches to provide for Roman Catholic Airmen.[211] In short, the military is more than capable of ensuring that free exercise accommodations are adequate for service members assigned to a given geopolitical area.

2. Foreign-Based Units

Service members may also encounter challenges to their religious practices when based in foreign countries; internationally based service members may encounter language barriers (as in Germany or Korea), off-base restrictions (as in Korea), or other obstacles to free exercise.[212] In short, like rural-based units, internationally based units are highly likely to have need of military chaplains to ensure that service members have sufficient opportunities to freely exercise their religions.

3. Deployable and Non-Deployable Units

Service members invariably have little to no access to religious resources when they are deployed. Recognizing this fact, several military chaplains have, in essence, acknowledged that an assignment to deployable units is perhaps the critical function of the military chaplaincy.[213] This

209. HUMANA MILITARY HEALTHCARE SERVS., TRICARE PRIME AND TRICARE PRIME REMOTE HANDBOOK: YOUR GUIDE TO PROGRAM BENEFITS 14 (Nov. 2012), *available at* http://www.tricare.mil/~/media/Files/TRICARE/Publications/Handbooks/TP_TPR_HBK.pdf.

210. Press Release, Air Combat Command, AIR COMBAT COMMAND CHAPLAIN EMPHASIZES AIRMEN'S RELIGIOUS FREEDOM (Sept. 3, 2009), *available at* http://www.1af.acc.af.mil/news/story.asp?id=123166352 ("We now work with Catholic churches in local communities around Air Force bases to help meet this [lack of Roman Catholic chaplains to cover Roman Catholic Airmen' religious needs].").

211. *Id.*

212. Jon Rabirof, *Military Curfew in South Korea to Continue*, STARS & STRIPES (Jan. 17, 2013), http://www.military.com/daily-news/2013/01/17/military-curfew-in-south-korea-to-continue.html.

213. Jerome A. Haberek, The Chaplaincy in the Army After Next 3, 10-11, 23 (Apr. 6, 1998) (unpublished manuscript) *available at* http://handle.dtic.mil/100.2/ADA341458 ("While force structure might dictate changes in numbers, and positions where chaplains serve, chaplains must remain in TO&E [deployable] organizations. . . . A chaplain will be

acknowledgement implicitly recognizes that military chaplain assignments to non-deployable units are, at the very least, less critical.[214] Determining which military units are deployable requires a separate analysis for each military department—Army, Navy, and Air Force—as each organizes for and fights in a war differently. Consequently, each military chaplain corps is organized somewhat differently, as it is designed to integrate with its respective military department: the Air Force chaplain corps is assigned to air bases, the Navy chaplain corps is assigned to either ship, shore, or other service billets, and the Army is assigned to either deploying or non-deploying Army units.[215] This section will analyze the Army and Navy chaplain corps in order to determine what units are or are not deployable.

In the Army, units that deploy and fight are designated as Table of Organization and Equipment (TOE) units, while non-fighting, non-deploying units are designated as Table of Distribution and Allowances (TDA) units.[216] Military chaplains are currently assigned to both TOE and TDA units.[217] TOE units are readily recognizable to most Americans—such as the 4th Infantry Division, 82nd Airborne Division, or 101st Air Assault Division; TDA units, on the other hand, are not as recognizable and are assigned mainly to "fixed facilities, command and control headquarters, and other Army/Joint organizations."[218] A significant percentage of Army chaplains are assigned to these TDA units; at the installation level in 1993, 20%-30% of Army chaplain billets were in TDA positions.[219]

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needed to share the hardships of troops and provide comfort to those in need, both physically and emotionally. Soldiers need to know that their religious leader is willing to undergo the hardships and suffering that they endure. Only in that context can ministry be effective. . . . Technology is something that will support the work of the chaplain. They must utilize it, but also remember their primary mission is the love and care of their people. This can only be accomplished when they are physically present with the flock. Development of technology must enhance ministry and not be a tool to replace it."); Hanchett, *supra* note 164, at 17-18 ("Were it not for TOE requirements and the unique character of military society, it may be possible to civilianize the chaplaincy.").

214. *See* Haberek, *supra* note 214, at 10-11.

215. Dan Ames, Keeping Faith: Manning the Army Chaplain Corps During Persistent Engagement 4 (Mar. 12, 2009) (unpublished manuscript), *available at* http://handle.dtic.mil/100.2/ADA498473.

216. *Table of Organization and Equipment (TOE), Table of Distribution and Allowances (TDA)*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/agency/army/toe.htm (last visited Oct. 10, 2013) [hereinafter GLOBALSECURITY.ORG].

217. Haberek, *supra* note 214, at 17.

218. GLOBALSECURITY.ORG, *supra* note 218.

219. Hanchett, *supra* note 164, at 17. Of course, TDA assignments may include units, such as Basic Training companies, that although non-deploying, may qualify for a military

In the Navy, chaplains are assigned to ship, shore, or with other services, such as the United States Marine Corps (Marines).[220] As with Army TOE units, a Navy chaplain assignment with the Marines is a deployable position.[221] Additionally, assignment to a U.S. Ship (USS) as a permanent crewmember carries with that assignment the potential for long deployments or exercises at sea.[222] Therefore, assignment to a USS or the Marines is to a deployable unit. However, a shore-based assignment does not normally entail a deployment obligation.[223] Excluding assignments to Marine units, approximately one-third of Navy chaplains are assigned to USS or other deployable billets, while two-thirds of Navy chaplains were assigned to non-deployable shore billets.[224]

As the foregoing analysis shows, the military already does and a court readily could determine, which units are or are not readily deployable, and there is good cause for distinguishing between deploying and non-deploying units in considering the necessity of military chaplains. Thus, adding a deployment element to the Katcoff analysis would not require a fact or time-intensive analysis by courts.

D. Counter-Arguments

Reevaluating positions for military chaplains on UA and UC based military installations is not without criticism.[225] Some have speculated that military chaplain retention rates will decrease if chaplains are assigned primarily to rural bases;[226] however, there is no publicly available study linking the availability of urban assignments to military chaplain retention.

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chaplain under this analysis due to the additional limitations that they face with respect to access to resources off-base. There are, however, reports of local clergy ministering to basic trainees, so whether chaplains are critical to these TDA units might be an area that a court would need to consider more fully. Bryant Jordan, *'God's Basic Training' Coming Under Fire*, MILITARY.COM (Dec. 19, 2007), http://www.military.com/NewsContent/0,13319,158531,00.html.

220. Note that United States Navy chaplains may also be assigned to units in the United State Marine Corps, United States Merchant Marine, or the United States Coast Guard. *A Calling Within a Calling: Chaplain*, NAVY.COM, http://www.navy.com/careers/chaplain-support/chaplain.html (last visited Oct. 10, 2013) ("Together, Navy Chaplains enable the free practice of religion for all the Sailors, Marines and Coast Guardsmen who serve.").

221. Harris, *supra* note 196, at 5.

222. *Id.*

223. *Id.*

224. *Id.* at 7-8.

225. *See* Richard Rosen, Katcoff v. Marsh *at Twenty-Two: The Military Chaplaincy and the Separation of Church and States*, 38 U. TOL. L. REV. 1137, 1147-48 (2007).

226. *Id.* at 1148.

In fact, it is plausible that a military chaplain may prefer an assignment to a rural area over an urban one. In any event, retention of chaplains in and of itself is likely not a sufficient consideration to avoid an Establishment Clause violation.

Others argue that changing the policy on chaplain placement will undermine the performance of non-free exercise duties, including activities such as burial services mandated by 10 U.S.C. § 3547.[227] This argument, however, overlooks the fact that a reevaluation of chaplain placement need not eliminate the presence of military chaplains to military bases in UAs altogether. On the contrary, the proposed limitations would only affect non-deploying units on specified urban bases insofar as they would not need chaplains for the purpose of free exercise accommodation; chaplains could still be assigned to non-deploying units on urban bases for other purposes. For example, Army chaplains could continue to receive assignments to the Pentagon to perform administrative jobs at the Army Chief of Chaplains Office or to a D.C.-area base for the purpose of performing burial services at Arlington National Cemetery. In sum, arguments against reshaping military chaplain assignments to UA-based installations can be dismissed by adding the deployment and free exercise role elements to the *Katcoff* analysis.

Finally, some may argue that the rural-international-deployable distinction for which this article advocates would be too administratively complex for DoD to implement or for the courts to supervise. And ultimately, if the constitutional basis for the chaplaincy is the government's imposition of burdens on the free exercise rights of service members, then that need—and more importantly, that constitutional mandate—is obviated in locations in which there is no government-imposed burden. Beyond that constitutional reality, it also makes administrative sense to employ limited resources in those locations where those resources are actually needed—i.e., rural, international, and deployed locations.

VI. Proposal for a Constitutional Twenty-First-Century Chaplaincy

Court precedent at various levels consistently indicates that the military chaplaincy is constitutional insofar as it provides free exercise opportunities to those who otherwise would likely be deprived of access to religious services. Indeed, because military obligations, assignments, and orders hinder religious access for deployable units and service members in rural, international, and perhaps even suburban (UC) based units, the Free

227. *Id.*

Exercise Clause compels the government to take action to alleviate those hindrances; the government does so by providing chaplains (and attendant religious resources) to service members. As such, the Chaplains Corps is a constitutional accommodation of these service members' free exercise rights.

The aforementioned hindrances are nonexistent for those service members assigned to non-deployable units in UAs and may not be a concern for service members assigned to non-deployable units in certain UCs. In short, the DoD's chaplaincy program is overbroad: it provides military chaplains for the purpose of accommodating some service members who already enjoy sufficient access to religious resources. With respect to these service members, the military's chaplaincy program amounts to an impermissible advancement of religion and, as such, cannot survive constitutional muster.

Given that the government may not constitutionally assign chaplains to provide for the free exercise of service members who suffer no government-imposed obstacle to the exercise of those rights, the most critical question for the courts to address is how to determine the sufficiency of religious access. Such questions may involve administrative, logistical, and security considerations. On these topics, the Court has historically deferred to the military, allowing the military to administer the Court-imposed standard.

As discussed earlier, the DoD has multiple avenues for determining the sufficiency of religious access. The most straightforward determination would involve a characterization of units as deployable or non-deployable (with the attendant presumption that deployable units require military chaplains to provide for service members' free exercise). Among those units that are non-deployable, the analysis may become somewhat more complicated. Non-deployable units in urban areas of the United States almost certainly have sufficient access to a number of religiously diverse resources and institutions; units in areas that are not UAs or UCs or are assigned to international areas may reasonably be granted a presumption of insufficient access (or may be subject to additional analysis).

The most difficult evaluation involves units in American UCs. But such analysis should be based upon other models that the military currently uses, including a consideration of military housing area surveys that are presently used for BAH determination and as well as the medical-service areas and commuting policies currently used by Tricare. The most challenging aspect of this evaluation will be the collection of data on the distribution of churches, temples, synagogues, and other religious establishments within the United States. No reliable and comprehensive source of such

nationwide data is presently available, and other organizations' attempts to gather such data have been riddled with problems. The DoD's vast resources and experience (as illustrated by BAH and Tricare models), however, illustrate that the military is capable of gathering and utilizing the necessary data to determine which areas are burdened by obstacles to religious free exercise and which are not. To ensure the constitutionality of the chaplaincy, the courts should insist that they do so.

This analysis leaves open the question of what quantity and level of religious diversity is "sufficient" when it comes to houses of worship and their proximity to military bases. The first step in any reevaluation of service member needs must focus on gathering more accurate data as to the religious affiliations of the service members themselves. Currently, service members' religious affiliations are voluntarily self-reported upon initial entry into military service. Indeed, three Army chaplains in 2000 were listed in official statistics as having either no religious preference or no preference recorded.[228] The probable result of such haphazard and individually identifiable reporting is inaccuracy and underreporting of religious affiliation; data collection would be greatly improved through more traditional survey methods.

Once reliable data has been secured as to the military's religiously affiliated population, the DoD's next step should be determining the best method for ensuring that the religious needs of non-deployable units are met (either through local access to religious resources or through the provision of military chaplains). Whereas proportional representation is impractical within the chaplain's corps, it should be a valid consideration in analyzing the distribution of civilian houses of worship adjacent to military posts. The DoD might, for example, require a minimum of one religious establishment within a given radius of a military base for every group or denomination that comprises at least 0.5% of the religiously affiliated military population. That population could be determined based on an annual survey. Those bases located in areas that do not meet such criteria would have a demonstrated need for military chaplains to accommodate service members' free exercise rights. Accommodation might be tailored even further by inversely correlating the number of chaplain assignments to the number and diversity of local civilian religious resources; for example, even if a given UC does not have sufficient houses of worship to satisfy the

228. Terry A. Dempsey, Asymmetric Threats to the U.S. Army Chaplaincy in the 21st Century 9 (Apr. 2000) (unpublished manuscript), *available at* http://handle.dtic.mil/100.2/ADA377952.

religious needs of a unit's service members, that unit may nonetheless have better access than a rural-based unit and, accordingly, may not need as many military chaplains as does the rural-based unit.

VII. Conclusion

In sum, chaplain assignments to various units need not be "all or nothing," that is, every unit is assigned a chaplain or no unit is assigned a chaplain. However, a significant number of military units have ample access to off-base religious services (as in heavily urbanized areas of the United States). If the free exercise clause allows for—or even mandates—the chaplaincy, the DoD must make *some* effort to distinguish between units that are and units that are not subject to a government-imposed burden on religious free exercise. As religious accommodation is permissible only when government action encumbers religious free exercise, service members' access to religious resources must be more carefully considered in order to ensure that the accommodation of military chaplains to various military units truly relieves a burden.