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NOTES

The United States Military Chaplaincy Program: Another Seam in the Fabric of our Society?

The military chaplaincy¹ may present the ultimate confrontation² between the establishment clause and the free exercise clause of the first amendment.³ By employing military chaplains, the government directly subsidizes religion, apparently in direct contravention of the establishment clause. Yet, transporting military personnel to isolated locations without providing them access to religious services might effectively deprive soldiers of the right to practice their religion as guaranteed by the free exercise clause. Thus, the chaplaincy promotes an "accommodation" between the two clauses, with sufficient religion being supplied to satisfy the free exercise clause, but not so much as to run afoul of the establishment clause's restriction against excessive government aid to religion.⁴

The precise contours of such an "accommodation," however, are pure speculation. While the past thirty-five years have seen many traditional areas of church-state cooperation subjected to judicial scrutiny,⁵ the constitutionality of the United States military chaplaincy program⁶ has yet to be considered under traditional⁷ establish-

1 A chaplain may be defined as "a clergyman officially attached to the army or navy, to some public institution, or to a family or court." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 375-76 (1976).

2 One constitutional scholar has stated that "[i]t may be that more can be learned about actual church-state affairs in America from studying military chaplains than can be seen in almost any other area." R. DRINAN, RELIGION, THE COURTS AND PUBLIC POLICY 24 (1963).

3 U.S. CONST. amend. I. The first amendment provides in relevant part: "Congress shall make no law respecting the establishment of religion nor prohibiting the free exercise thereof."

4 See notes 27-38 *infra* and accompanying text.

5 See, e.g., Engle v. Vitale, 370 U.S. 421 (1962) (prayer in public schools); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemptions for religious property); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (federal grants to sectarian colleges).

6 While this note deals only with government employment of chaplains in the armed forces, somewhat similar issues are presented by employment of chaplains in various state legislatures, in Congress, in state and federal prisons, and in veteran's hospitals and insane asylums.

The constitutional status of legislative chaplains has only recently been decided. Historically, taxpayer actions challenging the constitutionality of compensating ministers for opening each day's legislative session had been dismissed for lack of standing. Elliot v. White, 23 F.2d 997 (D.C. Cir. 1928); O'Hair v. Nixon, Civ. No. 410-73 (D.D.C. Mar. 21, 1973) (dismissed); Murray v. Morton, 505 F. Supp. 144 (D.D.C. 1981) (action by federal taxpayers

ment clause analysis.⁸ In recent years, however, the military chaplaincy seems more vulnerable to constitutional attack than ever before.⁹

challenging payment of salaries and certain expenses for the chaplains of the Senate and House of Representatives dismissed because plaintiffs lacked standing and the claim presented a nonjusticiable political question). However, in 1982, relying on *Flast v. Cohen*, 392 U.S. 83 (1968), the United States Court of Appeals for the Eighth Circuit held, in *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982), that a taxpayer (who was also a member of the legislature) clearly had standing to challenge the Nebraska legislature's practice of compensating a chaplain to open each legislative session with a prayer and to periodically collect and publish the prayers in book-form. The court ruled that the plaintiff had demonstrated a sufficient "nexus" between his taxpayer status and the establishment clause claim. *Id.* at 231. The Court of Appeals went on to find that the Nebraska legislature's practice, taken as a whole, was an unconstitutional violation of the establishment clause of the first amendment. The Supreme Court disagreed, and reversed. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983). The Court believed that compensation of legislative chaplains has become "part of the fabric of our society," and is merely a "tolerable acknowledgement" of the beliefs widely held among the people of the United States. *Id.* at 3336. See notes 23-26 and accompanying text *infra*. *Accord* *Colo. v. Treasurer & Receiver Gen.*, 378 Mass. 550, 392 N.E.2d 1195 (1979).

Despite *Marsh*, the standing requirement poses a potential barrier for plaintiffs attempting to challenge the military chaplaincy program. See note 8 *infra*.

The constitutional status of prison chaplains is not as clear. In *Cruz v. Beto*, 405 U.S. 319 (1972), the Supreme Court may have implicitly approved government funding of prison chaplains and chapels by ignoring a challenge of the state's subsidization of religion. Moreover, the Fifth Circuit has rejected a contention that employment of chaplains in federal prisons violates the establishment clause. This contention, said the court, "overlooks the balancing between the Free Exercise and Establishment clauses . . ." Theriault v. Silber, 547 F.2d 1279, 1280 (5th Cir.), *cert. denied*, 434 U.S. 871, *reh'g denied*, 434 U.S. 943 (1977). Presumably, these programs are reasonably necessary to permit those in custody to practice their religion.

7 As used in this Note, "traditional establishment clause analysis" refers to application of the tripartite test adopted by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

8 Very few individuals have sued to enjoin governmental expenditures for military and other chaplaincies. Until recently, such actions have been routinely dismissed for lack of taxpayer standing. See, e.g., *Elliot v. White*, 23 F.2d 997 (D.C. Cir. 1928); *Hughes v. Priest*, Civ. No. 4681-55 (D.D.C.) (argument) (case dismissed Jan. 12, 1956), Appeal No. 13,293 (D.C. Cir.) (dismissed May 16, 1956). Thus, attempts to complain in court against government expenditures for chaplains have historically encountered rebuff. See Herrmann, *Some Considerations on the Constitutionality of the Military Chaplaincy*, 14 AM. U.L. REV. 24, 31-32 (1964).

However, lack of standing may no longer bar taxpayer challenges of the military chaplaincy. A district court recently denied a motion to dismiss a complaint filed by two federal taxpayers seeking both declaratory and injunctive relief against any continuation of the United States Army's chaplaincy program. *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file). On the issue of standing, the court found that the plaintiffs had satisfied the requisite two-part nexus test of *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). The court further found that the Army's extensive support of the chaplaincy program (\$65,000,000 in 1980-81) was not an "incidental expenditure." *Katcoff*. The case is currently pending.

9 See generally Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1235-39 (1980). See also *Anderson v. Laird*, 466 F.2d 283 (D.C.

This note examines the constitutional vulnerability of the military chaplaincies of the United States Armed Forces.¹⁰ Part I considers the Supreme Court's interpretation of the first amendment religion clauses. Part II presents the constitutional issues involved in the chaplaincy question. Part III examines the military chaplaincy, and Part IV applies the constitutional issues to the chaplaincy. Finally, Part V analyzes various alternatives to the present system.

I. The First Amendment Religion Clauses: Establishment Clause Analysis

The first amendment provides that "Congress shall make no law respecting the establishment of religion nor prohibiting the free exercise thereof."¹¹ Exactly what the framers contemplated when they penned this terse provision has been the subject of debate for over two hundred years,¹² and the confusion is probably every bit as great today as it ever was.¹³ Nevertheless, in a series of decisions since 1947, the Supreme Court has made an earnest effort to apply the basic concept of separation of church and state to a wide variety of church-state relationships.¹⁴

The Supreme Court has rejected the notion that the establishment clause was meant to construct an "absolute wall" between church and state.¹⁵ Rather, the Court has recognized that the gov-

Cir.), *cert. denied*, 409 U.S. 1076 (1972) (rejecting compulsory attendance by cadets and midshipmen at Sunday chapel at the service academies.) One expert on the chaplaincy has noted that this decision may have weakened the constitutional status of the chaplaincy as a whole. C. ABERCROMBIE, *THE MILITARY CHAPLAIN* 20 n.7 (1977).

10 There are chaplains in the Army, Navy, and Air Force. *See* notes 46-48 *infra*.

11 *See* note 3 *supra*.

12 *See generally* J. BRADY, *CONFUSION TWICE CONFOUNDED* (1954).

13 As Professor Ripple notes, "the precise contours of the protection contemplated by the framers seem to have eluded, rather systematically, [both] courts and scholars." Ripple, *supra* note 9, at 1220. *See also* Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1383 (1967). For a brief history of the background and environment of the period during which the constitutional language was fashioned and adopted, see *Everson v. Board of Educ.*, 330 U.S. 1, 8-15 (1947), *reh'g denied* 330 U.S. 855 (1947). *See also Everson* at 33-44 (Rutledge, J., dissenting).

14 *See* notes 15-22 *supra*.

15 *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Both Jefferson and Madison advocated absolute separation of church and state. *See* Madison, *Memorial and Remonstrance against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901) (reprinted in 330 U.S. at 63-72 (1947) (Rutledge, J. dissenting)). In the first of the modern cases dealing with the religious guarantees, *Everson v. Board of Educ.*, 330 U.S. 1 (1947), *reh'g denied*, 330 U.S. 855 (1947), the Court purported to follow this interpretation noting, "[t]hat wall [between church and state] must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18. However, the Court in *Everson* upheld a New Jersey statute authorizing the reimbursement to parents of bus fares of children attending both public and

ernment can confer some benefits upon religious institutions,¹⁶ and the goal of establishment clause analysis is thus to distinguish permissible from impermissible governmental interventions. The early cases emphasized that government had to be neutral toward religion,¹⁷ neither advancing religious causes nor inhibiting them. This concept of neutrality led to the Court's adoption in *Lemon v. Kurtzman*¹⁸ of a three-part establishment clause test. First, the governmental activity must have a secular purpose that neither advances nor inhibits religion.¹⁹ Second, the governmental activity must have a direct and immediate effect that is secular and neither advances nor

Catholic schools, thus evidencing an unwillingness to apply the establishment clause so literally.

The Court soon explicitly retreated from the strict separationist school, and adopted a doctrine of accommodation rather than absolute separation. *See Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding a voluntary program releasing public school children for religious instruction). The Court has since warned against relying too heavily on the absolute language of *Everson*. *See Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). The current position of the Court is summarized in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971): "[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

16 Indeed, Justice Douglas has noted that our system at the federal and state level is presently "honeycombed" with governmental financing of religious exercises. *Engle v. Vitale*, 370 U.S. 421, 437 (1962) (Douglas, J., concurring).

17 *Everson v. Board of Educ.*, 330 U.S. 1, 14-16 (1947), *reh'g denied*, 330 U.S. 855 (1947). *See P. KURLAND, RELIGION AND LAW* 112 (1962). While neutrality is a central principle of both clauses, however, there is no single standard for determining what is a religiously neutral act; the neutrality or permissibility of a law must be examined in terms of the challenge to it. *See Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

18 403 U.S. 602, 612-13 (1971). *See also Wolman v. Walter*, 433 U.S. 229, 236 (1977). Although there are indications that the Court is not entirely satisfied with the three-prong test, this test remains the standard for establishment clause analysis. *Mueller v. Allen*, 103 S. Ct. 3062, 3066 (1983). However, the Court did not apply the three-prong test in *Marsh v. Chambers*, 103 S. Ct. 3330 (1983) (upholding the constitutionality of legislative chaplains). It is too early to speculate whether this case signals an abandonment by the Court of the tripartite test, or merely represents the Court's acknowledgment that the test is not to be applied to all areas of church-state cooperation. *See notes 25-26 infra* and accompanying text.

19 *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 106-109 (1968); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

The secular purpose test requires that the government's stated purpose neither establish, sponsor, nor support religion. Comparatively, this component is the least controversial part of the tripartite test because it is relatively easy to meet this prong of the test. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). The Court gives considerable deference to any indicia of a non-religious purpose found in the statute itself or extracted from its legislative history. L. MANNING, *THE LAW OF CHURCH STATE RELATIONS* 18 (1980). The Court will generally not inquire about any hidden motives which may have prompted the legislature to exercise its power. *Sozinsky v. United States*, 300 U.S. 506, 513-14 (1937).

inhibits religion.²⁰ Third, the governmental activity must not produce excessive entanglement between government and religion.²¹

²⁰ See, e.g., *Schempp*, 374 U.S. at 222; *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 774-80 (1973).

The primary secular effect test provides that even where a statute has a secular purpose, it violates the establishment clause when its primary effect is to financially aid, advance, or support religion. See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755-61 (1975); *Nyquist*, 413 U.S. at 774-80 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). Laws which aid one religion, all religion, or prefer one religion over another are equally prohibited. *Everson v. Board of Educ.*, 330 U.S. 1, 15, *reh'g denied*, 330 U.S. 855 (1947). Under the Court's application of this test, any supportive effect must flow incidentally, rather than directly, from the governmental activity. *Widmar v. Vincent*, 454 U.S. 263, 273 (1981).

Where a statute with a valid secular purpose has benefitted a broad class of institutions or individuals, including to some extent religious organizations, the Supreme Court has upheld the statute's constitutionality. *Widmar v. Vincent*, 454 U.S. at 274-77; *Wolman v. Walter*, 433 U.S. 229, 240-41 (1977); *Nyquist*, 413 U.S. at 771. However, where a statute with a valid secular purpose has benefitted only a limited class of primarily religious institutions or individuals, the Supreme Court has found the statute unconstitutional on the ground that the statute's primary effect was to advance religion. *Lemon*, 403 U.S. at 624-25.

²¹ See *Committee for Public Educ. v. Regan*, 444 U.S. 646, 653 (1980); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 748 (1976); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

Even if the first two parts of the tripartite test are met, a statute may still be voided if it endangers excessive governmental entanglement with religion. The first case to explicitly articulate the excessive entanglement test was *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (upholding general tax exemptions for religious property). The best treatment of the test is found in *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971). See also *Hunt v. McNair*, 413 U.S. 734 (1973), the only case in which entanglement was the primary basis of the decision.

The entanglement test is based on the traditional concept of a constitutional wall between church and state. Of course, an absolute wall is impossible, and government must accommodate religion in those areas where interaction is inevitable. *Lemon*, 403 U.S. at 622. But, to a reasonable degree, disentanglement is deemed necessary to prevent the mutual corruption that has historically occurred where the affairs of church and state have become entangled. See *Mueller v. Allen*, 103 S. Ct. 3062, 3069 (1983), *Lemon*, 403 U.S. at 614; *Walz*, 397 U.S. at 674-76.

The Court has identified two types of statutes that are clearly prone to excessive entanglement challenges. The first type includes statutes whose implementation requires significant administrative entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). A critical factor in determining whether a program of aid entails excessive governmental administrative entanglement with religion is the amount of continuing government surveillance required to administer the program. See *Tilton v. Richardson*, 403 U.S. 672, 688 (1971). In examining such a statute, the Court will look at the type of institution benefitted, the nature of the government-provided aid, and the result of the relationship between the government and the religious authority. *Lemon*, 403 U.S. at 615.

The second type of statute which is vulnerable to excessive entanglement challenge is one which intrudes into areas fraught with actual or potential political divisiveness. *Tilton*, 403 U.S. at 622. See also *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 794 (1973). Opponents charge that unnecessary government intrusion into certain highly charged areas has the potential to politically polarize the public along religious lines.

A final consideration in entanglement analysis is the degree of entanglement envisioned in viable alternatives to the present governmental practice. Even if the Court finds that a

Obviously, the application of this test involves a great deal of judicial subjectivity, and the test has met with some criticism.²²

The Supreme Court's recent decision in *Marsh v. Chambers*²³ may be an acknowledgement by the Court that the triparte test is not sufficient to deal with certain "unique" areas of church-state relations. In *Marsh*, the Court refused to find unconstitutional the Nebraska State Legislature's practice of opening each legislative day with a prayer delivered by a state-compensated chaplain. The Court did not apply the triparte test, but rather relied on the fact that the historical pattern of the United States, including the United States Congress, has been to use this kind of prayer and, in light of that history, the practice has become "part of the fabric of our society."²⁴ As Justice Brennan articulated in his dissent, the majority essentially carved an exception to the establishment clause rather than attempt to reshape establishment clause doctrine to accommodate legislative prayer.²⁵ *Marsh* and other recent decisions may reflect the court's inability to devise a standard of review capable of consistent application in the resolution of establishment clause challenges, and may indicate that Court precedent in this area can be applied only to identical or near-identical fact situations.²⁶

II. Constitutional Issues Under Establishment Clause Analysis

Several Supreme Court Justices have expressed the view that a chaplaincy program in the military, funded by Congress, may be constitutionally permissible to accommodate the rights of military personnel to the free exercise of religion.²⁷ Justice Brennan, concur-

statute is entangling, it may nonetheless validate it because the present degree of entanglement is less than that of the possible alternatives. *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970).

22 See Ripple, *supra* note 9, at 1224.

23 103 S. Ct. 3330 (1983).

24 *Id.* at 3336.

25 *Id.* at 3338. While it is still too early to evaluate the ultimate significance of *Marsh*, one scholar has expressed the view that the *Marsh* majority's abandonment of the triparte test appears to have carved out an exception to the Court's use of that standard when traditional practices are at issue. Devins, *Inconsistent Standard of Review in Last Term's Establishment Cases*, Nat'l L. J., Oct. 3, 1983, at 22, col. 4.

26 Devins, *supra* note 25, at 22, col. 1. Devins believes this renders court precedents of little significance. *Id.*

27 This justification for the chaplaincy is a fairly recent innovation, at least when viewed against the long history of the military chaplaincy. See notes 64-66 *infra* and accompanying text. Throughout history, most all armies have been from kingdoms or nations with established churches. The notion of free exercise would have been totally foreign to them. Moreover, there is no evidence that early American chaplains were retained to secure the soldier's right to practice religion. As Herrmann points out, the earliest recognition of the soldier's

ring in *School District of Abington Township v. Schempp*,²⁸ articulated the basic theme, noting that provisions for chaplains might be assumed to violate the establishment clause, yet be sustained on constitutional grounds as necessary to secure for military personnel the rights of worship under the free exercise clause: "Since government has deprived such persons of the opportunity to practice their faith at places of their choice . . . government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be."²⁹

Justice Goldberg, concurring in the same opinion, expressed even stronger convictions on the constitutionality of the military chaplaincy:

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. . . . And it seems clear to me . . . that the Court would recognize the propriety of providing military chaplains. . . .³⁰

Justice Stewart contributed the famous example of the "lonely soldier":

Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for

right to free exercise came in the 1860s, and recognition of the rights of *all* American soldiers to their own chaplains developed even more slowly. See Herrmann, *supra* note 8, at 26.

At least one scholar has expressed the opinion that if the free exercise justification is accepted, it logically must be extended to encompass other types of state action which endanger inhibition of free exercise rights. See R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 25-26 (1963). Scientific expeditions to remote areas such as the South Pole might afford one example of such state action.

A similar idea was expressed from the church's point of view in 1938: "There is no Christian reason . . . why the army and navy should be singled out as entitled to a disproportionate share of the church's ministry, as compared with hundreds of other groups and regions which equally need the gospel and the church's care." *The Chaplaincy Question*, CHRISTIAN CENTURY, Dec. 21, 1938, at 1567, 1568.

28 374 U.S. 203 (1963).

29 *Id.* at 297-298 (Brennan, J., concurring) (footnotes omitted).

30 *Id.* at 306 (Goldberg, J., concurring). Goldberg further stated:

[B]oth the required and permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the ultimate First Amendment objective of religious liberty.

pastoral guidance was affirmatively prohibiting the free exercise of his religion.³¹ (emphasis in original).

Other justices and commentators have expressed similar opinions.³²

While these statements cannot be read as an official judicial approval of the chaplaincy,³³ they at least make clear that in some circumstances the need to accommodate the guarantees of the free exercise clause within the strictures of the establishment clause might require a displacement of traditional establishment clause analysis. The analysis required was recently articulated in *Katcoff v. Alexander*,³⁴ a case pending in the Eastern District of New York which directly challenges the constitutionality of the Army's chaplaincy program. The *Katcoff* court, in denying the Defense Department's motion to dismiss, acknowledged that because of the unique aspects of military life, spending public funds for a military chaplaincy program is "justified and, indeed, perhaps even mandated."³⁵ But the court felt that this fact alone did not ensure the constitutionality of the present program, stating that:

In our view, we would be abdicating our judicial responsibility if we were merely to hold that because a chaplaincy program may in some circumstances be constitutional, the program challenged here does, in fact, pass constitutional muster. In other words, under this rationale a chaplaincy program is constitutional under the Establishment Clause so long as its existence is reasonably necessary to insure that the Free Exercise rights of military personnel will not be abridged. Where a program does not meet that end or goes beyond that goal it's constitutional justification evaporates.

. . . [T]he complaint alleges facts which, if proven, might well establish that the chaplaincy program is so overly broad in scope as to constitute a governmentally sponsored program of religious proselytism, and at the same time sadly inefficient in providing religious support services to members of certain religious faiths. If these facts were to be proven, then . . . the program would, at the least, be

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

32 See, e.g., separate opinions of Judges Bazelon, Leventhal, and MacKinnon in *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972); Greenwood, *The Constitutionality of the Military Chaplaincy: A Historical Study*, CHURCH AND SOCIETY, Mar.-Apr. 1974, at 25; J. BENNETT, CHRISTIANS AND THE STATE 234 (1958). For an attack on the reasoning of the Supreme Court justices, see Jonakait, *Is the Military Chaplaincy Constitutional?*, in MILITARY CHAPLAINS 129-37 (H. Cox ed. 1972).

33 Herrmann states, "[these] key statements reflect a somewhat arbitrary and less than thoroughly considered evaluation of an essentially unresolved complex." Herrmann, *supra* note 8, at 33.

34 No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

35 *Id.*

constitutionally suspect.³⁶

Under this approach, the court would be required to determine "how much" religion is enough to satisfy the demands of the free exercise clause.

While such a determination has never been made with regard to military chaplaincies, decisions dealing with free exercise rights of prisoners in state and federal prisons may provide some important clues. These cases indicate that although the free exercise clause requires the government to provide at least some access to religion, this right is not absolute. For example, prisons, like the military, often provide, at state expense, chaplains of only the Catholic, Jewish, and Protestant faiths. In *Cruz v. Beto*,³⁷ the Supreme Court ignored a Buddhist's complaint that equal religious facilities and services were not provided for him and members of his faith. Apparently then, while the state is justified in providing some religious services to prisoners, it need not cater to the individual religious preference of every prisoner. This decision might imply that the free exercise clause requires, not that the state provide absolute access to religious services, but only that the state make a reasonable effort to provide such services. Anything beyond this reasonable effort could render the program vulnerable to charges of excessive government aid to religion, a violation of the establishment clause.

III. The Military Chaplaincy Program

Chaplains³⁸ of a sort probably existed before the beginning of recorded history.³⁹ The earliest documented chaplains had two prin-

36 *Id.*

37 405 U.S. 319 (1972).

38 Any analysis of the constitutionality of the military chaplaincy must begin with an analysis of the institution itself, for as the *Katcoff* court notes, determination of the constitutionality of the chaplaincy "cannot be made in a vacuum." *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. File). The primary effect test will require that a court examine in detail not only the laws, rules, and regulations which pertain to the chaplaincy, but also how the institution functions in the field. Specifically, the court must determine how the institution of the chaplaincy affects military personnel, the chaplains themselves, and American church-state relations in general. This is no easy task, as the area is fraught with dispute and inhospitable to empirical study. This note attempts only to highlight selected areas of the chaplaincy which might be of importance to a court applying the primary effect test—it makes no pretense of presenting a thorough or exhaustive picture of the entire institution.

For a brief but excellent overview of the modern American military chaplaincy, see *United Presbyterian Report on the Military Chaplaincy*, in *CHURCH STATE AND CHAPLAINCY* 25, 30-40 (A. R. Appelquist ed. 1969).

39 For a thorough treatment of the evolution of the military chaplaincy concept from its

cial functions. First, chaplains were responsible for interpreting divine revelation in order to predict the future. Second, chaplains were employed to perform certain religious ceremonies that would win the favor of God, thereby assuring victory in battle. These two concepts, outlined in Biblical accounts, prescribed the role of the earliest military chaplains,⁴⁰ and have endured in many ways to the present day. By the 1600's, however, the chaplain's role as a minister to men in uniform became the dominant function of the office,⁴¹ and remains so today.⁴²

The American military chaplain is a member of two institutions. First, he is a member of the military, accorded officer's rank, and subject to the military chain of command.⁴³ Second, and of equal importance, he is an ordained minister, representing one of the major American religious denominations.⁴⁴ This "institutional duality" underlies the church-state cooperation involved in the administration of the chaplaincy.⁴⁵

Chaplains work in the Army,⁴⁶ Navy,⁴⁷ and the Air Force.⁴⁸

pre-Biblical origins to its modern manifestations, see R. HONEYWELL, *CHAPLAINS OF THE UNITED STATES ARMY* (1958) (the official history of the Army chaplaincy) and C. ABERCROMBIE, *supra* note 9, at 31-46.

40 The first recorded instances of "men of God" functioning in what might be called a chaplain's role are found in the Old Testament. In numerous instances, holy men accompanying the army were consulted as to the outcome of approaching battles. R. HONEYWELL, *supra* note 39, at 2-3. When Moses raised up his hands during Joshua's battle with the Amalekites, the Hebrew army was filled with the spirit of Yahweh and victory was assured. EXODUS 11:13. Later, the function of the chaplain became more differentiated. Yahweh directed Moses to make two silver trumpets, assuring him that if they were sounded on the eve of battle, victory would be assured. The trumpets were to be in the hands of the Aronite priests rather than the political or military leaders. Some years later the armies of Judah emerged victorious against overwhelming odds after their chaplains sounded the sacred trumpets. EXODUS 17; NUMBERS 10:9, 25:13, 31:6; II CHRONICLES 13:12-20. *See generally* R. HONEYWELL, *supra* note 39, at 3-4; C. ABERCROMBIE, *supra* note 9, at 31-32.

41 *See generally* J. SMYTH, *IN THIS SIGN CONQUER: THE STORY OF THE ARMY CHAPLAINS* (1968).

42 *See* notes 56-58 *infra* and accompanying text.

43 *See United Presbyterian Report, supra* note 38, at 38-39.

44 At any moment, at least 50 religious bodies contribute at least one chaplain to the chaplaincy. Appelquist, *Introduction: Chaplaincy Rationale and Support*, in *CHURCH STATE AND CHAPLAINCY* (A. R. Appelquist ed. 1969).

45 For an excellent explanation of the effect of institutional duality on the chaplaincy, see R. HUTCHESON, *THE CHURCHES AND THE CHAPLAINCY* (1975). Hutcheson points out that the chaplain is not just half-military and half-church; rather, he is a full member of both institutions, with "one foot in heaven and the other in a combat boot." *Id.* at 19. Thus, the chaplain's position is unique in both the military and the church. *Id.* at 17. An appreciation of the significance of institutional duality is a key to understanding both the problems and opportunities of the chaplaincy. Hutcheson feels that the implications of this dual set of obligations have been given inadequate attention. *Id.*

46 10 U.S.C. § 3073 (1983) provides:

Chaplain selection is based on a quota system using estimates drawn from natural religious census data and the projected needs of the separate services.⁴⁹ Based on this data, the denominations are asked to provide the appropriate number of ministers for the chaplaincy. To be eligible for appointment as a chaplain, a candidate must be a regularly ordained clergyman endorsed for the chaplaincy by a recognized religious denomination, and must be actively engaged in the ministry as his principle vocation. In addition, the candidate must meet certain educational requirements, including completion of ninety semester credit-hours at an accredited theological school.⁵⁰

There are Chaplains in the Army. The Chaplains include—

- (1) the Chief of Chaplains;
- (2) commissioned officers of the Regular Army appointed as chaplains; and
- (3) other officers of the Army appointed as chaplains in the Army.”

47 10 U.S.C. § 5142(a) (1983) provides: “The Chaplain Corps is a staff corps of the Navy and shall be organized in accordance with regulations prescribed by the Secretary of the Navy.”

48 10 U.S.C. § 8067(h) (1983) provides: “Chaplain functions in the Air Force shall be performed by commissioned officers of the Air Force who are qualified under regulations prescribed by the Secretary and who are designated as chaplains.”

49 See Zahn, *Sociological Impressions of the Chaplaincy*, in *MILITARY CHAPLAINS* 59, 65 (H. Cox. ed. 1972).

50 The statutory requirements for appointment as a chaplain are the same as for any commissioned officer. For appointment, a person must: (1) be a citizen of the United States; (2) be able to complete 20 years active commissioned service before his fifty-fifth birthday; (3) be of good moral character; (4) be physically qualified for active service; and (5) have such other special qualifications as the Secretary of the military department concerned may prescribe by regulation. 10 U.S.C. § 532 (1983).

The criteria to determine a religious group's eligibility for the chaplaincy and the minimum educational and ecclesiastical endorsements requirements for appointment in the chaplaincy of the military services (Army, Navy, Air Force), are given in 32 C.F.R. § 65 (1983). Section 65.4 provides in relevant part:

(a) Religious groups of the United States that seek to become ecclesiastical agencies in order to endorse candidates for the chaplaincy must obtain recognition from the Armed Forces Chaplains Board. As a prerequisite to receiving such recognition, each religious group must:

- (1) Have ecclesiastical authority to prepare and designate clergy for the chaplaincy.
- (2) Have enough adherents to warrant the effective use of chaplains.
- (3) Provide ecclesiastical validation, support, and supervision of its chaplains.
- (4) Provide chaplains who are willing to respect the integrity of and work in cooperation with other religious groups.
- (5) Abide by the regulations and policies of the Armed Forces Chaplains Board and the Military Services.

. . . .

(c) The following are the educational requirements for chaplain appointments. The applicant shall:

- (1) Possess 120 semester hours of undergraduate credits (or equivalent). . .
- (2) Possess a Master of Divinity (or the equivalent theological degree) or have completed 3 resident years of graduate-level study in theology or related sub-

The chaplain is a commissioned officer, but his rank does not generally carry with it the authority to command troops.⁵¹ He is considered for promotion within the rank structure through the same procedures used for other officers.⁵² He is obliged to follow orders handed down by his commanding officer,⁵³ and is subject to the Uniform Code of Military Justice, the *Manual for Courtmartial*, and all pertinent military regulations.⁵⁴ In general practice a chaplain can be retained on active duty only so long as he has the endorsement of his parent denomination.⁵⁵

jects that lead to ordination and ecclesiastical endorsement and that qualify the applicant to perform professional functions as a chaplain

(d) *Ecclesiastical endorsement of Chaplains.* As a prerequisite to appointment as a chaplain, an applicant must receive endorsement from an ecclesiastical endorsing agency recognized by the Armed Forces Chaplains Board. . . . This endorsement shall certify that the applicant is:

- (1) A fully ordained or qualified priest, rabbi, or minister of religion;
- (2) Actively engaged in a denominationally approved vocation; and
- (3) Recommended as being spiritually, morally, intellectually, and emotionally qualified to represent the applicant's religious body in the chaplaincy of the Armed Forces.

51 10 U.S.C. § 3581 (1983), pertaining to the Army, provides: "A chaplain has rank without command." Similar provisions are found in 10 U.S.C. § 5945 (1983) (Navy) and 10 U.S.C. § 8581 (1983) (Air Force).

52 Chaplains in all the armed forces are rated and promoted by the same procedures as those used for the evaluation of performance and promotion of all other officers. Fitness or efficiency reports, prepared by the commanding officer or a senior chaplain, are filed at regular intervals. Selections for promotion are made by boards of officers, including chaplains, on the basis of the official record of fitness or efficiency reports and other official documents. R. HUTCHESON, *supra* note 45, at 193; *United Presbyterian Report*, *supra* note 38, at 33.

53 The organizational position of the chaplain is quite clearly defined. He is subject to the chain of command beginning with his unit commander and is also under the supervisory control of the chaplain of the next higher military unit. *See* C. ABERCROMBIE, *supra* note 9, at 70. With regard to the purely military aspects of his life, the chaplain is under the same duty as any other officer to accept orders that come through the chain of command. *United Presbyterian Report*, *supra* note 38, at 33. But the chaplain is free of the control of his commanding officer in religious matters. *Id.*

54 C. ABERCROMBIE, *supra* note 9, at 70.

55 Because denominational endorsement is required by law before a chaplain can be commissioned, it is widely assumed that withdrawal of the endorsement terminates the commission. But although this result generally follows, no statute or regulation *requires* revocation of the commission under such circumstances. R. HUTCHESON, *supra* note 45, at 18. *See also* notes 149-52 *infra* and accompanying text.

However, 10 U.S.C. § 643 (1983) (concerning the discharge or retirement of chaplains upon loss of professional qualifications) may be an attempt to resolve this situation:

Under regulations prescribed by the Secretary of Defense, a commissioned officer on the active-duty list of the Army, Navy, or Air Force who is appointed or designated as a chaplain may, if he fails to maintain the qualifications needed to perform his professional function, be discharged or, if eligible for retirement, may be retired.

The Army describes the duties of the chaplain as "analogous to those performed by clergymen in civilian life,"⁵⁶ his primary mission to provide for the religious and moral needs of the military community.⁵⁷ These duties include: holding appropriate religious services such as worship services, marriage, baptism, funerals, and prayer breakfasts; providing religious education through religious classes, individual instruction, cultural groups, choral groups, leadership development programs, religious dance, drama, and films; and developing pastoral relationships with members of the command through visits with soldiers and their families, through guidance counseling, and through other forms of spiritual assistance.⁵⁸

The churches and the military may view the role of the chaplain somewhat differently. Civilian denominations basically agree that the chaplain is to be a servant of God for people in uniform according to the doctrine and tradition of the denomination that ordained him.⁵⁹ The military, however, seems less concerned with the obedi-

It should be noted that discharge or retirement is, according to this section, discretionary rather than mandatory.

56 UNITED STATES, DEPARTMENT OF THE ARMY, PAMPHLET NO. 165-2 THE CHALLENGE OF THE CHAPLAINCY IN THE UNITED STATES ARMY (1970); UNITED STATES, DEPARTMENT OF THE ARMY, ARMY REGULATION NO. 165-20, paras. 2-3 (1972).

57 Few duties are actually imposed on chaplains by statute. For Army chaplains, 10 U.S.C. § 3547 (1983) provides:

(a) Each chaplain shall, when practicable, hold appropriate religious services at least once on each Sunday for the command to which he is assigned, and shall perform appropriate religious burial services for members of the Army who die while in that command.

(b) Each commanding officer shall furnish facilities, including necessary transportation, to any chaplain assigned to his command, to assist the chaplain in performing his duties.

A similar provision governs Air Force chaplains. See 10 U.S.C. § 8547 (1983). For Navy chaplains, 10 U.S.C. § 6031 (1983) provides in relevant part:

(a) An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.

(b) The commanders of vessels and naval activities to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.

58 See *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file); ARMY REGULATION 165-20, *supra* note 56, at paras. 2-3; UNITED STATES DEPARTMENT OF THE ARMY, FIELD MANUAL 16-5, THE CHAPLAIN (1964) [hereinafter cited as FIELD MANUAL].

59 C. ABERCROMBIE, *supra* note 9, at 16. Some scholars point out, however, that the ministry of a chaplain is fundamentally different than that of his pastoral colleagues, because he works in circumstances where ordinary procedures for his being called and installed in service are determined much less by ecclesiastical practice than by the requirements of the military. See Williams, *The Chaplaincy in the Armed Forces of the United States of America in Histori-*

ence of the chaplain to the will of God than with his performance of formal religious duties. The military views the chaplain as a "staff specialist" who "acts as advisor and consultant to the commander in all matters related to religion, morals, and morale as affected by religion in the command."⁶⁰ Some scholars suggest that this difference in interpretation can lead to "tension" between the demands of the church and those of the military.⁶¹ A number of recent studies have addressed the question of whether the chaplain's "dual allegiance" tends to create internal conflict or "role tension,"⁶² and if so, in which direction that conflict is likely to be resolved.⁶³

cal and Ecclesiastical Perspective, in *MILITARY CHAPLAINS* 11 (H. Cox. ed. 1972). Consequently, Williams maintains chaplains in all services come to have much more in common among themselves than with their fellow denominationalists outside the military. *Id.* at 12.

60 *FIELD MANUAL*, *supra* note 58, at 1. *See generally* C. ABERCROMBIE, *supra* note 9, at 68-69; R. HUTCHESON, *supra* note 45, at 33-34.

61 *See* C. ABERCROMBIE, *supra* note 9, at 18. The chaplain is but one of a number of "professionals" commissioned in the military services, and the military establishment may be likely to think of a chaplain's ordination as being comparable to a physician's licensure or a lawyer's admission to the bar. But unlike other professions, chaplains must work for goals established by institutions outside the armed forces and are subject to the authority of these outside institutions. Hutcheson notes that few military commanders are deeply aware of this difference. R. HUTCHESON, *supra* note 45, at 34.

62 "Role tension" is the term used to describe situations in which the clergyman role and the military officer role conflict. The concept is based on the assumption that one cannot serve two masters (in this case, God and Caesar) at once. The idea is an old one. Jean-Jacques Rousseau, after stating that Jesus established a spiritual kingdom which separated the religious from the political system, wrote: "A perpetual conflict of jurisdiction has resulted from this double power . . . and no one has ever succeeded in understanding whether he was bound to obey the ruler or the priest." J.-J. ROUSSEAU, *THE SOCIAL CONTRACT AND THE DISCOURSE ON THE ORIGIN OF INEQUALITY* 138-39 (L. Crocker ed. 1762). Obviously the military chaplain, as a servant of both the church and the state, is in danger of experiencing such conflict to an unusually high degree.

63 Most sociological research in the field of the chaplaincy has focused on role conflict. *See* Aronis, *A Summary of Research Literature on the Military Chaplain*, 29 *THE CHAPLAIN*, Summer, 1973, at 2, 6-16.

The first significant research was done by Waldo W. Burchard shortly after World War II. W. Burchard, *The Role of the Military Chaplain* (1953) (doctoral dissertation, University of California at Berkeley) (*summarized in* Burchard, *Role Conflicts of Military Chaplains*, *AM. SOC. REV.*, Oct., 1954, at 528-35). Burchard's study, based on questionnaires and interviews with chaplains, concluded that chaplains resolve the conflict between their roles as clergymen and military officers by "withdrawing into 'compartments' so that at any given time one role is active and the other is passive." *Id.* at 6. Consequently, Burchard thought that the chaplain regards himself as operating in a moral context while he is conducting tasks associated with his clergyman role, but he is guided by other values when he is dealing with the military in non-religious situations covered by military regulations. Burchard, *Role Conflicts of Military Chaplains*, *AM. SOC. REV.*, October, 1954, at 531. Both Burchard's methodology and his findings have been criticized. *See* C. ABERCROMBIE, *supra* note 9, at 105-08.

Probably the best known study of role conflict in military chaplains is G. ZAHN, *THE MILITARY CHAPLAINCY: A STUDY OF ROLE TENSION IN THE ROYAL AIR FORCE* (1969). Zahn's study, based on the responses of commissioned officers in the Royal Air Force of Great

Throughout most of American history, the ideological relationship between organized religion and the military has been a harmonious one.⁶⁴ In the United States, the belief inherited from the

Britain, began with two assumptions. First, Zahn assumed that tension is present in the role of the military chaplain and that this tension could be demonstrated—even though the individual chaplain might be unaware of, or unprepared to acknowledge, its existence. *Id.* at 31-32. Second, Zahn assumed that where such tension is present and recognized, the chaplain will most likely resolve the tension in favor of the military dimension of the role. *Id.* Although he warns against any attempt to present the findings of his study as anything more than an exploratory and basically descriptive survey, Zahn concludes that these propositions were supported by the results of the study. *Id.* at 240-42. Zahn's study has been criticized for being based on unproven assumptions. See C. ABERCROMBIE, *supra* note 9, at 65.

The movement by American churches during the Vietnam War to reexamine the military chaplaincy made the role-conflict issue the subject of numerous studies. See, for example, the reports of the various religious agencies in CHURCH STATE AND CHAPLAINCY, *supra* note 38, at 18-55.

The most recent sociological study of role tension in the chaplaincy is that of Abercrombie, published in 1977. See C. ABERCROMBIE, *supra* note 9. Abercrombie, while acknowledging the great potential for conflict between the clergyman and military officer roles, found that most chaplains do not encounter situations in which God and Caesar came into direct conflict. *Id.* at 99. Based on his failure to explain the variation of "militariness" among chaplains by using military background factors, Abercrombie concluded that:

Many chaplains will tend to see military values as similar or identical to the values they had developed as Christians and clergymen before becoming chaplains. For these chaplains the military will not constitute a new and different moral environment requiring behavioral (thereby attitudinal) adaptations.

Id. at 123.

Other authors have further downplayed the presence of role tension in the chaplaincy. Indeed, one study examined the high retention rate of chaplains completing their initial service, and concluded that far from being in conflict with the military life style, many religious values are actually emphasized in the army. C. Keys, Student Research Project 86: An Evaluation of Certain Factors Affecting the Retention Rate of Career Chaplains in the United States Army (1969) (master's thesis, Industrial College of the Armed Forces).

Perhaps the most rational view is that taken by Hutcheson. See R. HUTCHESON, *supra* note 45. Hutcheson, a Navy chaplain of 30 years and an admiral, states that in a group of persons who are simultaneously full members of two social institutions as disparate as the church and the military, the existence of role conflict is not surprising. Indeed, he says, the surprising thing would be its absence. But he continues:

[T]he existence of role conflict is not of itself necessarily a negative factor. The chaplaincy is a profession which deliberately makes role conflict a way of life, and the relevant question is not whether it exists, but how useful the results may be.

Id. at 20. Hutcheson concludes that although chaplains are undoubtedly influenced by the military environment, they have not left the church and entered the military. Rather, Hutcheson believes the chaplain takes the institutional environment of the church with him into the military, and that a substantial part of the perceived world in which he lives and works is determined by church norms rather than military norms. *Id.* at 22. These observations are based on Hutcheson's admittedly biased personal feelings, rather than on empirical study. *Id.* at 8-9.

64 The function of the chaplain in today's military can only be understood within the larger context of the general relationship between organized religion and the activities of the

colonists that "service to God equals service to country"⁶⁵ ensured enthusiastic support by the churches for the nation's war efforts.⁶⁶

secular state. Consequently, the development of the American chaplaincy ought to be considered in light of both historical precedents and sociological, cultural, and political forces.

The identification of the will of God with military successes in the Old Testament has already been noted. *See* note 40 *supra*. By the time of the Crusades, this concept had evolved into the notion of the "holy war," in which not only were victories in battle perceived as a sign of God's favor, but war was being declared to fulfill the will of God. Not surprisingly, the chaplain's role in battle was often broader than mere moral or spiritual support. *See* R. BAIN-TON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 114 (1960).

But in the years following the Crusades, war came to be considered less as an expression of God's will and more as the business of the secular government. The role of the chaplain began to shift from exhorting the men on to victory to ministering to the men who happened to be in the army. By 1350, the "fighting padre" had all but disappeared in England. *See* J. SMYTH, *supra* note 41, at xvii, 4. *See also* C. ABERCROMBIE, *supra* note 9, at 33.

65 The American notion of itself as a "chosen" nation had special relevance to the development of the American chaplaincy, and explains, in part, why the propriety of the chaplaincy has been questioned only rarely until recent times. Unlike his British counterpart, the patriot chaplain of the American revolution was a "trumpet of Jehovah, proclaiming a new crusade." C. ABERCROMBIE, *supra* note 9, at 33. The reasons for this are both historical and theological. The Protestant churchmen of the Revolution relied heavily on the Hebrew Scriptures, believing them to be a guidebook for all times and places. In the Old Testament they found increasing support for their belief not only that secular history had meaning, but also that God realizes that meaning through the actions of a nation, of a chosen people. *Id.* at 35. Indeed, the revolutionaries were apparently so conscious of the relevance of the Old Testament to their difficulties that, as Honeywell states, "[m]any practices observed reverently by American chaplains grew directly out of the usages of the primitive church and of the prophets, priests, and judges of Israel." R. HONEYWELL, *supra* note 39, at 1. These practices fixed a general pattern for later years. *Id.* In essence, the settlers saw themselves as a new Israel—a chosen, covenanted nation that would serve as a model for the rest of the world. From the start, then, a strong identification of the interests of the new nation with the interests of Christianity existed, and the notion developed that service to America, including military service, is service to God. *See generally* E. TUVESON, *REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE* (1968); S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* (1972).

The groundwork for a militantly patriotic American church and chaplaincy having been laid, the chaplains of the Revolution were not only ministers of God, but were also active patriots, stirring up support for the rebellion and the cause of independence. An early commentator on the beginnings of the American military chaplaincy illustrated the conviction and revolutionary spirit of the chaplains of the day. In addition to being "earnest, self-denying ministers of God," many chaplains "were bold and active patriots besides, stirring up rebellion, encouraging the weak and timid by their example as well as their teachings and inspiring the brave and true with confidence by their heroism and lofty trust in the righteousness of the cause they indicated." J.T. HEADLEY, *CHAPLAINS AND CLERGY OF THE REVOLUTION* 58 (1864). *See also* R. HONEYWELL, *supra* note 39, at 35; S. AHLSTROM, *supra*, at 361.

66 The colonial theme of America as the vindicator of God's will on earth was much in evidence as the nation faced later threats to its existence. The Civil War was essentially a religious crusade against slavery, uniting the major religious traditions of the North to purge the nation of its most despicable evil. C. ABERCROMBIE, *supra* note 9, at 39. *See generally* T. SMITH, *REVIVALISM AND SOCIAL REFORM IN MID-NINETEENTH CENTURY AMERICA* (1957); L. FILLER, *THE CRUSADE AGAINST SLAVERY, 1830-1860* (1960); E. TUVESON, *supra* note 65,

Consequently, the propriety of the military's use of chaplains to further the war effort was, until recently, rarely questioned.⁶⁷

Vietnam brought with it a changed perspective.⁶⁸ Scholars gen-

at 162-63. *But see* Williams, *supra* note 59, at 33 (viewing the civil war as a "just war" but not a "crusade"). The Spanish American War was viewed by many as an unselfish effort to liberate the oppressed people of Cuba, and many church leaders wholeheartedly supported the effort. R. HONEYWELL, *supra* note 39, at 158. Honeywell comments that "many devout people saw the hand of Providence in the incidents of battle." *Id.* One participant wrote: "[F]ew came out of this campaign, we venture to believe, without firm conviction that had not God been on our side, the enemy would have swallowed us." *Id.* See also C. ABERCROMBIE, *supra* note 9, at 40.

Church support for the American efforts in World War I was similarly strong and vigorous. *Id.* According to Ahlstrom, one noted Utilitarian exclaimed that he felt Christ himself "would take a bayonet and grenade and bomb and rifle and do the work of deadlines against that which is the most deadly enemy of his Father's Kingdom in a thousand years." S. AHLSTROM, *supra* note 65, at 885; ABERCROMBIE, *supra* note 9 at 40.

The Cold War lacked the violence of previous conflicts, but the role of religion was no less central. The reaction to the threat of the atheistic communists was severe; one historian has noted that many people in the United States came "to regard the Soviet Union almost as the Anti-Christ" and that anti-communism emerged in the United States "virtually as a secular religion." A. THEOHARIS, *THE YALTA MYTHS: AN ISSUE IN U.S. POLITICS 1945-1955* 72 (1970). Ahlstrom commented that "[b]eing a church member and speaking favorably of religion became a means of affirming the 'American way of life', especially since the USSR and its communist allies were formally committed to atheism." S. AHLSTROM, *supra* note 65, at 951-52. Thus, viewing the communist movement as a threat to Christianity, the churches rallied to the ideological defense of the free world. C. ABERCROMBIE, *supra* note 9, at 41-42. Such sentiments were additionally evident during the Vietnam War. As late as 1966, Cardinal Spellman told soldiers in Vietnam that they were "fighting for Christ." Williams, *supra* note 59, at 53.

Based on this history, Abercrombie concludes that until very recently, most of the American churches have often supported United States military policy as the will of God. C. ABERCROMBIE, *supra* note 9, at 42. Consequently, he believes American chaplains were able to serve two masters without tension, since both masters appeared to want much the same thing. *Id.* at 137.

Vietnam may have ended this harmonious partnership. See note 68 *supra* and accompanying text.

67 Since colonial times, however, the chaplain's *constitutional* status has occasionally been called into question. See notes 75-78 *infra* and accompanying text. See generally Klug, *The Chaplaincy in American Public Life*, in *CHURCH STATE AND CHAPLAINCY* 70-83 (R. Appelquist ed. 1969).

68 See Fernandez, *Forward*, in *MILITARY CHAPLAINS* iii-iv (H. Cox ed. 1972). In explaining why he decided to edit *MILITARY CHAPLAINS* when he did, Harvey G. Cox, Jr. explained: "Now" means Vietnam. Our whole nation is *now* reeling under the traumatizing and unprecedented experience of discovering how wrong we have been and for how long we have been wrong about our war in Southeast Asia Our bitter experiences in Vietnam and Indochina have provoked the beginnings of a searching reevaluation of all our national institutions It is only natural that this shocked reappraisal should also include another hard look at the military establishment and the religious community, and at that crucial point where these two intersect is the institution of the military chaplaincy.

Cox, *Introduction: The Man of God and the Man of War*, in *MILITARY CHAPLAINS* vi (H. Cox ed. 1972) (emphasis in original).

erally agree that the Vietnam experience sparked a general reappraisal of America's moral and religious traditions regarding the activities of the secular government.⁶⁹ American society began to question whether America's participation in the war was justified, and serious doubt was expressed whether organized religion had any business legitimizing the unpopular and unjust war.⁷⁰ Chaplains, sometimes referred to as "greased cogs in a machine for killing"⁷¹ because of their role in the military, came under particularly harsh criticism.⁷² The chaplain's role as a military officer was considered by many churchmen to be incompatible with the clergy role, necessitating elimination of the chaplaincy.⁷³

69 See S. AHLSTROM, *supra* note 65, at 1085; C. ABERCROMBIE, *supra* note 9, at 127-28.

70 A good discussion of these concerns is found in Zahn, *supra* note 49, at 77-80. Zahn concedes that the "essentially parochial" activities of the chaplain are unlikely to produce serious tension. *Id.* at 77. But other dimensions of the chaplain's role—the provision of guidance, the obligation to set a moral tone, the duty to advise commanders on religious, moral, and morale matters—present potential problems. *Id.* at 78. Zahn also concedes that the adverse stereotype of the chaplain as a tool of the military ("a blesser of cannons") is probably a thing of the past. *Id.* But he feels that dramatic and possibly controversial ceremonial occasions or spiritual endorsements of this type are much less of a problem than the more subtle day-by-day endorsement the chaplain may be giving the military establishment and its practices merely by being present. *Id.* He states:

Although to the best of my knowledge there has been no research which will settle this particular issue one way or the other, it would be inconsistent with all that is known about the power of symbolic communication if the sight of a clergyman wearing the uniform and holding officer's rank did not become, at the very least, a symbol of the military's *acceptability* in the eyes of the church he represents. One may debate whether the chaplain's presence is taken as evidence of the church's direct blessing, but that is largely beside the point (emphasis in original).

Id.

Zahn further expresses his belief that eventually, the chaplaincy and the churches will have to face the question of whether the "spiritual welfare of the men" might not require a complete and open dissociation from war and the fighting of wars:

If clergymen, once they have put on the uniform and rank of the military establishment, have nothing to say [about the immoral practices and policies of the military] . . . it is possible that their example might serve to quiet and dull the moral sensitivities of their charges, and, by so doing, work to their spiritual detriment.

Id. at 85. In short, Zahn feels the chaplaincy may have reached the point where it constitutes a source of scandal in the strict theological sense. *Id.*

71 R. HUTCHESON, *supra* note 45, at 62.

72 See Klitgaard, *Onward Christian Soldiers: Dehumanization and the Military Chaplain*, CHRISTIAN CENTURY, Nov. 18, 1970, at 1377-80.

73 Supported by resurgent pacifism and anti-military feeling, a serious debate emerged in church circles over the advisability of the chaplaincy. "Clergy and Laity Concerned about Vietnam" published MILITARY CHAPLAINS, note 32 *supra*, a collection of essays that was highly critical of the modern chaplaincy. In addition, many denominational task forces issued reports in the early seventies that called for changes in, or demilitarization of, the chaplaincy; see, for example, United Church Task Force, *Ministeries to Military Personnel* 82-91 (1973) (report to the Ninth General Synod, St. Louis, Missouri).

The voices of criticism have quieted in recent years; but the experience raises serious doubts whether the churches can ever again ally themselves so comfortably with the ideology of the military. The chaplain's resulting predicament is vividly described in a recent study of the chaplaincy: "The day will come, I feel, when the contrast. . . between the American military ethic and the American civilian ethic will be nowhere greater than in the field of religion. And the chaplain will be left, straddling the gap that has become a chasm!"⁷⁴

IV. Constitutional Status of the Military Chaplaincy

The debate over the constitutionality of the military chaplaincy is not new. James Madison opposed every form of government-supported chaplaincy,⁷⁵ and a strong anti-chaplain movement surfaced

74 C. ABERCROMBIE, *supra* note 9, at 137.

75 Madison opposed every form and degree of official relation between clergy and civil authority. For him, religion was a wholly private matter beyond the scope of civil power either to restrain or to support. *See* *Everson v. Board of Educ.*, 330 U.S. 1, 39-40 (Rutledge, J., dissenting), *reh'g denied*, 330 U.S. 885 (1947). Accordingly, Madison opposed government sponsorship of chaplains in every area, including the army and navy. Although he recognized that the state might have a legitimate interest in seeing that the morale of its troops was maintained, he could not reconcile this admittedly valid interest with his beliefs in religious liberty. In his *Detached Memoranda*, he set forth his arguments against the chaplaincy:

Better also to disarm in the same way, the precedent of Chaplainships for the army and navy, than erect them into a political authority in matters of religion. The object of this establishment is seducing; the motive too is laudable. But is it not safer to adhere to a right principle, and trust to its consequences, than confide in the reasoning, however specious in favor of a wrong one. Look thro' the armies and navies of the world, and say whether in the appointment of ministers of religion, the spiritual interest of the flocks or the temporal interest of the Shepherds be most in view; whether here, as elsewhere the political care of religion is not a nominal more than a real aid.

Fleet, *Madison's "Detached Memoranda,"* III WM. & MARY Q. 558 (1946). Madison recognized the possibility that the restricted freedom of movement of military personnel might require the appointment of chaplains to prevent an infringement on the free exercise of religion, especially in the case of "navies with their insulated crews." *Id.* However, he concluded that even in these situations the "right principle" precluded the use of government-supported chaplains. *See generally* C. ANTIEAU, A. DOWNEY, & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT 178-82* (1964) [hereinafter cited as C. ANTIEAU]; L. PFEFFER, *CHURCH STATE AND FREEDOM* 250-52 (rev. ed. 1967); Herrmann, *supra* note 8, at 26-27.

Madison was not alone in his opposition to the use of chaplains during this period. Antieau quotes an unsigned article in the *Virginia Herald and Fredericksburg Advertiser* for December 24, 1789, which asserted:

The moment that a minister is so fixed by law as to obtain a legal claim on the treasury for religious services, that moment he becomes a minister of the state and ceases to be a gospel ambassador. This is the very principle of religious establishment and should be exploded forever.

in the last half of the 19th century.⁷⁶ For a number of reasons,⁷⁷ however, the debate has been especially heated in the years since Vietnam.⁷⁸

C. ANTIEAU, *supra*, at 181. On the whole, however, the American community was overwhelmingly supportive of chaplains in a variety of situations. *Id.*

76 A strong anti-chaplain movement arose in the period between the war with Mexico and the outbreak of the Civil War (1848-1861). Various Protestants, particularly Predestinarian Baptists, launched strong attacks against government chaplaincies, invoking article VI of the Constitution as well as the first amendment. These "memorials" petitioned that the office of chaplain be abolished not only in the army and navy and their academies, but also in Congress and in relations with Indian tribes. Hard-shell Baptists recommended that military personnel support their own clergymen if they desired religious services. Moreover, they objected to the chaplain's officer rank, and suggested that chaplains join the services as common enlisted men. *See generally* Klug, *supra* note 67, at 74-79.

In response to this widespread criticism of federal chaplaincies, the Judiciary Committees of both houses of Congress considered the issue, and issued reports which concluded that neither the letter nor the spirit of the first amendment was violated by the chaplaincies. Instead, the reports advocated the government's continuance in providing religious facilities for those citizens who were serving their country. H.R. REP. NO. 583, 31st Cong., 1st Sess. 1 (1849); S. REP. NO. 376, 32nd Cong., 2d Sess. 1-2 (1853); H.R. REP. NO. 124, 33d Cong., 1st Sess. (1854). The reports stressed the view that Christianity should be encouraged, and that to abolish the military chaplaincy "would seem like retrograding rather than advancing civilization." H.R. REP. NO. 583, *supra*. A major publication which sustained Congress's pro-chaplaincy stance during this period was JOHNSON, CHAPLAINS OF THE GENERAL GOVERNMENT WITH OBJECTIONS TO THEIR EMPLOYMENT CONSIDERED 14-21 (1856), which emphasized the country's status as a "Christian nation." *See generally* 1 C.M. DRURY, THE HISTORY OF THE CHAPLAINS CORPS UNITED STATES NAVY 1788-1949 64 (1950); Klug, *supra* note 67, at 74-79; Williams, *supra* note 59, at 30-32; Herrmann, *supra* note 8, at 27-29.

Toward the third quarter of the 19th century, a number of liberal religious groups, such as the National Liberal League, vigorously pursued their conception of true church-state separation, which included advocating the abolition of all state-paid chaplaincies. Herrmann, *supra* note 8, at 29.

The period between the two world wars also presented difficulties for the military chaplaincy. The drastic demobilization of the armed forces, the movement toward pacifism in some American churches, and the criticism of incumbent chaplains for their lack of spirituality almost ended the chaplaincy. *See* Klug, *supra* note 67, at 80.

In 1950, President Harry Truman appointed a committee to study the chaplaincy program, and their report was supportive of the program. THE PRESIDENT'S COMMITTEE ON RELIGION AND WELFARE IN THE ARMED FORCES, REPORT ON THE MILITARY CHAPLAINCY (1950).

77 Some scholars have expressed the opinion that many traditional areas of civil-religious cooperation, such as the military chaplaincy, may be exposed to new attack. *See* Ripple, *supra* note 9, at 1237, 1239. Abercrombie feels that the decision in *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972), which rejected compulsory attendance by cadets and midshipmen at Sunday chapel at the service academies, may have weakened the constitutional status of the chaplaincy. C. ABERCROMBIE, *supra* note 9, at 20 n.7. *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file), indicates that such views are not unfounded.

78 *See* notes 68-73 *supra*. Many of the denominational task force reports and other publications came to the conclusion that the present military chaplaincy program violates the first amendment. *See, e.g.*, Jonakait, *Is the Military Chaplaincy Constitutional?*, in MILITARY CHAPLAINS 129-37 (H. Cox. ed. 1972); R. Jonakait, *The Abuses of the Military Chaplaincy* (May

Several approaches might be utilized by a court to determine the constitutionality of the military chaplaincy program. First, a court could apply traditional establishment clause analysis and the tripartite test to the military chaplaincy and those areas of the program that are constitutionally suspect. Second, a court could focus on two unique characteristics of the military chaplaincy, its relationship to national defense and its long history of acceptance as a part of American life. These two characteristics might lead a court to find the program constitutional despite the fact that it might otherwise fail the tripartite test and violate the establishment clause.⁷⁹

A. *The Tripartite Test Applied to the Military Chaplaincy*

1. The Secular Purpose Test

The government has historically encountered little difficulty in establishing a secular legislative purpose behind legislation which directly or indirectly benefits religion.⁸⁰ Similarly, a secular purpose for the military chaplaincy is easily established. The government views the chaplaincy program as a necessary element in the provision of the welfare needs of the troops. The commander of a military unit, it is argued, has the final responsibility for the welfare of the men in his unit. All human beings need food, shelter, and the other physical necessities. In addition, human beings also have other needs

1973) (mimeographed report, American Civil Liberties Union); United Church Task Force, *Ministries to Military Personnel* 11 (1973) (report to the Ninth General Synod, St. Louis, Missouri).

On the other hand, a study of the judicial status of the military chaplaincy in 1974 concluded that the chaplaincy was both constitutional and necessary. Greenwood, *The Constitutionality of the Military Chaplaincy: A Historical Study*, CHURCH AND SOCIETY, Mar.-Apr., 1974, at 25.

⁷⁹ In *Committee for Public Educ. v. Regan*, 444 U.S. 646, 662 (1980), Justice White, writing for the majority, indicated that the Court does not necessarily view the tripartite test as the final or definitive tool of establishment clause analysis. White noted that by avoiding categorical imperatives and absolutist approaches, the Court's decisions have sacrificed clarity and predictability for flexibility. This sacrifice will endure "until the continuing interaction between the courts and the states . . . produces a single, more encompassing construction of the Establishment Clause." *Id.* at 662. Some scholars have interpreted such statements to indicate that the Court may be planning a reassessment of the tripartite test. See, e.g., Ripple, *supra* note 9, at 1196. Whether *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), represents such a reassessment remains unclear. If so, the result in *Marsh* may have been foreseen by the *Katcoff* court when it stated with regard to the military chaplaincy that "[i]t is clear that in some circumstances the need to accommodate the strictures of the Establishment Clause with the guarantees of the Free Exercise Clause might require a displacement of the traditional Establishment Clause analysis." *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1982) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

⁸⁰ See note 19 *supra* and accompanying text.

that transcend those physical necessities. One such need, at least for a large number of troops, is religion. Thus, the commander also has responsibility for the religious life of the men in his unit. Since the commander himself lacks the training necessary to understand the religious needs of all his men, he appoints the chaplain as a "staff specialist" to assist him in this phase of his responsibility.⁸¹ This stated purpose should be sufficient to satisfy the secular purpose test.

Judicial acceptance of this argument, however, might not be automatic. In *Schempp*,⁸² the Supreme Court dealt with the reading, without comment, of Bible verses at the beginning of each public school day. The School District argued that the exercises were for the secular educational purposes of inculcating moral and spiritual values in the school children and establishing discipline in the classroom.⁸³ However, the court found that the exercises were intended by the state to be a religious exercise, and thus in violation of the establishment clause.⁸⁴ With respect to the inculcation of moral and spiritual values, Justice Brennan stated in his concurring opinion:

To the extent that only *religious* materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause. The fact that purely secular beliefs may eventually result does not seem to me to justify the exercises. . . . (emphasis in original).⁸⁵

As for the secular purpose of fostering a more disciplined classroom atmosphere, Brennan stated that "[t]o the extent that such benefits result not from the content of the readings and recitation, but simply from the holding of such a solemn exercise . . . it would seem that less sensitive materials might equally serve the same purpose."⁸⁶

A school situation can of course be distinguished from that of a chaplain.⁸⁷ But the Court of Appeals for the D.C. Circuit in *Anderson*

81 See C. ABERCROMBIE, *supra* note 9, at 17-18. See also R. HUTCHESON, *supra* note 45, at 62.

82 374 U.S. 203 (1963).

83 *Id.* at 278-79 (Brennan, J., concurring).

84 *Id.* at 223.

85 *Id.* at 280. Brennan also stated that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." *Id.* at 265.

86 *Id.* at 280.

87 Brennan distinguished the activities and practices of chaplains from the sponsorship of daily Bible reading and prayer recital, stating that the situation of the school child is "plainly unlike" that of the isolated soldier. *Id.* at 299. In *Marsh*, the Court also distinguished the chaplain situation from that of prayer and Bible reading in public schools, stating that "[h]ere, the individual claiming injury by the practice is an adult, presumably not readily

v. Laird,⁸⁸ using reasoning analagous to that in *Schempp*, ruled that compulsory church attendance in military academies was unconstitutional. The court issued this ruling despite the argument of senior Naval authorities that the divine services conducted at the Naval Academy chapel were "entirely secular in purpose," and provided solely as an element in the training of young midshipmen to become officers and gentlemen.⁸⁹ Applied to the chaplaincy, this reasoning suggests that for the government to demonstrate a secular legislative purpose, it would have to prove that alternative systems of providing for the psychological and spiritual welfare of the troops, such as lay guidance counselors or a privately funded civilian chaplaincy, would not achieve the secular purpose of providing for the general spiritual welfare of the troops.⁹⁰

2. The Primary Secular Effect Test

The establishment clause prohibits statutes which aid religion in general and which prefer one religion over another.⁹¹ The military chaplaincy, it is argued, does both.

First, opponents of the chaplaincy allege that by design and appearance the United States lends its prestige, influence, and power to organized religion by granting commissions, rank, and uniform to chaplains.⁹² In response, the government's position is that the military is simply supplying religious services to those denominational members who wish to participate in them, and that the existence of the Chaplain's Corps need not even imply an official position about the existence of God.⁹³ While this response is probably sufficient to satisfy the secular purpose test, analysis of the military chaplaincy indicates that the government is indeed promoting organized religion to a considerable degree, thus failing the secular effect test.

Central to this analysis is the concept of "civil religion."⁹⁴ In the

susceptible to 'religious indoctrination' . . . or peer pressure . . ." *Marsh v. Chambers*, 103 S. Ct. 3330, 3335-36 (1983).

88 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972).

89 *Id.* at 294, 300 n.5. *See also* R. HUTCHENSON, *supra* note 45, at 9, 134.

90 Toward this end, one author asks: "The armed forces have secular recreation officers; why not secular morale offices or secular counselors? What is it precisely that requires a shaman with ties and obligations and military rank conferred by the army, navy, or marine corps?" Miller, *Chaplaincy vs. Mission in a Secular Age*, *CHRISTIAN CENTURY*, Nov. 2, 1966, at 1335-36.

91 *See* note 20 *supra* and accompanying text.

92 *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

93 C. ABERCROMBIE, *supra* note 9, at 18.

94 Rousseau first coined the phrase in *THE SOCIAL CONTRACT*, *supra* note 62. *See* R.

broadest sense, civil religion refers to *any* modification of the pure teachings of the denominations by the socio-political environment. Most controversy, however, has focused on the substantive effect of patriotic and naturalistic sentiments on such teachings. The label "civil religion" has been applied to at least three different phenomena present in the American experience.⁹⁵ The first, and most widely accepted,⁹⁶ definition of civil religion is that given by Robert Bellah,⁹⁷ who describes it as merely an expression of religious faith interpreted in light of American historical experience. In essence, such civil religion consists of the natural consequences of the "God-centered dimension" of American national life.⁹⁸ This manifestation of civil religion poses few problems for the military chaplain. However, the two other manifestations of civil religion, "common denominator" religion and "American way of life" religion, do present serious problems for the chaplain.

Common denominator religion is a danger in any system, such as the chaplaincy, which is based on cooperative religious pluralism.⁹⁹ Pluralism is an essential feature of the chaplaincy, since in many situations, such as on a ship at sea, chaplains representing the denominations of all the troops will not be available. Therefore, each chaplain is obligated not only to serve those of his own faith or

HUTCHESON, *supra* note 95, at 131. Only recently, however, has civil religion been clearly identified and discussed as a religious dynamic in the United States. See Bellah, *Civil Religion in America*, DAEDALUS, Winter, 1967, at 1-21.

95 See generally R. HUTCHESON, *supra* note 45, at 129-43. Hutcheson notes that failure to differentiate between the three kinds can lead to considerable confusion. *Id.* at 137.

96 *Id.* at 141.

97 See note 94 *supra*.

98 Bellah's form of civil religion recognized the "God-centered dimension of national life" as revealed by American history. Bellah, *supra* note 94, at 12. Rather than replacing or opposing denominational religions, civil religion coexists with them as an additional aspect of a valid religious experience. *Id.* Civil religion is characterized by a general recognition that God is a central Symbol and God's sovereignty has safeguarded the nation from absolutism. *Id.* It recognizes a deep obligation to carry out God's will on earth, and emphasizes the theme that sacrifice for the nation is, in a sense, sacrifice for God. Bellah felt that this civil religion makes a significant contribution to the American tradition, and Hutcheson feels that this is an authentic religious expression in which chaplains may legitimately participate. R. HUTCHESON, *supra* note 45, at 141.

99 Pluralism may be defined as "[a] state or condition of society in which members of diverse ethnic, racial, religious, or social groups maintain an autonomous participation in and development of their traditional culture or special interest within the confines of a common civilization." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1745 (1976).

The pattern of cooperative pluralism currently practiced in the military chaplaincy is based on the principle that "the American religious climate is properly one of mutual respect, understanding, and cooperative co-existence between adherents of different religions." R. HUTCHESON, *supra* note 45, at 117.

denominational group, but also to make provision for those of other faiths and groups. One way to accommodate all troops is to adjust his services to serve the needs of his inter-denominational congregations.¹⁰⁰ Alternatively, the chaplain may provide for the exchange of services among chaplains, the services of civilian clergymen, or use of lay leaders.¹⁰¹ Another consequence of this religious pluralism is the use of educational materials which stress the common beliefs shared by most denominations.¹⁰²

While such accommodations may be unavoidable, many writers feel that the chaplaincy, by practicing "practical ecumenicism", effectively creates a "common denominator religion,"¹⁰³ in which the individual identities of the denominations are lost.¹⁰⁴ It has been alleged that the Army and Navy become "denominations" for the chaplains of the respective services, supplanting civilian ecclesiastical bodies.¹⁰⁵ Thus, it might be argued that the primary effect of the government's sponsorship of the chaplaincy is to "establish" a religion. Supporters of the chaplaincy vigorously deny these allegations.¹⁰⁶

100 R. HUTCHESON, *supra* note 45, at 118.

101 *Id.* at 118-19.

102 *Id.* at 154 ("Character Education" lectures on religion).

103 "Common denominator religion" consists of those beliefs and symbols which are held in common by most people. Its roots may be traced to the 1930s, when John Dewey proposed the elimination of all uncommon and exclusive elements in denominational religion and the replacement of denominational religion with a new "common faith" of Americans. J. DEWEY, *A COMMON FAITH* (1934). Most contemporary common denominator approaches seek to combine rather than discard particularized religions, focusing on the common elements in the Judeo-Christian family. Common denominator religion is an element in all forms of civil religion, and is generally objectionable only when it seeks to stand on its own or become a substitute for denominational religion.

104 R. HUTCHESON, *supra* note 45, at 128. Denominational officials have criticized the chaplaincy on these grounds. *Id.* at 129. Justice Brennan has commented that the concept of a "common core" theology is offensive to many. *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 286-87 (1963) (Brennan, J., concurring) (commenting on the suggestion of fashioning school prayers that were tolerable to all creeds but preferential to none).

105 Williams, *supra* note 59, at 12-13, 32. Williams states that the ministry of a chaplain is fundamentally different from that of his pastoral colleagues because "he works in circumstances such that the ordinary procedures for his being called and installed in service are determined much less by ecclesiastical practice than by the requirements of the specialized group and institution in which he serves." *Id.* at 11. Thus, he concludes, chaplains in the service often come to have much more in common among themselves than with their fellow denominationalists outside the military, and "it is only natural that the 'distinctive polity' of armadas and armies should create, as it were, two new 'denominations,' namely, the Army and Navy chaplaincies." *Id.* at 12.

106 Supporters of the chaplaincy argue that the chaplaincy makes a clearcut distinction between the administrative area, in which the chaplain functions without regard to his denominational affiliation, and the religious area, in which he functions entirely as a representa-

The "American way of life" religion is based on the idea that the pure teachings of the denominations become modified by patriotic and nationalistic sentiments,¹⁰⁷ resulting in an "operative natural religion"¹⁰⁸ which tends to equate service to God with service to country.¹⁰⁹ Obviously, the military situation is especially conducive to the development of such sentiments, and it has been observed that no one comes closer to civil religion in all its manifestations than the

tive of his own church. R. HUTCHESON, *supra* note 45, at 119. Hutcheson notes that this principle is summed in the motto of the Navy Chaplains Corps: "Cooperation without Compromise." *Id.*

Moreover, supporters point out that it is not true, as is widely assumed, that chaplains conduct general Protestant services that conform to a common normative pattern. Rather, every chaplain is entirely free to follow the liturgy and forms of his own denomination, with such adjustments as his denomination may permit (and he may care to make) to the fact that worshipers come from many denominations. Such adjustments are by no means mandatory. *Id.* at 120-21.

Establishing a lack of coercion by the military to adjust denominational Protestant services to become generalized is probably insufficient to answer the accusation of common denominater religion. The fact remains that most chaplains of Protestant denominations *do* make such adjustments. *Id.* at 120. Even Hutcheson admits that the effect of cooperative pluralism on religious faith, while promoting a decrease in "petty sectarianism" and contributing to the ecumenical movement, also "may lead to a weakening of those aspects of Christian witness which might be controversial (but may nevertheless be regarded by some as central) and a blurring of focus." *Id.* at 128.

107 See note 65 *supra* and accompanying text.

108 "American way of life" religion is described by Will Herberg. W. HERBERG, *PROTESTANT—CATHOLIC—JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (rev. ed. 1960). Herberg identified the things to which Americans were obviously devoted, as evidenced by their operative choices, and postulated that this core of common values constituted the operative national religion. *Id.* at 75. Serious problems are undoubtedly presented when the "American way of life" is elevated to the status of a religion in substitution for more authentic forms. In such situations religion might be used for nationalistic purposes, since God's will is identified with the national will. In essence, God becomes a means rather than an end. See R. HUTCHESON, *supra* note 45, at 141. Such fears were at the root of the anti-chaplain movement following the Vietnam war, and this aspect of civil religion presents the most problems in regard to the chaplaincy. *Id.*

Abercrombie concluded, however, that such fears were probably unfounded. His studies indicated that the chaplain corps has remained "remarkably faithful" to the original source of its religious attitudes, even within the sometimes contradictory military environment. Furthermore, he noted (with optimism) that civilian clergymen, and indeed, the American churches in general, seem to be increasingly less willing to accept a nationalistic definition of Christianity. C. ABERCROMBIE, *supra* note 9, at 135.

109 Williams describes the phenomenon as follows:

[T]he religious pluralism of the original republic and the religious fervor connected with almost all American wars . . . have together as in some titanic geological process abraded the jagged contours of sectarianism and religious regionalism to create a rather polished religion of the republic, or civil religion or common-denominator religion, a "civil ecumenity" shaped by the forces of national destiny.

Williams, *supra* note 59, at 14.

military chaplain.¹¹⁰ Indeed, it has been posited that chaplains are in actuality communicating a "military religion" which legitimizes military authority, justifies participation in war, and seeks to further the concept of the wholesome soldier.¹¹¹

Many activities of the chaplain can be viewed as bringing the chaplain face to face with civil religion. For example, he is almost always expected to be a participant on ceremonial occasions.¹¹² Civil religion also manifests itself in the various character guidance, moral leadership, and human goals programs.¹¹³ It is difficult if not impos-

110 R. HUTCHESON, *supra* note 45, at 133. Hutcheson states of the chaplain:

As a member of an institution which exists to serve a national purpose and which is a major focal point for much of the nation's patriotic sentiment, he is no stranger to veneration of the American way of life, particularly in its patriotic manifestations. As a clergyman member of the military institution, his very presence is seen as a symbol of the national relationship to God.

Id.

111 Berger & Pinard, *Military Religion: An Analysis of the Educational Materials Disseminated by Chaplains*, in *MILITARY CHAPLAINS* 87-108 (H. Cox ed. 1972). The authors based their conclusions on an analysis of various prayer books, pamphlets, and periodicals published by military chaplains. They contend that military religion, and the chaplaincy which serves as its mediating agent, function both directly and indirectly to legitimate the military enterprise. *Id.* at 89. Directly, military religion legitimates the military enterprise through the traditional linkage of "God and Country." In this linkage the national society, its ideology, and its principal institutions, especially the state and military, as well as concrete policies of the latter, are explicitly justified in religious terms. *Id.* Even more importantly, military religion *indirectly* legitimates the military enterprise by promulgating the image of the "wholesome soldier," thus advocating values that are functional to soldierly performance and de-emphasizing values that are potentially dysfunctional. *Id.* at 99.

The research methods used to obtain these conclusions have been criticized. *See* R. HUTCHESON, *supra* note 45, at 130 n.7. Hutcheson admits that many chaplains would agree without hesitation that they provide strength for "service to God and country" but claims that most would deny that such teachings are central to their gospel. *Id.* at 130.

A 1971 study concluded that the relationship between civil religion and church-oriented religion contributes to role conflict among chaplains. *See* L. Ahrnsbrak, *Role Conflicts Among Navy Chaplains in Light of American Civil Religion* (May 21, 1971) (Research Paper, Princeton Theological Seminary), (*discussed in* R. HUTCHESON, *supra* note 45, at 136-39).

112 R. HUTCHESON, *supra* note 45, at 133. Among the occasions on which chaplains are called to offer prayers are change of command ceremonies, ship commissionings, unit anniversaries, and training course graduations. *Id.* Military ceremony is also often combined with religious rites at memorial services and military funerals. *Id.* at 133-34.

113 R. HUTCHESON, *supra* note 45, at 135. Such programs are never regarded by the military command as part of the explicitly "religious" program in which the chaplain represents his church, although the chaplain generally regards his participation as part of his explicitly religious ministry. The goals of these programs include the teaching of ethical conduct, the facilitation of personal growth, training in human relations, assistance with human problems, or the elimination of injustice and discrimination. *Id.* They are official programs, and participation is usually mandatory; yet elements of common denominator religion are almost always present in them. *Id.* Furthermore, as Pinard and Berger point out, such programs may indirectly legitimize the activities of military enterprise. Pinard & Berger, *supra* note 111, at 114. For a detailed description of the various "Character Education" and "Personal Growth

sible to justify those activities on the basis of providing access to religion for military personnel, and the implications are strong that the government is actually using these activities to promote and enforce its own religious viewpoint.¹¹⁴

Another constitutional problem is presented by the evangelical¹¹⁵ aspect of a chaplain's ministry. It has been alleged that the chaplaincy is designed to inculcate religious values, and thus provides encouragement for religious activity among the troops.¹¹⁶ Many chaplains openly admit that they feel one of the chief benefits of the chaplaincy system is that it is an office which offers countless opportunities to present the gospel to young men, many of whom are totally unacquainted with it.¹¹⁷ One expert on the chaplaincy feels that one of the chief benefits of shared insider status is ready made contact with the unchurched, and goes on to state that "[t]here is probably no ministry of the church that offers a better or more natural opportunity for meaningful encounter with the functionally non-Christian majority of the population."¹¹⁸ By requiring the chaplain to engage in a wide variety of activities beyond merely ministering to members of his own denomination, the government arguably aids the denominations in spreading their own faith.¹¹⁹

A related problem, also stemming from the chaplain's evangelical ministry, is that of favoritism.¹²⁰ For many denominations, the making of converts is a central thrust, and statistics show that the

and Human Relations" programs, see R. HUTCHESON, *supra* note 45, at 146-80. Such programs have become increasingly uncommon in recent years, and many have been officially terminated.

114 See *Engle v. Vitale*, 370 U.S. 421 (1962), which held that it is no part of the business of government to compose official prayers for recital in public schools. *Id.* at 425. Explaining the Court's decision, Justice White wrote of the framers:

These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.

Id. at 429. Given the attitude of chaplains and the content of the educational materials (see note 111 *supra*), it seems difficult to discount this reasoning simply by labelling programs as "command" rather than "religious" in nature.

115 "Evangelical" ministry, as used here, is one that concerns itself with the spreading of the denomination's faith.

116 Plaintiff's Complaint at 6, para. 10, *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

117 Ledebuhr, *Military Chaplaincy: An Apologia*, CHRISTIAN CENTURY, Nov. 2, 1966, at 1332.

118 R. HUTCHESON, *supra* note 45, at 49.

119 For examples of how much religion can be taught under the guise of a military command function, see *id.* at 145-61.

120 One of the chief reasons Madison opposed the chaplaincy was the danger of favorit-

chaplain's ministry is not merely one of maintenance alone, but that conversions are quite frequent.¹²¹ The problem is that for every denomination that gains a convert, another loses a member. Critics have alleged that, because clergy whose denominations do not have endorsing agencies recognized by the Armed Forces Chaplains Board are effectively excluded from the chaplaincy, the system favors certain religions over others.¹²² This argument gains strength in light of the extremely broad meaning ascribed by the Supreme Court to the term "religion",¹²³ and the emergence of non-conventional, spiritually-oriented movements among the troops.¹²⁴

Other indications of favoritism may exist in the present chaplaincy program. The plaintiffs in *Katcoff* alleged that religion is favored over non-religion because chapels and other religious facilities may be used only for religious and allied purposes.¹²⁵ They also alleged that by granting scheduling priorities to general Protestant services over Protestant denominational services the government favors one Protestant rite over others.¹²⁶ Indeed, it could even be argued that the statute's requirement that chaplains perform religious services on Sundays whenever possible¹²⁷ favors religions who have

ism. He felt the chaplaincy was an unnecessary politicizing of religion, and would exclude religious minorities. Fleet, *Madison's Detached Memoranda*, III WM. & MARY Q. 558 (1946).

121 R. HUTCHESON, *supra* note 45, at 125-26. Hutcheson recognizes that this might lead to problems but believes it is less likely to be a problem in practice than in theory. *Id.*

122 Plaintiff's Complaint at 7, para. 13, *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file). *See* note 50 *supra*.

123 In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court held that the Amish lifestyle, educational practices, and refusal to submit their children to further secular education were religious, and not merely a personal or philosophical rejection of secular values. Central to this determination were the following facts: (1) this was a shared belief by an organized group rather than a personal preference; (2) the belief related to certain theocratic principles and interpretation of religious literature; (3) the system of beliefs pervaded and regulated their daily lives; and (4) the system of belief and lifestyle resulting therefrom had been in existence for a substantial period of time. *Id.* at 215-17.

124 *See* R. HUTCHESON, *supra* note 45, at 93. Another interesting question is presented by *Torcaso v. Watkins*, 367 U.S. 488 (1961), which held that belief in God could not be a condition of employment. Does making entry into the chaplaincy dependent upon denominational endorsement indirectly make employment as a chaplain dependant on belief in God? If so, the chaplaincy is, arguably, inherently unconstitutional.

125 Plaintiff's Complaint at 7, para. 11, *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

126 *Id.* at 7, para. 12. It should be noted, however, that since there are no actual "general Protestant services," the validity of this assertion is questionable. *See* note 106 *supra* and accompanying text.

127 10 U.S.C. § 3547 (1983) (Army); 10 U.S.C. § 6031 (1983) (Navy); 10 U.S.C. § 8547 (1983) (Air Force). *See* note 57 *supra*.

traditionally held services on Sundays over those who have not.¹²⁸

The primary effect test prohibits not only those statutes whose primary effect is to aid religion, but also those which effectively inhibit it as well.¹²⁹ The plaintiffs in *Katcoff* alleged that rather than enhancing the right of military personnel to the free exercise of their religion, the chaplaincy program instead serves to inhibit that free exercise.¹³⁰ Perhaps the most convincing argument in support of this allegation is that, because the chaplain is subject to the authority of his commanding officer, the military has the ability to restrict the free exercise rights of the chaplain by placing requirements and/or restrictions on the time, place, or manner of worship.¹³¹ Every chaplain serves under a military commander, and in theory, the authority of that secular commander over his religious ministry can be nearly absolute.¹³² While it may be true that in practice a commander would be unlikely to influence the purely religious activity of a chap-

128 It is true, of course, that in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court upheld the constitutionality of the so-called "blue laws" against allegations that the laws' mandating of businesses closing on Sundays favored Christian religions over non-Christian religions. However, the Court in that case based its decision on the right of the legislature to declare that a day of rest was desirable for the public good, and that Sunday, as the traditional day of rest, was an unobjectionable choice for this purpose. *Id.* at 426.

The Sunday-closing laws in *McGowan* were upheld because since they did not threaten to impose religious activity; the secular purpose and effect outweighed any incidental benefit to those who chose to attend services on Sundays. The same cannot be said of 10 U.S.C. §§ 3547, 6031, and 8547, which actually mandate when religious services are to be performed.

129 See note 21 *supra* and accompanying text.

130 Plaintiff's Complaint at 8, para. 24, *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct., 1983, on LEXIS, Genfed library, Dist. file). In regard to the level of proof required in a free exercise case, the Supreme Court has stated that one must "show the coercive effect of the enactment as it operates against him in the practice of his religion." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 202, 223 (1963). Chief Judge Bazelon thought that this burden was met in the case of mandatory attendance at military academy chapels. *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972).

131 The *Katcoff* complaint lists a number of ways in which free exercise of religion is inhibited by the fact that "the commander, not the chaplain or his church, has the ultimate responsibility for the religious programs of the Army." Plaintiff's Complaint at 10, para. 31, *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file). The complaint alleges that the commander has control over: (a) determining the requirements, priorities, and geographical allocations of chaplains and chaplain assistants; (b) determining the requirements for religious facilities and supplies; (c) determining the allocation of funds for religious activities; (d) religious fund raising, including the flow of private, outside funds to support religious activities of the Army; and (e) access by civilian clergy to the military community. *Id.* at 10, para. 31.

132 See R. HUTCHESON, *supra* note 45, at 56. In fact, Hutcheson even admits that, in an official sense, the commanding officer causes divine services to be held. *Id.* at 59. He believes, however, that in practice "the commander is unlikely to interfere in what is recognized as the province of the church." *Id.*

lain, it is significant that at least one major denomination (the Wisconsin Evangelical Lutheran Synod) has refused to participate in the chaplaincy on the grounds that its ministers "would not be free to obey the direction of Christ its Head alone."¹³³ The events of the Vietnam War, and the subsequent pacifist movement, have probably increased the possibility of conflict between chaplain and commanding officer over the content of his ministry. In addition, since promotional decisions are based, in part, upon the commanding officer's evaluation of the chaplain's performance,¹³⁴ the pressure on the chaplain to conform his ministry to the expectations of the military command are increased.¹³⁵

The *Katcoff* plaintiffs also alleged that by prescribing the time, place, or manner of religious activities, the government infringes on the free exercise rights of military personnel. Among the practices cited in support of this allegation are: (1) the requirement of a uniform curriculum; (2) the requirement that chaplains provide general Protestant service; (3) restrictions on the type of literature that may be distributed by chaplains; (4) the limitations on the chaplaincy to members of the Protestant, Catholic, and Jewish faiths; (5) educational requirements for chaplain appointments; and (6) denominational quotas for chaplains that are based on the national population as a whole rather than the composition of the military alone.¹³⁶

Challenges alleging violations of the free exercise rights of chap-

133 Herrmann, *supra* note 8, at 33. Cox asks: "How does a chaplain proclaim a prophetic gospel when he is wearing the uniform of the military, is paid by the state, and furthermore is dependant on his superior officers for advancement?" Cox, *Introduction: The Man of God and the Man of War*, in *MILITARY CHAPLAINS* x (H. Cox ed. 1972).

An embittered Jewish chaplain expressed the same idea even more forcibly: "By thoroughly domesticating the military chaplain, the military makes sure that the one person who might appeal to a higher authority (outside of channels), which might command the ultimate loyalty of some of those within the military is effectively silenced." Siegal, *Being a Chaplain in Today's Military*, in *MILITARY CHAPLAINS* 109-10 (H. Cox ed. 1972).

134 See R. HUTCHESON, *supra* note 45, at 192; Herrmann, *supra* note 8, at 30.

135 Hutcheson states that the danger of a chaplain becoming subservient to military command is not as great as opponents claim, and reports that chaplains are not nearly so much at the mercy of commanding officers as outsiders think. R. HUTCHESON, *supra* note 45, at 192-94. However, the Supreme Court's position seems to be that where free exercise rights are concerned, actual inhibition need not be shown — the potential for inhibition of first amendment freedoms may suffice. Justice Brennan, concurring in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), noted that one teacher had stopped praying in class because the state statute made him promise not to inject religious teaching into the secular courses. Brennan found this to be a "concrete testimonial to the self-censorship that inevitably accompanies state regulation of delicate First Amendment freedoms." *Lemon* at 650.

136 See *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

lains and military personnel are, however, unlikely to be successful. The right to free exercise of religion in the military situation is probably not absolute, but must be tempered by the realities of military life.¹³⁷ In addition, the Supreme Court seems to distinguish between religious "status" and religious "belief." In *McDaniel v. Paty*,¹³⁸ McDaniel, a prospective candidate and a minister, challenged a Tennessee statute which prohibited ministers from holding a seat in the state legislature. The Court ruled the statute invalid; however, Chief Justice Burger was careful to point out that since the statute operated against McDaniel because of his "status" as a minister or priest, and since ministerial status was defined in terms of conduct and activity rather than in terms of belief, the free exercise clause's absolute prohibition of infringements on the freedom to believe was "inapposite."¹³⁹ But three justices saw no real distinction between status and belief, and the question cannot be regarded as settled.¹⁴⁰

3. The Excessive Entanglement Test

Any conceivable form of providing religion to military personnel is likely to entail the danger of significant governmental entanglement with religion. The Supreme Court's decision in *Walz v. Commissioner*¹⁴¹ suggests that analysis of the varying degrees of entanglement engendered by possible alternative systems is an important consideration in determining whether the present program suffers from excessive entanglement with religion.¹⁴² Thus, judicial consideration of the constitutionality of the chaplaincy may very well consist of a weighing of the present system's potential for entanglement with that of alternative systems of supplying religion, such as a privately funded civilian chaplaincy.¹⁴³

Supporters of the chaplaincy point to an impressive record of harmonious relations between the armed forces, churches, and government.¹⁴⁴ Yet it is undeniable that the military chaplaincy, because of its inherent institutional duality, is fraught with potentially

137 See note 163 *infra* and accompanying text.

138 435 U.S. 618 (1978).

139 *Id.* at 627 (Burger, C.J., plurality opinion).

140 See *id.* at 632 (Brennan, J., concurring), 642-643 (Stewart, J., concurring), 643 (White, J., concurring).

141 397 U.S. 664 (1970).

142 See notes 178-99 *supra* and accompanying text.

143 See notes 180-87 *supra* and accompanying text.

144 Hutcheson claims that the pluralism which characterizes the chaplaincy is a "notable achievement" in that it is a "workable tripartite relationship" between armed forces, churches, and a religiously neutral government. R. HUTCHESON, *supra* note 45, at 109.

entangling areas. A few potentially troubling areas have already been encountered. One is the problem of primary jurisdiction. In 1972 the Navy sought to court-martial a chaplain under the Uniform Code of Military Justice for committing adultery with the wives of servicemen who had been sent away for duty.¹⁴⁵ But the American Baptist Convention argued that the chaplain had wronged the denomination, not the military, and demanded that the church be given jurisdiction to discipline him in its own ecclesiastical courts. The church even went so far as to attempt to enlist the aid of the other denominations in opposing the military.¹⁴⁶ The controversy waned when the chaplain was acquitted, but the spectre of similar confrontations in the future remains.

Another potentially entangling situation already encountered involves the government's activity in such substantive matters of religion as the wording of educational materials. In 1968, the American Civil Liberties Union created quite a controversy by successfully arguing for the deletion of references to God and religion from the Army's character-guidance program manual.¹⁴⁷ Following great public uproar, the references were reinserted and the controversy ended. Still, the potential for entanglement and political divisiveness was made clear. A third potentially entangling situation was encountered during World War II when the Navy announced its U-12 program, which gave financial support to theological trainees who later

145 *United States v. Jensen* (court-martial tried at the Naval Air Station, Cecil Field, Florida in 1972). See Ripple, *supra* note 9, at 1236; NEWSWEEK, Mar. 27, 1972, at 99; R. HUTCHESON, *supra* note 45, at 29.

146 R. HUTCHESON, *supra* note 45, at 124. For a more complete account of the widely-publicized trial, see A. JENSEN & M. ABRAMSON, *THE TRIAL OF CHAPLAIN JENSEN* (1974).

147 See Willoughby, *Chaplains Role Under New Scrutiny*, CHRISTIAN CENTURY, Apr. 25, 1969, at 32-33. To appreciate the potential for entanglement, and especially for political divisiveness, the events should be recounted in some detail.

According to Willoughby, when several Congressmen discovered the deletions, there was "righteous indignation aplenty." Newscaster Paul Harvey fanned the flame, and soon "whats-this-country-coming-to letters" were piling up on Congressmen's desks. Defense Secretary Melvin Laird claimed any Army orders for chaplains to stop referring to God were "news to him." He called for an immediate departmental review, and within the week, "God was redrafted." *Id.*

Dr. Ray Appelquist (of the General Commission on Chaplains and Armed Forces Personnel) said:

"We could have told them they were facing a hopeless task. Taking God out of morals is like teaching mathematics without a timetable. There's often a lot of unnecessary flack coming from the Pentagon on religious questions. We could have saved them a lot of trouble if they'd only let us in on it.

Id. Appelquist thought a simple solution would be to form a permanent advisory body to inform the military of what the probable feeling of the churches on touchy religious questions would be.

would become Navy chaplains. Certain churchmen saw it as an attempt by the Navy to control the education of ministers, and a rousing dispute arose.¹⁴⁸

Based on these experiences, a wide variety of potentially entangling situations can be envisioned. For example, the chaplain's officer status¹⁴⁹ could involve the military and the churches in conflict. As a matter of course, when a denomination has stripped a chaplain of his ecclesiastical endorsement, the army has voluntarily released him from the ranks,¹⁵⁰ though it is not required by law to do so.¹⁵¹ Even though the process is usually accomplished without difficulty,¹⁵² the potential for conflict is immediately perceivable.

The converse situation, involuntary release, presents a similar danger. When a chaplain is inadequately performing his duties, the combined pressure of church and military is generally brought to effect his involuntary release.¹⁵³ This cooperation could be entangling in itself. Furthermore, the military could theoretically release a chaplain even against the wishes of his denomination.¹⁵⁴ And, although there are safeguards against such discharges,¹⁵⁵ it is not inconceivable that the chaplain or his denomination could conclude that the release was motivated by the chaplain's preaching of views unpopular to the military establishment. Again, the potential for conflict is obvious.

The potential for such occurrences is compounded by the churches' desire to become increasingly involved in the chaplaincy by assuming more control and responsibility over the program. In the interests of creating a more effective chaplaincy that will be more responsive to the needs of the people it serves, chaplains¹⁵⁶ and de-

148 See Klug, *supra* note 67, at 88-89. No branch of the armed forces presently gives financial assistance to prospective military chaplains.

149 See note 55 *supra* and accompanying text.

150 See R. HUTCHESON, *supra* note 45, at 18.

151 *Id.*

152 See R. HUTCHESON, *supra* note 45, at 27. However, Hutcheson notes that in one instance in the late sixties a regular Navy chaplain whose endorsement had been withdrawn by his denomination refused to resign. The permanence of his commission, in the absence of officially documented unsatisfactory performance, was protected by law. A compromise was reached under which the chaplain was allowed to remain in the Navy but was assigned non-chaplain duties. *Id.*

153 *Id.* at 27.

154 No such situation has yet occurred.

155 For example, chaplain evaluations are to be based on performance of religious duties alone. See note 52 *supra*.

156 See R. HUTCHESON, *supra* note 45, at 29, 197-214.

nominations¹⁵⁷ have called for increased church supervision and control of the chaplaincy. Many chaplains and denominations urge stronger church supervision and support structures,¹⁵⁸ and recommend that multi-denominational organizations, such as the General Commission, be strengthened to provide a united voice to coordinate military policy on chaplains.¹⁵⁹ While such changes would probably lead to a more effective chaplaincy, they might also multiply the entanglements between church and state.

B. *Additional Justifications for the Military Chaplaincy*

The *Katcoff* court stated its belief that even if the plaintiff's could prove that the present chaplaincy program was not perfectly tailored to meet the goal of providing otherwise unavailable religious facilities to military personnel, they would not necessarily, by that determination alone, establish the program's invalidity.¹⁶⁰ The court felt that it would also have to consider any additional justification put forth by the defendants to establish the present posture of the chaplaincy program. Two additional justifications can be advanced, the first based on national defense, and the second on the chaplaincy's long history of acceptance as a part of American life.

1. "National Defense" Justification

Some commentators argue that the chaplaincy is necessary to the defense of the nation, and therefore not subject to the usual establishment clause analysis. As one author stated, "[i]f . . . use of government paid chaplains is determined to be necessary for the defense of the nation, the Establishment Clause will not stand in the way."¹⁶¹ In other words, even if chaplains in normal circumstances would be unconstitutional, war and preparation for war are not ordinary circumstances.¹⁶² Such arguments have, in the past, successfully

157 *Id.* at 30-32.

158 *Id.* at 202-205.

159 *Id.* at 202. *See also* Appelquist's proposal for a "permanent advisory body," *supra* note 147.

160 *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

161 L. PHEFFER, *GOD, CAESAR AND THE CONSTITUTION* 160-61 (1975). A similar argument was made and rejected regarding compulsory attendance at chapel for cadets in *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972).

162 Appelquist uses this justification to conclude that the chaplaincy is within Congress' power under the "War Powers Clause." U.S. CONST. art. 1, § 8. *See* Appelquist, *Introduction: Chaplaincy Rationale and Support*, in *CHURCH STATE AND CHAPLAINCY* 6-7 (A.R. Appelquist ed. 1969).

defended government infringements of first amendment freedoms. Speech, for instance, can be restricted in time of war to an extent not possible in times of peace.¹⁶³ It seems unlikely that this justification alone could support the chaplaincy. But the unique situation presented by the military is at least another factor which could be relied on by a court to uphold the present chaplaincy.¹⁶⁴

2. Historical Justification

Certainly there is no such thing as constitutionality by prescription. The mere fact that the military chaplaincy has gone unchallenged for over two hundred years cannot be automatically interpreted as an implied validation by the Supreme Court of its constitutionality.¹⁶⁵ This historical tradition of acceptance, however, is far from irrelevant, and the *Marsh* decision suggests that it may even be the determining factor in finding the program constitutional.

Even prior to *Marsh*, historical practice has been an important factor in establishment clause analysis.¹⁶⁶ Indeed, historical practice may have been the determinative factor in *Walz v. Commissioner*.¹⁶⁷ In that case, the Supreme Court upheld the constitutionality of tax exemptions for religious places of worship. Noting that the practice was "deeply embedded in the fabric of our national life,"¹⁶⁸ the Court went on to state that long use and unbroken practice is "not something to be lightly cast aside."¹⁶⁹ Justice Brennan, concurring, was even more explicit, stating that "the more longstanding and widely accepted a practice, the greater its impact on constitutional interpretation."¹⁷⁰

163 L. PHEFFER, *CHURCH, STATE AND FREEDOM* 251-52 (1967). See, e.g., *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Schenck v. United States*, 249 U.S. 47 (1919); *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969).

164 The *Katcoff* court was careful to note that a determination of the validity of plaintiff's claims cannot be made in a vacuum, and that additional justifications presented by defendants for the present posture of the chaplaincy program would be considered. *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

165 The *Katcoff* court refused to find a "body of constitutional jurisprudence" in the statements of the Supreme Court justices, holding that the plaintiff's claims must be given "full and fair consideration . . . [from a] fully developed factual record." *Id.*

166 See, e.g., Justice Stewart's dissent in *Engle v. Vitale*, 370 U.S. 421, 450 (1962) (arguing for permitting the recitation of prayer before school commences because such prayer is one of the nation's deeply entrenched and highly cherished spiritual traditions). See also *Lemon v. Kurtzman*, 403 U.S. 602, 648-49 (1971) (Brennan, J., concurring).

167 397 U.S. 664 (1970). See *Ripple*, *supra* note 9, at 1219.

168 397 U.S. at 676.

169 *Id.* at 678.

170 *Id.* at 681. See *Ripple*, *supra* note 9, at 1219-1224. Justice Brennan, concurring in

But by far the strongest support for the position that the military chaplaincy is constitutional because of its long history as a part of American life lies in *Marsh v. Chambers*.¹⁷¹ Writing for the majority, Chief Justice Burger began by noting that the opening of sessions of legislatures and other deliberative public bodies with prayer “is deeply embedded in the history and tradition of this country.”¹⁷² Burger then traced in some detail the history of the adoption of the first amendment and of legislative prayer, and concluded that “[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.”¹⁷³ Moreover, the Court went on to state that “[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.”¹⁷⁴ The Court felt the practice was not an establishment of religion, but merely a tolerable acknowledgement of the beliefs widely held among the people of this country.¹⁷⁵

It is entirely possible that the Court, in looking at the history of the military chaplaincy in American life, might reach a similar conclusion with regard to the military chaplaincy. Several factors, however, distinguish the situation of the military chaplain from that of the legislative chaplain. First, the history of the American people’s acceptance of the military chaplain is not “long and unbroken.” In fact, as has been discussed, the relationship has often been one fraught with criticism, especially during the Vietnam War.¹⁷⁶ Second, in *Marsh* the Court seems to place the ultimate justification for its decision on the belief that legislative chaplaincies pose “no real threat”¹⁷⁷ to the establishment clause. And, in fact, legislative chaplaincies do affect a relatively small number of people and consume a

School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 234 (1963), wrote that “an awareness of history and an appreciation of the aims of the Founding Fathers does not always resolve concrete problems.” This idea was echoed in *Wolman v. Walter*, 433 U.S. 229 (1977), where Justice Powell stated that “[a]t this point in the 20th Century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights.” *Id.* at 263 (Powell, J., concurring in part and dissenting in part) (quoted with approval in *Mueller v. Allen*, 103 S.Ct. 3062, 3069 (1983)).

171 103 S. Ct. 3330 (1983). See notes 23-26 *supra* and accompanying text.

172 *Id.* at 3332-33.

173 *Id.* at 3335.

174 *Id.* at 3336.

175 *Id.*

176 See notes 68-73 *supra* and accompanying text.

177 103 S. Ct. at 3337.

relatively small amount of public funds. The same cannot be said of the military chaplaincy.

V. Alternative Systems

The present system is, at the very least, constitutionally suspect.¹⁷⁸ If the *Katcoff* opinion is correct in that the constitutional justification for a military chaplaincy extends only so far as its existence is reasonably necessary to insure that the free exercise rights of military personnel will not be abridged, it becomes the task of the Court to determine which aspects of the present chaplaincy are unnecessary to achieve that goal. Such a determination requires an analysis of the various alternative systems that have been proposed to supply the religious needs of military personnel.¹⁷⁹ The drawbacks inherent in many alternative systems might be so severe that the requirements of free exercise would be validated "in toto," despite its substantial overbreadth.¹⁸⁰

A. Demilitarization

In the past fifteen years some denominations and other organizations have called for demilitarization of the military chaplaincy.¹⁸¹ The chaplaincy would not be abolished altogether, but rather a privately funded and controlled chaplains corps would be created which, while obviously necessitating considerable government cooperation, would not be a formal part of the military organization.

The demilitarization alternative presents a number of problems. While a privately-funded civilian chaplaincy has been suggested in a number of studies, none of the studies have presented concrete suggestions on how such a system might be implemented. Moreover, there has never been a thorough, in-depth study of possible demilitarized chaplaincies and their effectiveness.¹⁸²

178 *Katcoff v. Alexander*, No. 79 Civ. 2986 (E.D.N.Y. Aug. 21, 1980) (available Oct. 1, 1983, on LEXIS, Genfed library, Dist. file).

179 It has, of course, been suggested that the military chaplaincy as such be abolished altogether. See Miller, *Chaplaincy vs. Mission in a Secular Age*, CHRISTIAN CENTURY, Nov. 2, 1966, at 1335-37, (arguing from a purely theological point of view). However, these proposals fail to consider the free exercise rights of soldiers, and so are not discussed here.

180 The United Presbyterian Task Force, after examining the various alternatives, was unable to find any that did not "suffer by comparison to the present arrangement." *United Presbyterian Report*, *supra* note 38, at 41.

181 See R. HUTCHESON, *supra* note 45, at 30-31.

182 In 1972, however, the General Commission did publish a feasibility study of civilian chaplaincy for the armed forces. *Armed Forces Chaplains: All Civilians?*, 29 THE CHAPLAIN 1-86 (1972). See R. HUTCHESON, *supra* note 45, at 186.

On the other hand, a great deal of evidence suggests that the Army's status as a total institution¹⁸³ makes it necessary that the chaplain share insider status¹⁸⁴ with the troops. Many chaplains regard their insider status as an imperative,¹⁸⁵ and feel that any attempt to remove the chaplaincy from formal association with the military will fail miserably.¹⁸⁶ While this claim has been disputed, there can be no doubt that deprivation of shared insider status would cause at least some reduction in a chaplain's ability to effectively minister to military personnel.¹⁸⁷ The court must then wrestle with the question of whether such an emasculated chaplaincy is sufficient to satisfy free exercise requirements. Nor would the inquiry stop there. Even if a civilian chaplaincy were deemed adequate, strong countervailing considerations of military exigency may require that all persons accompanying the armed forces in a support capacity be subject to the military chain of command and to the sanctions of military discipline.¹⁸⁸

B. *Changes Within the Military*

Most suggestions for change in the chaplain's status within the military concern questions of rank and uniform.¹⁸⁹ As early as 1938 commentators suggested that chaplains lay aside uniform and

183 The concept of a total institution was developed by Erving Goffman in Goffman, *On the Characteristics of Total Institutions*, in E. GOFFMAN, *ASYLUMS* 3-124 (1961). Major characteristics of a total institution are: (1) an encompassing tendency; (2) a breakdown of barriers; and (3) needs which are handled by the bureaucracy. The military is a classic example of the "total institution," although there are indications that the recent liberalization of the armed forces may affect this status. See R. HUTCHESON, *supra* note 45, at 35-53.

184 "Insider status" refers to the chaplain's position as a member of the military institution, as opposed to a civilian participant.

185 R. HUTCHESON, *supra* note 45, at 188.

186 *Id.* The National Study Conference on Church and State concluded that a privately supported chaplaincy presented almost insuperable difficulties. Appelquist, *supra* note 38, at 22.

187 See Herrmann, *supra* note 8, at 30-31. Not all commentators feel this reduced effectiveness is necessarily negative. Miller, after proposing that the chaplaincy make a radical break from the state, writes: "Let them hope for nothing more than tolerance from the government. It may be good sometimes if they are unwelcome; we should be suspicious when there is no healthy tension between state and church." Miller, *supra* note 179, at 1337.

188 Ripple, *supra* note 9, at 1236. Ripple notes that 10 U.S.C. § 802 (1983) demonstrates a congressional determination to subject the broadest category of persons connected with the armed forces to the Uniform Code of Military Justice. *But see* McElroy v. Guagliardo, 361 U.S. 281, 283-84 (1960); Kinsella v. Singleton, 361 U.S. 235, 236-40 (1960); Reid v. Covert, 354 U.S. 1, 19-41 (1957); Toth v. Quarles, 350 U.S. 11, 22-23 (1955).

189 For a good proposal of such a system, see Brown, *Military Chaplaincy as Ministry*, in *MILITARY CHAPLAINS* 139, 146 (H. Cox. ed. 1972).

rank.¹⁹⁰ A possible alternative system avoiding uniform and rank is that employed by the British navy, in which chaplains hold no rank but theoretically assume the rank of whomever they are speaking to.¹⁹¹ The approach of American Red Cross presents another possibility; their personnel are uniformed, but not as military officers.¹⁹² Officer status, however, may be necessary to enable the chaplain to perform his duties, and loss of this status could drastically reduce his effectiveness.¹⁹³ Again, the Court must then decide whether a chaplaincy with such diminished effectiveness is sufficient to meet the demands of the free exercise clause.

Other changes within the military, even less drastic, might render the system sufficiently narrow to pass constitutional muster. Specifically, one author has proposed that all day-to-day activities of the chaplain that do not specifically relate to the ministerial duties mandated by the free exercise clause be eliminated.¹⁹⁴ Alternatively, the chaplaincy could seek a more independent organizational power base. One suggestion is to reduce the chaplain's dependency on the military by increasing the status and power of the Chief of Chaplains over various matters connected with chaplain activities.¹⁹⁵ For example, primary fiscal control over the religious programs, presently the responsibility of the commanding officer, could be assumed by

190 See *The Chaplaincy Question*, CHRISTIAN CENTURY, Dec. 21, 1938, at 1567-68. See also Herrmann, *supra* note 8, at 30.

191 See C. ABERCOMBIE, *supra* note 9, at 141-42.

192 The American Red Cross has a corps of career field directors who serve the armed forces under a legal agreement. They are extended many courtesies by the military, such as office space on bases and use of government communications facilities, but they are not actually a part of the military. See R. HUTCHESON, *supra* note 45, at 187.

193 *Id.* at 198.

194 See Klitgaard, *supra* note 72, at 1379, in which the author suggests that the chaplain should continue to work within the system but refuse to assume the position of a "military lackey." Essentially, if this course of action were adopted, the chaplain would retain the powers of his rank but would be "relieved of those aspects which hamper his Christian mission." *Id.* Thus, the chaplain's duties at certain ceremonial occasions and his involvement in personnel development programs might cease.

On the other hand, Williams states at least four reasons why difficulty exists in distinguishing between church and state functions in the chaplaincy. First, the principle of separation of church and state has been operative in the American republic for considerably less than half of the history of American society. Second, the religious pluralism of the original republic and the religious fervor connected with almost all American wars has created a civil or common denominator religion. Third, the roles of the chaplain have never been defined by statute and directive and have extended over a considerable range. Fourth, the chaplaincy is more peculiarly American than most professional historians of the chaplaincy in the army and navy have recognized. See Williams, *supra* note 59, at 13-15.

195 R. HUTCHESON, *supra* note 45, at 66.

the Chief of Chaplains.¹⁹⁶ Additionally, the promotional process could be redesigned with a view toward decreasing the influence of the commanding officer.

All these suggestions, however, while tending to reduce the dependency of the chaplaincy on the military, might inevitably lead to greater entanglement than now exists. The less the churches are concerned about the chaplaincy, the less chance there is for conflict, and fewer situations will be encountered which require close church-state administrative cooperation. If the above suggestions were implemented, the entanglements between church and state could become much more pronounced. For instance, who would monitor the chaplains to make sure they were not engaging in activities that went beyond their ministerial function? Who would make major policy decisions regarding the day-to-day activities of chaplains? If the chaplains corps were treated as an ancillary force, like the Red Cross, who would supervise the program to ensure that the requisite cooperation was being advanced by both sides? Acceptable solutions to all these problems might be found, but surely such issues must be taken into account by any court assessing the constitutionality of the present program.¹⁹⁷

C. *Maintenance of the Military Chaplaincy Only Where
Civilian Ministry Is Not Possible*

The concurring opinions of Justices Brennan and Goldberg in *Abington* imply that the government need not supply chaplains and chapels where civilian facilities are available to the military personnel.¹⁹⁸ Thus, at isolated locations the government would supply chaplains and religious services, but on stateside bases military personnel would make use of civilian churches and facilities. At least one scholar thinks the proposal may provide a tentative solution.¹⁹⁹

Like the other alternatives, however, this proposal has its drawbacks. It may be desirable, perhaps even necessary, to keep chaplains

¹⁹⁶ *Id.* at 68.

¹⁹⁷ In preparation for such scrutiny, it has been suggested that the military should give increased attention to known "stress points" between the churches and the military. Ripple states that such a demonstration of careful forethought may be at least partially effective in keeping the Court's entanglement analysis within meaningful bounds. Ripple, *supra* note 9, at 1237. Abercrombie agrees, stating: "[F]orewarned of the storm that may someday break, churchmen should think out clearly what a chaplain should be if he is to render greatest service to the army and the nation while remaining faithful to the shepard and his sheep." C. ABERCROMBIE, *supra* note 9, at 137.

¹⁹⁸ See notes 29-30 *supra*. See also Hermann, *supra* note 8, at 34.

¹⁹⁹ Hermann, *supra* note 8, at 34.

at stateside bases.²⁰⁰ Moreover, it is difficult to imagine what criteria would be employed to determine when adequate civilian facilities are available, and when they are not. The plan, while attractive in the abstract, may prove difficult in execution.

VI. Conclusion

The statutes authorizing the military chaplaincy programs in the various branches of the armed forces of the United States, and the rules and regulations promulgated thereunder, are on their face and as applied overly broad, and many aspects of the present military chaplaincy cannot be justified by free exercise clause requirements. Yet this conclusion only establishes that the program is constitutionally suspect; it does not necessarily follow that the program would or should be declared unconstitutional. Clearly, some form of military chaplaincy is mandated by the free exercise clause, and the present system has functioned admirably in meeting this need. While alternative systems initially seem less objectionable to the establishment clause, they may in fact require more, not less, entanglement with religion. Moreover, whether these alternatives would be sufficiently effective to satisfy the requirements of the free exercise clause is unclear. A decision by a court overturning the chaplaincy would involve the court in a long, difficult process of assessing the effectiveness of untried and untested alternatives and supervising their implementation and operation. Finally, the program's long history of acceptance cannot be ignored.

In view of any court's natural reluctance to engage in such an undertaking, a court could well rely on the unique circumstances surrounding the military chaplaincy to justify a maintenance of the present institution. For, in the final analysis, a court is likely to find that although the program is overbroad, the special nature of the military situation makes the elimination of this overbreadth impossible.

Moreover, the Supreme Court, in *Marsh*, has provided itself with an effective way to escape making even this determination. Surely the prospect of validating the military chaplaincy by a finding that it also is a part of the "fabric of our society" would be attractive to the Court. But whether the military chaplaincy is susceptible to such

²⁰⁰ Hutcheson lists five reasons for maintaining chaplains at stateside bases: (1) readiness; (2) counseling; (3) mobility; (4) effect on ecclesiastical life; and (5) health of the chaplain. R. HUTCHESON, *supra* note 45, at 198-200.

treatment is questionable, and the Court may find that it is ultimately unable to apply the *Marsh* analysis to the military chaplaincy.

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