

NAVAL LAW REVIEW

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AND A CALL FOR CONGRESS TO DEFINE ITS MEANING

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Jason A. Gonzalez, MBA, JD, LLM

BOOK REVIEW: INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS

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NAVY CHAPLAINS AT THE CROSSROADS: NAVIGATING THE INTERSECTION OF FREE SPEECH, FREE EXERCISE, ESTABLISHMENT, AND EQUAL PROTECTION

CDR William A. Wildhack III, CHC, USNR*

* © Copyright 2005 by CDR William A. Wildhack III, CHC, USNR. The views expressed in this Article are those of the author and do not necessarily reflect the views of the Department of the Defense, the Department of the Navy, or the Navy Chaplain Corps. Commander Wildhack (B.A., University of Delaware, 1982; M.Div., Princeton Theological Seminary, 1985; Th.M., Princeton Theological Seminary, 1986; J.D., Stetson University College of Law, expected 2005) is a Minister of Word and Sacrament in the Presbyterian Church (U.S.A.), a Navy Reserve Chaplain, and a student at Stetson University College of Law, Gulfport, FL. Prior to entering law school, Chaplain Wildhack was mobilized to the staff of Commander, U.S. Naval Forces Central Command in support of Operation ENDURING FREEDOM, and he is currently assigned to NR USCG RELSUP 106, Adelphi, MD, and USCG District 7, Miami, FL. He has pastored churches in Virginia and Florida, and served active duty tours as a chaplain assigned to U.S. Naval Station Panama Canal and USS ABRAHAM LINCOLN (CVN 72). During law school, Chaplain Wildhack has interned with the Florida Supreme Court, the U.S. District Court for the Middle District of Florida (Tampa Division), and the Civil Rights Division of the U.S. Department of Justice, and served as both Assistant Editor and Articles & Symposia Editor of the *Stetson Law Review*. Chaplain Wildhack would particularly like to thank Lieutenant H. Brendan Burke, JAGC, USN, former *Stetson Law Review* Editor in Chief, Carrie Ann Wozniak, former *Stetson Law Review* Notes & Comments Editor, and Stetson University College of Law faculty members Associate Dean Theresa Pulley Radwan, Professor Thomas C. Marks, and Professor Brooke J. Bowman for their professional encouragement, advice, and support as he developed this Article, and he is especially indebted to Professor Kristen David Adams for her help and counsel throughout his time at Stetson. Chaplain Wildhack dedicates this article to his wife and children, who have been so patient and understanding through overseas moves, Reserve duty, mobilization, and law school, and especially to all who have served well and faithfully in seeking to provide for the free exercise of religion by all persons in the armed forces of the United States.

I. INTRODUCTION: MINISTERING TOGETHER IN THE WORST OF TIMES

A Jewish rabbi, a Catholic priest, a Methodist minister, and a Dutch Reformed minister once went on an ocean cruise together. Rather than the start of a bad joke, it is instead the beginning of one of history's most moving stories of cooperative ministry in the religiously pluralistic environment of the armed services. The rabbi, priest, and two ministers were Army chaplains who sailed with nearly 900 other service members and crew aboard the U. S. Army Transport *Dorchester* as it traveled across the North Atlantic toward Europe and World War II in early 1943.¹ Just before 1:00 a.m. on February 3, German torpedoes struck the ship, and by 1:30 a.m. the *Dorchester* was gone.² Eyewitness accounts speak of the four chaplains "calm[ing] the frightened, tend[ing] the wounded and guid[ing] the disoriented toward safety" as the ship was sinking.³ Having given their own lifejackets to others, the four stood on the deck of the sinking ship, linked arms, and prayed together.⁴ One account notes that as they gave away their lifejackets, "Rabbi Goode did not call out for a Jew; Father Washington did not call out for a Catholic; nor did the Reverends Fox and Poling call out for a Protestant," but they gave the jackets to whomever was next.⁵

Forty years later, on October 23, 1983, a terrorist bomb killed 241 Marines, Sailors, and Soldiers in Beirut, Lebanon.⁶ In the aftermath of that tragedy, two Navy chaplains -- a Jewish rabbi and a Catholic priest -- worked

¹ The story of the four chaplains continues to be widely reported, as a Westlaw search in early 2005 found 37 stories or announcements of services commemorating their actions. Search of Westlaw, ALLNEWS database (Apr. 16, 2005) (search for records including "four chaplains" and "Dorchester" within the last 90 days). This account is adapted from the history found on the website of The Chapel of Four Chaplains, an organization formed in their honor. The Chapel of Four Chaplains, *The Story*, available at <http://www.fourchaplains.org>. The Chapel labels itself a "non-profit organization established to encourage cooperation and selfless service among all people," says it "exists to further the cause of 'Unity Without Uniformity,' and does not purport a particular theology or doctrine. Rather, it is a symbol of strength found in unity with one another and with God." *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ As with the story of the four chaplains, this story was also widely reported. See, e.g., Larry Bonko, *Rabbi's Camouflage Yarmulke Woven with Tragedy, Heroism*, NORFOLK LEDGER-STAR A1 (Jan. 13, 1984), at http://www.resnicoff.net/kippa_story_84.html; 133 CONG. REC. E1846-02 (daily ed. May 11, 1987) (extension of remarks by Rep. Steven J. Solarz regarding religious apparel and military uniforms). The account here is adapted from a retelling of one chaplain's first-hand account by President Ronald Reagan in a speech to Baptist Fundamentalists. Ronald W. Reagan, *Remarks at the Baptist Fundamentalism Annual Convention*, at <http://www.reagan.utexas.edu/archives/speeches/1984/41384h.htm> (April 13, 1984).

tirelessly with the wounded, offering comfort, passing on information, and helping move others to safety.⁷ A third chaplain, a Protestant minister, was among the seriously wounded.⁸ As they worked together that day, the priest noticed that the rabbi had lost his *kippa*, the small cap worn by rabbis.⁹ As the rabbi reported:

[T]he Catholic chaplain, cut a circle out of his cap - a piece of camouflaged cloth which would become my temporary headcovering. Somehow he wanted those [M]arines to know not just that we were chaplains, but that he was a Christian and that I was Jewish. Somehow we both wanted to shout the message in a land where people were killing each other - at least partially based on the differences in religion among them - that we, we Americans still believed that we could be proud of our particular religions and yet work side by side when the time came to help others, to comfort, and to ease pain.

[We] worked that day as brothers. The words from the prophet Malachi kept recurring to me—words he'd uttered some 2,500 years ago as he had looked around at fighting and cruelty and pain. "Have we not all one Father?" he had asked. "Has not one God created us all?" It was painfully obvious, tragically obvious, that our world still could not show that we had learned to answer, yes. Still, I thought, perhaps some of us can keep the question alive. Some of us can cry out, as the [M]arines did that day, that we believe the answer is yes.¹⁰

In their ministry, the chaplains on the *Dorchester* and in Beirut sought and found the "highest common denominator without compromise of

⁷ The rabbi was Lieutenant Commander Arnold Resnicoff; the Roman Catholic priest was Lieutenant Commander George Pucciarelli. *Id.*

⁸ The third chaplain was Lieutenant Danny Wheeler. *Id.* Although Chaplain Resnicoff uses the general term "Protestant" for him in this account, published Chaplain Corps' records list Chaplain Wheeler as a minister in the Evangelical Lutheran Church in America. CHAPLAIN RESOURCE BOARD, UNITED STATES NAVY CHAPLAINS 1982-1991 at 295 (Michael D. Halley, ed., Chaplain Resource Board 1993).

⁹ *Id.*

¹⁰ Reagan, *supra* n.6 (quoting from the rabbi's report; the referenced Bible passage is Malachi 2:10).

conscience”¹¹ and ministered to all without any preferential treatment for one faith over another. Their stories have been told in the popular media¹² and used as lessons in instructing new chaplains for years.¹³

More than twenty years have passed since that horrible morning in Beirut, and more than sixty since that frigid night in the North Atlantic. Perhaps it was easier to minister well with chaplains of other faith groups in an earlier time, but a growing number of legal actions brought in federal court by chaplains (and potential chaplains) against the Navy suggest that it is increasingly difficult to do so today.¹⁴ Just as the historical acts described above may have been noteworthy for remarkable cooperation shown in difficult circumstances, so may be the current allegations of cooperation lacking or compromise directed.¹⁵

¹¹ The National Conference for Community and Justice (NCCJ), *When You Are Asked to Give Public Prayer in a Diverse Society*, (NCCJ, date unknown) (available at <http://65.214.34.18/PublicPrayerBrochure.pdf>).

¹² See *supra* nn.1, 6 (describing media accounts of these actions).

¹³ The author first learned of these events while a student at the Naval Chaplains School, Newport, RI, in the summer of 1984. These powerful lessons made a deep impression on him as a young officer.

¹⁴ The primary cases are *Adair v. England*, No. CIV.A.00-0566 (D.D.C.) and *Chaplaincy of Full Gospel Churches (CFGC) v. England*, No. CIV.A.99-2945 (D.D.C.). The district court consolidated *Adair* and *CFGC* for the purposes of all pretrial motions. *Adair*, 217 F. Supp. 2d 8 (2004). At the time of writing this article, both cases are still pending in the U.S. District Court for the District of Columbia. A motion to compel testimony of chaplain selection-board personnel in the cases, granted by the district court, was overturned by the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court denied certiorari on the appeal. *Chaplaincy of Full Gospel Churches v. England*, 217 F.R.D. 250 (D.D.C. 2003), *rev'd in part and vacated in part sub nom; In re England*, 375 F.3d 1169 (D.C. Cir. 2004), *cert. denied sub nom. Chaplaincy of Full Gospel Churches v. England*, 125 S.Ct. 1343 (2005). Although fascinating, the examination of the issues raised in that action are beyond the scope of this article. Other recent actions involving Navy chaplains include *Sturm v. Dept. of the Navy*, 76 Fed. App. 833 (9th Cir. 2003) (unpublished), *Wilkins v. United States*, 279 F.3d 782 (9th Cir. 2002), *Veitch v. Danzig*, 135 F. Supp. 2d 32 (D.D.C. 2001) (denying plaintiff's motion for preliminary injunction and return to duty), and *Veitch v. England*, No. CIV.A.00-2982, 2005 U.S. Dist LEXIS, 6257 (D.D.C. April 4, 2005) (granting the Navy's motion for summary judgment because plaintiff did not adequately rebut the presumption that he resigned voluntarily from the Navy, nor did he show any material dispute with regard to his claim of constructive discharge). Another pending case involving four ministers who wanted to become chaplains but allege the Navy unlawfully discriminated against them in denying their applications is *Larsen v. England*, No. CIV.A.02-2005 (D.D.C.). The district court granted in part and denied in part the Navy's motion to dismiss *Larsen's* case in late 2004. *Larsen v. England*, 346 F. Supp. 2d 122, 124 (D.D.C. 2004).

¹⁵ One article refers to the litigation as a “barrage of civil lawsuits brought against the Navy by current and former chaplains” and describes them as alleging “that the system of religious accommodation intended by the implementation of a military chaplaincy has now been replaced by a system that perpetuates a denominational hierarchy dominated by Roman Catholic and [l]iturgical chaplains.” After summarizing the allegations, the author of that article asserts that “[i]f

A. Cooperation Under Fire: Litigating the Line between Cooperation and Compromise¹⁶

As alleged in one of the cases, a senior chaplain of one Christian group declared that a junior chaplain's style of worship, which followed the traditions of a different Christian group, was "hogwash," and took over the service and recast it in a form more acceptable to the senior chaplain.¹⁷ In another allegation in the same case, one can hear an echo from the mid-nineteenth century,¹⁸ as an Episcopalian chaplain allegedly instructed a Southern Baptist chaplain to make changes in a weekly service for which the Baptist chaplain was responsible.¹⁹ Allegedly, making the changes would have transformed one chaplain's service from one conducted "according to the manner and forms of the church of which he is a member"²⁰ into one following the manner and forms of another chaplain's church.²¹ Other allegations focus on a senior chaplain's alleged criticism of the content of a chaplain's prayers and direction that future prayers be altered,²² another senior chaplain's alleged direction of changes in the content of a junior chaplain's sermons in worship,²³ various other alleged violations of the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment,²⁴ and alleged violations of the Equal Protection Clause of the Fifth Amendment.²⁵

Related actions involve similar allegations filed by one Christian faith group on behalf of several of its chaplains,²⁶ a claim of constructive discharge resulting from a hostile environment after a chaplain refused to change the

ultimately proven, these claims threaten to impact the careers of hundreds of active duty and retired Navy chaplains who were commissioned since 1977, award millions of dollars in compensation to litigants and force a massive restructuring of the Navy Chaplain Corps." Steven H. Aden, *The Navy's Perfect Storm: Has a Military Chaplaincy Forfeited Its Constitutional Legitimacy by Establishing Denominational Preferences?* 31 W. ST. U. L. REV. 185, 187 (2004).

¹⁶ "Cooperation Without Compromise" is an oft-repeated motto of the Chaplain Corps. See *infra* nn.125-26 (discussing the history of this motto).

¹⁷ *Adair v. England*, 183 F. Supp. 2d 31, 37 (D.D.C. 2002) (describing actions alleged by Lieutenant Michael Belt). The terms "senior" and "junior" refer to relative military rank.

¹⁸ See *infra*, nn.54-56 and accompanying text (relating questions sent from Congress to the Navy in 1859 regarding allegations that "non-Episcopal ministers are required . . . to use the Episcopal liturgy").

¹⁹ *Adair*, Pl.'s 3d Amend. Comp. ¶3.q.

²⁰ 10 U.S.C. § 6031a. The full text reads, "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." *Id.*

²¹ *Adair*, Pl.'s 3d Amend. Comp. ¶3.q.

²² *Adair*, 183 F. Supp. 2d at 37 (listing allegations of Dr. Gregory M. DeMarco).

²³ *Id.* (continuing allegations of Lieutenant Belt).

²⁴ *Id.* at 44 (referring to the plaintiff's complaint).

²⁵ *Id.*

²⁶ *Adair*, 183 F. Supp. 2d at 39 (describing *CFGC v. England*, *supra*). The court consolidated *CFGC* with *Adair* for the limited purpose of ruling on several motions. *Id.* at 34-35.

content of his sermons and other speech,²⁷ and alleged religious discrimination in decisions regarding potential chaplains' applications to join the Navy.²⁸ In all of the cases, a central theme is the allegation that the Navy's categorization of various faith groups has led to favoring some groups over others, and that some groups of Christians have allegedly treated other groups of Christians particularly unfairly.²⁹

In 2002, one of the cases became a class action with a potential class size asserted to be over 1,000 current and former chaplains.³⁰ Late in 2003, the District Court for the District of Columbia asked for memoranda from the parties regarding consolidation of all the pending cases because of the court's view that the underlying issues in all of them are so similar.³¹

²⁷ Veitch v. England, *supra*, 135 F. Supp. 2d at 32. *But see* n.14, *supra* (listing the full history of the case, including a recent ruling granting the Navy's motion to dismiss the action).

²⁸ Larsen v. England, No. CIV.A.02-2005 (D.D.C.) (alleging that the Navy wrongfully denied entry to four fully qualified candidates for the chaplaincy from one faith group, while it accepted for active duty others of another faith group who were not fully qualified). At least one Canadian minister has complained to the Canadian Human Rights Commission alleging similar discrimination after the Interfaith Committee on Canadian Military Chaplaincy denied his application in favor of applicants from other faith groups. *Canadian Military is Accused of Anti-evangelical Bias*, THE CANADIAN PRESS (March 18, 2003) (available at 2003 WL 16140599).

²⁹ The district court has observed that an overriding theme running through all the free exercise claims is that Navy policies and practices effectively silence one group of chaplains. *Adair* at 65. This argument asserts that the Navy favors Catholics and so-called "liturgical Protestants" over the groups labeled "non-liturgical Protestants." These categories will be described and further developed in Part III, *infra*.

³⁰ *Adair v. England*, 209 F.R.D. 5, 8-9 (D.D.C. 2002) (ruling that the litigation could proceed as a class action and citing the plaintiffs' assertion that the Navy's own statistics suggested a class between 700 and 1000 in size). A later action extended the time back to 1977, thus expanding the potential class size beyond 1000. *Adair v. Johnson*, 216 F.R.D. 183 (D.D.C. 2003) (granting plaintiffs' motion for leave to amend their complaint in light of new evidence that the alleged discrimination began earlier than originally argued). *But see* Letter from Louis V. Iasiello, Chief of Chaplains, U.S. Navy, in *Letters to the Editor for Thursday, December 18, 2003*, STARS AND STRIPES (Dec. 18, 2003) (available at <http://www.stripesonline.com/article.asp?section=125&article=19125&archive=true>) (arguing that any discussion of the size of the class is "mere speculation" and pointing out that the only certain number is *Adair's* 17 named plaintiffs).

³¹ Telephone interview with Arthur A. Schulz, Sr., Plaintiff's Counsel in *Adair, CFGC, Larsen, Veitch, and Wilkins*. (October 16, 2003) (asserting that the plaintiffs favor consolidation but the government opposes it).

B. A Fascinating Intersection, Or an Accident Waiting to Happen?

While a full treatment of all the issues raised in these cases is clearly beyond the scope of a single article, an examination of just one is not.³² In ruling on several motions in the two cases already combined for pretrial motions,³³ Judge Ricardo Urbina observed that “[t]he issue of what restrictions the Navy may place on the content of its chaplains’ speech is a fascinating one, standing at the intersection of four major jurisprudential roads—free speech, free exercise, establishment, and equal protection.”³⁴ Successful navigation of such an intersection presents several challenges to the chaplain who seeks to serve both his or her faith and the Navy, to the faith group he or she represents, to the Navy itself, and to any who would seek to offer guidance to the parties. Just as drivers accept traffic signals and lane markers to guide free movement through an intersection, some argue Navy chaplains may have to accept some restriction on the content of their speech³⁵ so that the free exercise rights of all service members can be protected fully.³⁶ At the same time, one court has suggested the Navy must recognize that some restrictions on speech are impermissible, and that whatever permissible restrictions it seeks to apply must be applied evenly to all or not at all.³⁷

In preparing to enter this fascinating intersection, Part II of this article examines the evolving role of chaplains in American military history, highlighting a shift in official responsibility from providing primarily direct ministry to a priority of protecting free exercise. Moving closer to the

³² For another treatment of the cases that further develops the plaintiffs’ equal protection claims, see Aden, *supra* n.15.

³³ *Adair*, 183 F. Supp. 2d at 34-35.

³⁴ *Id.* at 66.

³⁵ Such limitations would join other provisions in the Bill of Rights either expressly inapplicable to the military or interpreted differently in a military setting. See, e.g., John A. Carr, *Free Speech in the Military Community: Striking a Balance between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 312 (1998) (listing as examples the grand jury provision of the Fifth Amendment and a qualification of the search and seizure protection of the Fourth Amendment in suggesting that free speech protections may also not be as broad for service members as for civilians).

³⁶ The full scope of religious free exercise rights, and the challenges in defining them, are beyond the scope of this discussion. The challenges in defining religious belief, along with the accompanying challenge of recognizing either exercise or establishment, are many. See John C. Knechtle, *If We Don’t Know What It Is, How Do We Know If It’s Established?*, 41 BRANDEIS L.J. 521 (2003).

³⁷ In first describing the four-way jurisprudential intersection, Judge Urbina noted in *Adair* that the Constitution does not permit the Navy to regulate religious speech of one group of Christian chaplains but not that of other groups of Christian chaplains. 183 F. Supp. 2d at 66. See *infra* n.100 for a discussion of the terms “liturgical” and “non-liturgical.”

intersection, Part III examines modern recognition of the “Protestant Problem”³⁸ and the challenges it presents. Part IV enters the intersection, and seeks to offer some traffic signals or lane markers that fully protect a chaplain’s rights to free speech in worship while also protecting other service members’ rights to free exercise, avoid further establishment problems, and treat all chaplains equally.

II. HITTING THE ROAD: HISTORICAL NOTES ON MILITARY CHAPLAINCY IN THE UNITED STATES

Chaplains have been a part of our history on this continent since before the Revolutionary War. A chaplain, Francis Fletcher, accompanied Sir Francis Drake on his famous trip around the world in the late sixteenth century, and led the first English-language Church of England worship service in the New World when the expedition landed in what is now California in the late 1570s.³⁹ Other chaplains accompanied Sir Walter Raleigh and Captain John Smith on the earliest explorations of Virginia.⁴⁰ George Washington began asking Virginia’s governor and state legislature at least as early as 1756 to appoint a chaplain for his troops, though it took some time before he received one.⁴¹ In 1775, one year before the signing of the Declaration of Independence, the Continental Congress authorized pay for chaplains serving the Army.⁴² In the second article of the Navy Regulations approved later that year, that same Congress also recognized the need for worship opportunities for sailors.⁴³ Although the first U.S. Navy chaplain known by name in Navy archives did not report aboard his first ship until 1778,⁴⁴ records of the Continental

³⁸ The “Protestant Problem” refers to the wide variety of faith groups labeled “Protestant” by the Navy, and is described more fully in Part III, *infra*.

³⁹ CLIFFORD M. DRURY, 1 THE HISTORY OF THE CHAPLAIN CORPS OF THE UNITED STATES NAVY: 1778-1939, 2 (Bureau of Naval Personnel 1983) [hereinafter DRURY]; FRANK S. MEAD AND SAMUEL S. HILL, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES 130 (Craig D. Atwood, rev. 11th ed., Abingdon 1990)[hereinafter MEAD & HILL].

⁴⁰ MEAD & HILL, *supra* n.39, at 130.

⁴¹ Charles W. Hedrick, *The Emergence of the Chaplaincy As a Professional Army Branch: A Survey and Summary of Selected Issues*, MIL. CHAPLAINS’ REVIEW 20-21 (Winter 1990). At the time, Washington was a colonel responsible for protecting Virginia’s western frontier. *Id.*

⁴² Interestingly, the pay for Army chaplains was set at the same rate as that of judge advocates. Hedrick, *supra* n.41 at 21 (citing CHAUNCEY FORD, JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 (GPO 1905)).

⁴³ DRURY, *supra* n.39, at 3. The regulation stated: “The Commanders of the ships of the thirteen United Colonies, are to take care that divine service be performed twice a day on board, and a sermon preached on Sundays, unless bad weather or other extraordinary accidents prevent.” *Id.*

⁴⁴ The record apparently begins with Benjamin Balch reporting aboard the *Boston* in October, 1778. DRURY, *supra* n.39, at 4-5. One of his sons, William, also became a chaplain, and has the distinction of being the first chaplain to receive a commission in the United States Navy. *Id.*

Congress in 1776 seem to assume chaplains were already present in the Continental Navy from its earliest days.⁴⁵

Interestingly, a former Army chaplain was a signer of the Constitution and member of the First Congress.⁴⁶ It is also important to note that the First Congress approved employing chaplains “to offer daily prayers in the Congress” the same week it approved the Religion Clauses of the First Amendment⁴⁷ for submission to the states.⁴⁸ Those who approved the Establishment Clause apparently saw no conflict between the two actions.⁴⁹ Nor did they suggest any conflict the day after voting on the Religion Clauses when they passed a resolution calling on President Washington to declare a day of Thanksgiving “to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.”⁵⁰ Finally, just two years later, when Congress voted in 1794 to formally establish a “United States Navy” in response to raids by Algerian pirates,⁵¹ it included a chaplain in the crew of each ship above a certain size.⁵²

⁴⁵ Drury reports that the *Journals of the Continental Congress* contain two references to chaplains in 1776. *Id.* at 3. The first includes chaplains in the list of those who share in any prizes seized; the second sets pay for Navy chaplains at the same rate enjoyed by Army chaplains and judge advocates at the time (and already \$5 less than that paid to surgeons). *Id.*

⁴⁶ Abraham Baldwin was a Georgia delegate to the Constitutional Convention, then represented that state in Congress from 1789 through 1799. William J. Hourihan, *Abraham Baldwin: Army Chaplain and Signer of the Constitution*, MIL. CHAPLAINS' REV. 55, 61 (Nov. 1987). Along with serving as an Army chaplain, Mr. Baldwin was also a professor of divinity at Yale. *Id.* at 56.

⁴⁷ The Religion Clauses form the first part of the First Amendment, and state, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. CONST. amend. I.

⁴⁸ *Lynch v. Donnelly*, 465 U.S. 668, 674 (noting the First Congress included 17 veterans of the Constitutional Convention “where freedom of speech, press, and religion . . . were subjects of frequent discussion,” and suggesting “[i]t would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers” than in the practice of employing chaplains to offer prayers in Congress each day, and pointing out that the practice has continued ever since).

⁴⁹ While James Madison’s later writings are often referenced by opponents of a federally-funded military chaplaincy, he voted in favor of it in 1792 and nothing in the record suggests he had any reservations about doing so or said anything opposing the action. Paul J. Weber, *The First Amendment and the Military Chaplaincy: The Process of Reform*, 22 J. CHURCH & ST. 459, 460 (1980). With the First Amendment just two months old, and Madison as “a scrupulously careful legislator and president in church-state matters, his vote can only be interpreted as an endorsement.” *Id.* (citing several of his votes in Congress on religious matters).

⁵⁰ *Lynch*, 465 U.S. at 675 n.2 (1984) (referring to various sources for the text of both the resolution and President Washington’s following proclamation).

⁵¹ DRURY, *supra* n.39, at 6.

⁵² *Id.* at 8.

A. Early Questions about Worship

As in our day, questions about the manner and forms of worship have also long been a part of the history of the Chaplain Corps. Early regulations specified that the duties of chaplains included having to “read” prayers.⁵³ In 1859, the Speaker of the House of Representatives asked the Secretary of the Navy whether chaplains were required to “read” prayers or follow any particular forms or ceremony in leading worship, and if the Navy had any evidence of a requirement that non-Episcopal chaplains had to follow the Episcopal liturgy.⁵⁴ In replying, the Secretary explained that he was not aware that the instruction to “read” had ever been construed to require a literal reading from a particular prayer book, but rather as a requirement that prayers be offered aloud without specifying they be read from a book, written down by the chaplain beforehand to be read later, or offered extemporaneously.⁵⁵

To further reassure the Speaker and his colleagues in Congress, the Secretary announced a new order officially interpreting the requirement that prayers be “read” to mean that prayers be “offered,” thus leaving the chaplain free to follow the dictates of his own religious tradition.⁵⁶ Perhaps in response to such communication with Congress, new Navy Regulations adopted in 1860 included this addition: “Every chaplain shall be permitted to conduct public worship according to the manner and forms of the church of which he may be a member.”⁵⁷ No longer merely a regulation, that language is now in force as part of the United States Code.⁵⁸

B. Free Exercise Then and Now: The Need for Chaplains

While conducting worship has always been one of a military chaplain’s duties, protecting the rights of others to freely exercise their faith

⁵³ President Jefferson issued a new set of Navy Regulations in early 1802. *Id.* at 17. In reference to chaplains, the first duty listed was “to read prayers at stated periods” and the only requirement in those regulations regarding worship says that the chaplain shall “perform all funeral ceremonies over such persons as may die in the service” *Id.* In addition to praying and funerals, these early chaplains were also onboard schoolmasters. *Id.*

⁵⁴ *Id.* at 68-69 (quoting from a letter sent by the Secretary of the Navy to the Speaker of the House of Representatives in response to the inquiries).

⁵⁵ *Id.* at 69.

⁵⁶ *Id.* Note also that “his” in this sentence reflects the fact that all chaplains of the time were male.

⁵⁷ *Id.* (quoting from wording included in a later edition of the Navy Regulations).

⁵⁸ The current law changes only the language identifying the chaplain, saying, “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.” 10 U.S.C. § 6031(a) (2000). The exclusively male language in the statute will have to be revised to reflect the presence of women in the modern chaplaincy.

also predates the Constitution and Bill of Rights.⁵⁹ The earliest chaplains, like their modern-day counterparts, served a military population representing a variety of faith groups or no faith at all.⁶⁰ One author asserts that the “pattern for chaplain ministry to soldiers of different religious backgrounds was set in the seventeenth century, from the time the first militia units drilled at Jamestown, Plymouth, Boston and New York.”⁶¹

In the modern day, the responsibility for protecting free exercise rights in the broadest sense for all personnel became the chaplains’ explicit duty after the U.S. Court of Appeals for the Second Circuit announced its decision in *Katcoff v. Marsh*⁶² in 1985. The court observed that the Army chaplaincy of the time, if viewed in isolation, would likely be found to violate the Establishment Clause.⁶³ The court also noted, however, that neither the Establishment Clause nor the chaplaincy existed in a vacuum.⁶⁴ A history including more than 200 years of military chaplaincy, congressional action authorizing a chaplaincy before, during, and after its debate on the Religion Clauses, and Congress’ continuing support all suggest that neither the Framers nor their successors intended the Establishment Clause to preclude a government-funded military chaplaincy.⁶⁵

Perhaps most importantly for the current debate, the court suggested that the Army “could be accused of violating the Establishment Clause *unless* it provided [soldiers] with a chaplaincy since its conduct would amount to inhibiting religion” if the Army prevented soldiers from worshiping by deploying troops to places where religious leaders and facilities were not available.⁶⁶ Echoing the second prong of the Supreme Court’s test in *Lemon v.*

⁵⁹ See John W. Brinsfield, *Our Roots for Ministry: The Continental Army, General Washington, and the Free Exercise of Religion*, MIL. CHAPLAINS’ REV. 23 (Nov. 1987).

⁶⁰ *Id.* at 25.

⁶¹ *Id.* at 23.

⁶² 755 F.2d 223, 234 (2nd Cir. 1985).

⁶³ *Katcoff*, 755 F.2d at 232.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (emphasis in original). The court also commented on the use of government facilities for worship in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963):

We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.

*Kurtzman*⁶⁷ for Establishment Clause questions,⁶⁸ the Second Circuit observed that if the Army did not provide chaplains, the Army would “deprive the soldier of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion.”⁶⁹ Noting that Congress had in 1850 recognized that not providing a chaplaincy would violate soldiers’ free exercise rights,⁷⁰ that the Supreme Court, at least in dicta, seemed to assume the chaplaincy’s continuation “in order to avoid infringing free exercise guarantees,”⁷¹ and that Congress had “from time to time . . . rejected proposals for abolition of the military chaplaincy,”⁷² the Second Circuit also upheld continuation of a federally-funded military chaplaincy.⁷³ Finding relevance to national defense and reasonable necessity as more appropriate standards for reviewing chaplaincy activities than *Lemon*’s prongs,⁷⁴ the court went so far as to say that

Id. at 226, n.10.

⁶⁷ 403 U.S. 602 (1971).

⁶⁸ *Lemon*, 403 U.S. at 612 (listing the three prongs as secular legislative purpose, primary effect neither advancing nor inhibiting religion, and absence of excessive entanglement with religion on the part of the government).

⁶⁹ *Katcoff*, 755 F.2d at 234. The court seems to transpose part of the Free Exercise Clause into the Establishment Clause here, because inhibiting religion seems more a danger of the government acting to prohibit free exercise than of the government acting to establish religion. U.S. CONST. amend I.

⁷⁰ *Id.* at 235 (citing H.R. REP. No. 171, 31st Cong., 1st Sess. (1850)).

⁷¹ *Id.* at 235 n.4. The court cited comments in Justice Brennan’s concurrence and Justice Stewart’s dissent in *Schempp*. Justice Brennan suggested that provisions for chaplains could be an example of a practice arguably in violation of the Establishment Clause that, if struck down, could seriously interfere with other liberties covered by the First Amendment. *Schempp*, 374 U.S. at 296 (Brennan, J., concurring). Justice Stewart was more declarative:

[T]he fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.

A single obvious example should suffice to make the point. 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 far-away outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.

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

⁷² *Katcoff*, 755 F.2d at 237

⁷³ *Id.*

⁷⁴ Following Supreme Court reasoning that the test arising from *Lemon* was not the only appropriate test for evaluating Establishment Clause challenges, and recognizing that any interpretation of the Clause must accommodate other parts of the Constitution (citing *Marbury v. Madison*, 55 U.S. 137 (1803)), the Second Circuit noted that *Katcoff*’s challenge on establishment

not only did the majority of the chaplaincy's activities meet those standards, but that "[a]s a result, the morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for the national defense rests in substantial part on the military chaplaincy, which is vital to our Army's functioning."⁷⁵ While *Katcoff* limited its examination to the Army chaplaincy, it is reasonable to extend its result to the Navy Chaplain Corps and the Air Force Chaplain Service as well.⁷⁶

C. Free Exercise Today: Modern Regulations

Since *Katcoff*, Department of Defense (DoD) policy has emphasized protection of free exercise rights for all service members -- and others -- as a chaplain's duty.⁷⁷ The Secretary of the Navy, in implementing the DoD policy

grounds had to be resolved in tension with what it called "the War Power Clause" (citing U.S. CONST. art. I, § 8 and including several parts of that section in its description) and the Free Exercise Clause (U.S. CONST. amend. I). *Katcoff*, 755 F.2d at 232-33. The court concluded that *Lemon*'s test was inappropriate here, holding instead that "the test of permissibility in this context is whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense." *Id.* at 235.

⁷⁵ *Katcoff*, 755 F.2d at 237.

⁷⁶ In fact, one author (who was both an attorney and Army Reserve chaplain) involved in preparing the Army's defense in *Katcoff* later wrote:

Katcoff and Weider [a second plaintiff] set themselves the task of ridding this nation of its military chaplaincy, for had they succeeded in their challenge against the Army, similar suits would soon have doomed an organized chaplaincy in the Navy and Air Force, in federal prisons, and at hospitals run by the Veterans Administration.

ISRAEL DRAZIN & CECIL B. CURREY, *For God and Country: The History of a Constitutional Challenge to the Army Chaplaincy* 3 (KTAV Publ. House 1995)[hereinafter DRAZIN & CURREY].

⁷⁷ The DoD directive on appointing chaplains states:

It is DoD policy that the Chaplaincies of the Military Departments:

4.1. Are established to advise and assist commanders in the discharge of their responsibilities *to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution*, to assist commanders in managing Religious Affairs (DoD Directive 5100.73 (reference (e))), and to serve as the principal advisors to commanders for all issues regarding the impact of religion on military operations.

4.2. *Shall serve a religiously diverse population.* Within the military, commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility. *Religious Organizations that choose to participate in the Chaplaincies recognize this command imperative and express willingness for their Religious Ministry*

and assigning responsibilities for religious ministry support, defines “chaplains” first as “professionally qualified clergy of a certifying faith group *who provide for the free exercise of religion for all military members of the Department of the Navy, their family members, and other authorized persons, in accordance with [DoD Directive (DODD) 1304.19].*”⁷⁸ Accordingly, the Chief of Naval Operations implements the Secretary’s policy “by *providing for the free exercise of religion for all naval service members, their families, and all other authorized personnel,*”⁷⁹ and declares, “Religious Ministry is the entire spectrum of professional duties performed by Navy chaplains and Religious Program Specialists⁸⁰ *to provide for or facilitate the free exercise of religion and accommodates [sic] the religious practices of military personnel, their families, and other authorized personnel.*”⁸¹ Doctrine for military operations involving forces from more than one service states plainly that “[r]eligious support includes the entire spectrum of professional duties that a chaplain provides and performs in the *dual role* of religious leader and staff

Professionals (RMPs) to perform their professional duties as chaplains in cooperation with RMPs from other religious traditions.

Department of Defense Directive (DOD Dir.) 1304.19, *Appointment of Chaplains for the Military Departments*, ¶ 4 (June 11, 2004) (emphasis added).

⁷⁸ Secretary of the Navy Instruction (SECNAVINST) 1730.7B, *Religious Ministry Support within the Department of the Navy*, ¶ 4.a. (Oct. 12, 2000) (emphasis added). Although this Article focuses on the role of chaplains, it is important to note that Navy policy makes commanding officers responsible for providing Command Religious Programs supporting the religious needs and preferences of all eligible personnel. *Id.* at ¶ 5.

⁷⁹ Chief of Naval Operations Instruction (OPNAVINST) 1730.1D, *Religious Ministry in the Navy*, ¶ 1 (May 6, 2003) (emphasis added).

⁸⁰ “Religious Program Specialists” are enlisted sailors who are much more than merely chaplain’s assistants. The Navy describes their duties as follows:

Religious Program Specialists (RP) support chaplains in implementing Command Religious Programs (CRPs) to accommodate the religious needs and rights of sea service personnel and their families; facilitate the delivery of ministry by chaplains by conducting rehearsals, making referrals, and rigging and unrigging for religious services and CRP events; recruit, train, and supervise CRP volunteers who assist in worship, religious education, and other programs; publicize CRP programs and events; organize, coordinate, and support religious education programs; serve as bookkeepers and custodians of Religious Offering Funds; provide library services onboard ships; manage and administratively support CRP program elements; determine, requisition, and manage logistic support for CRPs; manage, maintain, and assist in designing and determining requirements for Religious Ministry Facilities afloat and ashore; provide physical security for chaplains in combat.

CHIEF OF NAVAL PERSONNEL, MANUAL OF NAVY ENLISTED MANPOWER AND PERSONNEL CLASSIFICATIONS AND OCCUPATIONAL STANDARDS (NAVPERS 18068F), RP-1 (October 2003).

⁸¹ OPNAVINST 1730.1D, ¶ 4.a. (emphasis added).

officer Religious support in joint operations is *dedicated to [m]eeting the personal free exercise of religion needs of military and other authorized members.*⁸² Finally, a duty of the Navy's Chief of Chaplains is to "[a]dvise the Secretary of the Navy, the Chief of Naval Operations, the Commandant of the Marine Corps and the Commandant of the Coast Guard on *all matters pertaining to the free exercise of religion.*"⁸³

While chaplains have always had responsibility for protecting free exercise for all personnel, prior to *Katcoff* their focus was mostly on providing ministry according to the "manner and forms of the church of which he [or she] is a member."⁸⁴ Post-*Katcoff*, the directives and instructions appear to focus first on providing for free exercise by all personnel.⁸⁵ This shift began at a time when our nation was experiencing profound changes in the practice and understanding of religion due to an explosion of new religious movements along with increasing fragmentation of traditional denominations as "individual autonomy, greater mobility, increased self-expression and experimentalism" affected both society and religion.⁸⁶ At the same time, religion-based bias was emerging as a growing issue in the workplace.⁸⁷ With such shifts occurring in military policy and society at large, it should not be surprising that chaplains themselves are struggling with their evolving roles. Chaplains must balance the growing incongruity between those roles and their own faith beliefs,⁸⁸ along with what the Navy thinks it needs from its chaplains.⁸⁹ This seems especially true as commands more and more expect chaplains to learn about -- and be able to explain -- the growing multitude of religious traditions, even as

⁸² Joint Chiefs of Staff Publication (Joint Pub) 1-05, *Religious Support in Joint Operations* I-1 (Jun. 9, 2004) (emphasis added).

⁸³ OPNAVINST 1730.1D, ¶ 6.a.(1) (emphasis added). Flowing from this duty, the Navy Chaplain Corps also provides chaplains for service in the Marine Corps and the Coast Guard.

⁸⁴ See *supra* nn.53-58 (quoting earlier regulations and the current statute).

⁸⁵ See *supra* nn.77-83 (citing various official policies).

⁸⁶ Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 127-28, 138 (Winter 2003). Professor French examined over 1000 religion cases decided between 1963 and 2001, comparing their content and results with religious trends in society at large. One finding of note is that the politically-oriented cases she examined have shifted over the years from "a religious concern about minority and disadvantaged members of the society to a concern about the power of conservative Christianity's influence on the general population." *Id.* at 154.

⁸⁷ Georgette F. Bennett, *Religious Diversity in the Workplace . . . An Emerging Issue*, 9 THE DIVERSITY FACTOR 15 (Winter 2001).

⁸⁸ Olenda E. Johnson, *Diverse Views of Religious Pluralism: Implications for the Military Chaplaincy* 6 (Defense Equal Opportunity Management Institute 2001).

⁸⁹ "The needs of the Navy" is a catchall phrase frequently used by sailors in recognition of the secondary place of many of their personal needs in relation to the Navy's.

commands continue to expect chaplains to remain faithful to their own beliefs.⁹⁰

III. APPROACHING THE INTERSECTION: THE “PROTESTANT” PROBLEM⁹¹ OF SPLIT “P” SOUP⁹²

This struggle among expectations, roles, and needs is most obvious not only between those chaplains the Navy labels as “Protestant” and chaplains of other faith groups represented in the Chaplain Corps, but also within the group of chaplains called “Protestant.”⁹³ During World War II, the Navy classified religious preference with just three categories and marked “dog tags” with a one-letter code accordingly: “C” for Catholic, “J” for Jewish, and “P” for Protestant.⁹⁴ As convenient as that was, it was overly simplistic:

If one was not a J or a C, one was automatically a P. Chaplains were also classified in this way. Even a Russian Orthodox priest was categorized as a P. The histories of the chaplaincies of each branch of the service include in the Protestant category all faith groups other than Roman Catholic, Jewish, and Orthodox.⁹⁵

Although the groupings within the modern Navy Chaplain Corps have expanded to include Buddhist, Hindu, Islamic, and “other faiths,”⁹⁶ the groupings may still be overly broad. No differentiation is made, for example,

⁹⁰ Johnson, *supra* n.88.

⁹¹ An endorsing agent from one of the Protestant groups discussed this “problem” in a 1983 speech he gave to a meeting of the National Conference on Ministry to the Armed Forces (NCMAF), an interfaith body of organizations that endorse chaplains from their respective faith groups. S. David Chambers, *The Protestant Problem*, MIL. CHAPLAINS’ REV. 81, 82 (Nov. 1987).

⁹² The author first heard this term applied to the various Presbyterian churches in a conversation otherwise forgotten long ago. It seems even more applicable to all the various “Protestant” groups than to just one family of them.

⁹³ The term “Protestant” first arose in 1529 in reference to the minority at the Diet of Speyer in Germany, who sought to follow the reformation teachings of Martin Luther and others against the wishes of the Roman Catholic majority. THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1135 (F. L. Cross and E. A. Livingston, eds., 2d ed., Oxford 1983).

⁹⁴ Chambers, *supra* n.91, at 82. Today, religious preference is spelled out in full on the tags if possible. NAVY MILITARY PERSONNEL MANUAL (MILPERSMAN) 1000-070, ¶ 7.c-7.d. (Aug. 22, 2002) (including a list of suggested abbreviations for faith groups whose names are too long to fit on the tags).

⁹⁵ Chambers, *supra* n.91, at 82. “Orthodox” apparently became a separate category from “Protestant” at some point, but Chambers does not comment on the change.

⁹⁶ Chaplain Resource Branch, *United States Navy Chaplain Corps* (visited Apr. 16, 2005), at <http://www.chaplain.navy.mil>; *select* Faith Groups. The pull-down menu lists: Buddhism, Catholic, Hinduism, Islam, Judaism, Orthodox, Protestant, and Other Faiths. The category “Other Faiths” includes Baha’i, Confucianism, Taoism, and Wicca. *Id.*

between the Sunni and Shia branches of Islam,⁹⁷ nor does the category “Jewish” take into account the differences between Orthodox, Reformed, Conservative, Reconstructionist, or other Jewish groups.⁹⁸ Of particular interest are all the groups included under the label “Protestant,” representing perhaps 70% of all chaplains and military personnel.⁹⁹ In common usage today, the Navy Chaplain Corps appears to distinguish between “liturgical” and “nonliturgical” groups within the category “Protestant.”¹⁰⁰ Though allegations regarding that apparent division are at the heart of the current litigation,¹⁰¹ even that distinction fails to go far enough.

Of 116 groups currently eligible to endorse chaplains for service, the Navy considers at least 105 of them “Protestant.”¹⁰² It is also important to note that several of the groups listed endorse chaplains from more than one faith group, so the actual number of faith groups is higher than the number of endorsing agencies.¹⁰³

An earlier analysis of groups the Navy deemed “Protestant” noted four distinctions:

⁹⁷ See ABINGDON DICTIONARY OF LIVING RELIGIONS 351 (Keith Crim, gen. ed., Abingdon 1981) (describing Islam’s development and its various sects).

⁹⁸ *Id.* at 392 (delineating the modern branches of Judaism).

⁹⁹ RICHARD G. HUTCHESON, JR., THE CHURCHES AND THE CHAPLAINCY 88 (rev. ed., GPO 1997).

¹⁰⁰ “Liturgical” refers generally to churches that have a set order of worship or formal structure for worship; “nonliturgical” refers generally to churches that do not follow a formal order. See *Adair*, 183 F. Supp. 2d at 36 n.4 and accompanying text (following the plaintiffs’ definitions in distinguishing the two groups, and noting that the defendants use the same terminology in their documents). Also, the two groups are often distinguished by their differing baptismal practices: so-called liturgical groups generally baptize infants; the nonliturgical groups limit baptism to adults or children who have attained an “age of reason.” *Id.*

¹⁰¹ *Adair*, 183 F. Supp. 2d at 36–37, 40 (identifying the plaintiffs as “seventeen current and former nonliturgical Christian chaplains” and alleging the Navy favored liturgical over nonliturgical chaplains in accession, retention, and promotion).

¹⁰² CHIEF OF NAVAL PERSONNEL, 1 MANUAL OF NAVY OFFICER MANPOWER AND PERSONNEL CLASSIFICATIONS, NAVPERS 15839I, Major Code Structures (October 2003) (available at [https://buperscd.technology.navy.mil/bup_updt/508/Officer Classification/i/officerClassOneMenu.htm](https://buperscd.technology.navy.mil/bup_updt/508/Officer%20Classification/i/officerClassOneMenu.htm)) (listing 99 groups); an expanded listing at <http://www.chaplain.navy.mil/Attachments/aqd.pdf> adds 17 more groups that do not yet have a separate classification number assigned by DoD. Removing groups other than “Protestant,” as listed *supra* n.96, leaves at least 105 groups. Faith groups endorse chaplains subject to a DoD instruction listing requirements that a group must meet for DoD to recognize as a “Religious Organization” as well as requirements that a group’s “Religious Ministry Professional” must meet for the services to consider them for accession as chaplains. Department of Defense Instruction (DODI) 1304.28, *Guidance for the Appointment of Chaplains for the Military Departments* (June 11, 2004).

¹⁰³ For example, the Chaplaincy of Full Gospel Churches describes itself as representing members of 120,000 independent/non-denominational churches from 245 Fellowships or Associations. Chaplaincy of Full Gospel Churches, *About the CFGC!* at <http://www.chaplaincyfullgospel.org> (visited April 16, 2005).

- groups that recognize themselves and are recognized by others as “Protestant” (e.g., Presbyterian, Lutheran, Methodist),
- groups that do not recognize themselves as “Protestant” but are called that by others (e.g., Baptist, Episcopalian),
- some groups who accept the term “Protestant” but are not considered such by many others (e.g., Unitarian, Christian Scientist), and
- some groups called “Protestant” by the Navy but who do not consider themselves, nor do others consider them, to be such (e.g., Latter Day Saints (Mormons)).¹⁰⁴

To further exacerbate the Protestant problem, not all of these groups recognize each other as even being “Christian.” While some groups share a common set of core beliefs but differ on certain other beliefs or practices,¹⁰⁵ some of them also consider at least some of the other groups to be cults.¹⁰⁶

With such a wide diversity of beliefs, this challenge of identity leads, not surprisingly, to a challenge in worship. While Catholic, Jewish, or Islamic worship may be easy to identify, the plethora of “Protestant” possibilities is the crux of the current conflict.¹⁰⁷ While it may once have been possible to have a single “General Protestant”¹⁰⁸ service that arguably met the religious

¹⁰⁴ Chambers, *supra* n.91, at 83. The Episcopal Church, USA was known as the Protestant Episcopal Church from 1789 until 1967; it adopted the term “Protestant” in the United States to distinguish it from Roman Catholic churches. MEAD & HILL, *supra* n.39, at 131. The church is not properly a descendant of the Protestant Reformation in continental Europe but of a distinctly English movement. THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH, *supra* n.93, at 1166 (describing the English Reformation as an insular process separate from others).

¹⁰⁵ Two such groups may be the Presbyterian Church (U.S.A.) and the Presbyterian Church in America. The two share a common history until 1973 when a conservative group formed the Presbyterian Church in America after a long period of growing disagreement with decisions of the annual national assembly of church leaders. MEAD & HILL, *supra* n.39, at 302. The two groups share a common form of church governance, but differ, for example, on qualifications and eligibility for church office. *Id.* at 303.

¹⁰⁶ WALTER MARTIN, THE KINGDOM OF THE CULTS (Hank Hanegraaff ed., rev. ed., Bethany House, 1997). The table of contents lists at least three of the Navy’s “Protestant” groups as cults: Church of Jesus Christ of Latter Day Saints (Mormons), Christian Scientist, and Unitarian Universalism. *Id.*

¹⁰⁷ See *supra* nn.17-29 and accompanying text (outlining the allegations regarding limitations on preaching and styles of worship).

¹⁰⁸ One author suggests that the term “General Protestant Service” may be confusing, but that it is used more for convenience than to suggest any requirement for enforced conformity. He argues

needs of the perceived majority with little objection -- and sometimes willing acquiescence -- from smaller groups, that day may be disappearing into the past.¹⁰⁹ Chaplains today “represent all degrees of liturgy, non-liturgy, and a-liturgy,”¹¹⁰ and “[a]ll extremes of ordered and free worship are present” in today’s Navy chaplaincy.¹¹¹ Yet the alleged insistence of senior chaplains that “Protestant” chaplains cooperate in leading such a service,¹¹² and an alleged resistance to permitting (and sometimes flat out prohibiting) chaplains to lead faith-group specific worship apart from a general service, fuels the current litigation.¹¹³ While some faith groups or chaplains consider leadership and

the phrase is nothing more than a “more convenient term for use in the plan of the day or on the bulletin board than ‘Service Conducted by a Methodist Chaplain Open to Protestants of All Denominations.’” Hutcheson, *supra* n.99, at 86.

¹⁰⁹ Chambers, *supra* n.91, at 85 (asserting that there was a fair degree of uniformity in the past when 90% of “Protestant” chaplains came from just six major faith groups, but that today’s diversity greatly reduces the possibility for uniformity); *See also* CLIFFORD M. DRURY, 2 THE HISTORY OF THE CHAPLAIN CORPS OF THE UNITED STATES NAVY: 1939-1949, 58-59 (Bureau of Naval Personnel 1992) [hereinafter DRURY 2] (describing cooperation among “Protestant” chaplains at the end of World War II).

¹¹⁰ Chambers, *supra* n.91, at 85. The three terms describe a continuum from an externally imposed order of worship to an avoidance of any predictable order.

¹¹¹ *Id.* at 85, 86. Mr. Chambers goes on to state:

[I]t has long been accepted that a chaplain of the Episcopal church has the prerogative not to celebrate communion with chaplains of other faith groups; that Missouri Synod Lutheran chaplains may hold closed communion; that Baptist chaplains shall not baptize infants; that those who choose not to wear ecclesiastical garb are justified in conducting worship in civilian or military attire if they should desire.

Id.

¹¹² Chambers asks two provocative questions beyond the scope of this article regarding continuation of a “General Protestant” worship service:

Chaplains exist in the military first, last, and always to provide opportunity for the military community to exercise its right for worship. The focus must be on the worshippers and their spiritual needs and enrichment; not upon chaplains with their likes and dislikes. The first question is therefore: How can chaplains of diverse traditions provide meaningful worship to the greatest number of parishioners without compromising the essential tenets of their own tradition? . . .

[A] second question is: If a chaplain or a faith group cannot accommodate ministry to the needs of the pluralistic religious community, does the faith group or its clergy belong in the military environment?

Id. at 86–87.

¹¹³ *See supra* nn.17–29 (describing the allegations).

form of worship as incidental and open to great cooperation, others consider such matters crucial and open to very little compromise.¹¹⁴

IV. ENTERING THE INTERSECTION: REGULATING RELIGIOUS SPEECH

Navigating Judge Urbina's "intersection of . . . free speech, free exercise, establishment, and equal protection"¹¹⁵ is difficult while both the chaplains bringing suit and the Navy continue to insist that each has the right of way and the other must yield.¹¹⁶ Although the pending cases involve allegations of discriminatory practices in recruiting, retention, and promotion, the roads that form this particular intersection come together on the "fascinating" issue of what restrictions the Navy may place -- if any -- on the content of a chaplain's speech.¹¹⁷

Several of the allegations focus on the conduct of worship and the content of chaplains' sermons and prayers: one nonliturgical chaplain alleges that a liturgical chaplain reprimanded him for preaching that those "who call themselves Christians should live as Christians;"¹¹⁸ another alleges that his supervising chaplain criticized him for ending his prayers with the phrase, "in Jesus [sic] name;"¹¹⁹ and a third alleges his supervising chaplain removed him from worship leadership when he refused to conform his nonliturgical service to his supervisor's liturgical preferences.¹²⁰ In each case, the chaplains allege they received poor fitness reports¹²¹ because they refused to compromise their

¹¹⁴ Chambers, *supra* n.91, at 85. The author once served with two senior chaplains who alternated leadership of the "General Protestant" service; one was from a fairly liturgical tradition, while the other was from a fairly non-liturgical tradition. While always complimentary of each other and the faithfulness with which each led worship according to his respective tradition, both expressed a lack of understanding of the other's preferences. When asked to substitute in worship for one or the other, the author received clear guidance from each on how that chaplain preferred "his" service to be conducted on a particular day.

¹¹⁵ *Adair*, 183 F. Supp. 2d at 66.

¹¹⁶ Judge Urbina has commented on his frustration at delays in getting the already-consolidated cases through his court, much less getting through the intersection, saying, "[o]ver the past two years, the court has issued memorandum opinions on at least seven dispositive motions filed by the parties. Yet more motions are waiting in the wings. The court's patience is beginning to wear thin." *Chaplaincy of Full Gospel Churches v. Johnson*, 276 F. Supp. 2d 79, 81 (D.D.C. 2003) (internal citations omitted).

¹¹⁷ *Adair*, 183 F. Supp. 2d at 66.

¹¹⁸ *Id.* at 37 (citing plaintiff's complaint).

¹¹⁹ *Id.*

¹²⁰ See *supra* nn.18-21 and accompanying text (discussing an alleged disagreement over worship styles).

¹²¹ All officers receive a "fitness report" at least once each year which includes both numerical grades on performance in various areas and comments from their reporting seniors, and selection for promotion is based almost entirely on the grades and comments on these official records.

religious beliefs or change their speech, leading to reduced opportunities for advancement in the Navy.¹²² In general, the plaintiffs allege “that senior officials in the Chaplain Corps have criticized and berated non-liturgical chaplains ‘for preaching and teaching on truths of the Christian faith and their specific religious tradition.’”¹²³ Noting the overlap between the plaintiffs’ claims, the court has observed that “[t]he overriding theme that runs through all the claims relating to the plaintiffs’ free exercise of their religion is that the Navy has adopted and implemented policies and practices that effectively silence non-liturgical Christian chaplains.”¹²⁴

“Cooperation without compromise” has long been a motto of the Navy Chaplain Corps.¹²⁵ These allegations suggest that chaplains today view the boundary between the two terms quite differently from many of their predecessors,¹²⁶ and while cooperation may be a worthy goal, it cannot come at the sacrifice of religious liberty.¹²⁷

Bureau of Naval Personnel Instruction (BUPERSINST) 1610.10, *Navy Performance Evaluation and Counseling System* (Aug. 2, 1995).

¹²² See *Adair*, 183 F. Supp. 2d at 59-61 (discussing allegations concerning promotion practices).

¹²³ *Adair*, 183 F. Supp. 2d at 66 (citing plaintiff’s complaint).

¹²⁴ *Id.* at 65.

¹²⁵ Chaplain Thomas Knox suggested this slogan while serving on temporary duty to assist in starting the first Naval Chaplains School in 1943. DRURY 2, *supra* n.109, at 59.

¹²⁶ Drury is careful to note that “[a]ny categorical statement to the effect that Navy chaplains of all faiths always worked together in peace and harmony would be unhistorical.” *Id.* at 214. But, even if that was not always true, he later notes that by the end of World War II:

Chaplains of all religious groups lived and worked together in a more intimate manner than was ever possible in civilian life. The motto of the Chaplains School—Cooperation Without Compromise—was found to be possible. Protestants learned more about the Catholics, Christians more about the Jews, and vice versa. Rarely were denominational lines drawn among the Protestants. The experiences of the chaplaincy did much to promote the spirit of ecumenicity among the Protestants. Chaplains who had learned to minister to men and women in the service without denominational labels were less tolerant of some of the minor differences of doctrine and polity which keep some of the Protestant denominations apart.

Id. at 307.

¹²⁷ Indeed, as the court intends to apply a strict-scrutiny standard to the plaintiffs’ free exercise, establishment, free speech, and equal protection claims in the current litigation, *Adair*, 183 F. Supp. 2d at 50-53, 63-67, it seems quite unlikely that it would consider “cooperation” alone to be a compelling state interest.

A. Religious Speech in Faith-Group Worship

Although the question of restrictions on speech in military chapels has not yet reached the Supreme Court,¹²⁸ it did reach the United States District Court for the District of Columbia in *Rigdon v. Perry*.¹²⁹ In that case, a Roman Catholic priest, a Jewish rabbi, and other service members¹³⁰ sued the DoD and the armed forces over restrictions on the chaplains' speech in worship, falling under the Anti-Lobbying Act¹³¹ and various regulations.¹³² The court held that chaplains act in a religious capacity when they preach, and it is appropriate for them to teach their religious beliefs in that setting.¹³³ Applying the Religious Freedom Restoration Act (RFRA),¹³⁴ the court observed that the suspect speech appeared to be "no less important . . . than other religiously-motivated activity courts have held to be important enough to a religion such that its prohibition amounts to a substantial burden."¹³⁵ RFRA imposes strict-scrutiny analysis on questions of governmental burden on free exercise, allowing substantial burden of one's exercise of religion only if the government can show a compelling governmental interest and that such burden "is the least restrictive means of furthering that compelling governmental interest."¹³⁶

¹²⁸ Given the issues in these cases and the determination of both the plaintiffs and the Navy, the author believes that this question may reach the Court as a result of these actions.

¹²⁹ *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997).

¹³⁰ For an examination of *Rigdon* describing the other plaintiffs and developing the idea of chaplains serving as officers with rank but not with command, see Aden, *supra* n.15, at 198-203.

¹³¹ 18 U.S.C. § 1913 (2000). The defendants conceded before trial that the Anti-Lobbying Act was not relevant to the facts in this case because it only applies if the activity in question involves spending government funds; because this case involved active duty service members but no government funds, the defendants relied instead on DOD Directive 1344.10, *Political Activities of Members of the Armed Forces on Active Duty* (Jun. 15, 1990). *Rigdon*, 962 F. Supp. at 157.

¹³² *Rigdon*, 962 F. Supp. at 152, 154 (citing several DOD and Air Force regulations or directives, and describing correspondence directed to chaplains by each service's headquarters regarding the restrictions).

¹³³ *Id.* at 161.

¹³⁴ 42 U.S.C. § 2000bb-1 (2000). While at first blush the Supreme Court's holding in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), regarding RFRA's constitutionality may appear all-encompassing, later opinions clarify that *Boerne's* ruling abrogated RFRA only with regard to state government action. Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 638 (1999); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003) (indicating that the court hearing the current cases has held "without doubt" that RFRA "survived the Supreme Court's decision striking down the statute as applied to the States" and is still constitutional as applied to the federal government, citing *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.D.C. 2001)).

¹³⁵ *Rigdon*, 962 F. Supp. at 161. The judge hearing the current cases has ruled, following First Amendment rather than RFRA analysis, that strict-scrutiny applies to the cases pending before it. *Adair*, 183 F. Supp. 2d at 50-53.

¹³⁶ 42 U.S.C. §§ 2000bb-1(a), (b) (2000).

Having found a substantial burden in *Rigdon*,¹³⁷ the court examined whether the burden fit the exception and held that “the compelling interests advanced by the military are outweighed by the military chaplains’ right to autonomy in determining the religious content of their sermons”¹³⁸ The government’s asserted interests in *Rigdon* were potential political conflicts that might arise in the military ranks should different chaplains encourage their respective congregations to undertake competing lobbying activities.¹³⁹ In fact, the court observed, the defendants failed to show how the burden furthered those interests at all, much less in the least restrictive manner.¹⁴⁰ *Stare decisis* suggests the district court’s decision in *Rigdon* is strongly indicative of how it will rule in the current litigation, and it would seem that an interest in cooperation between individual chaplains is even less compelling than an interest in preventing potential political conflicts in the ranks.¹⁴¹

In a particularly interesting parallel to the differences between various so-called “Protestant” groups in the current litigation, the court also examined a difference of opinion between two Roman Catholic chaplains.¹⁴² The military considered one chaplain’s religious speech to violate the restriction, while the other chaplain’s speech on the same subject did not.¹⁴³ The court reasoned that the military was thus sanctioning one Catholic view over another on a matter of faith, a form of viewpoint discrimination that is presumed impermissible in such a forum.¹⁴⁴ Finally, at least with regard to speech in worship, *Rigdon* uses very strong language in concluding that:

¹³⁷ *Supra* n.135.

¹³⁸ *Rigdon*, 962 F. Supp. at 162.

¹³⁹ *Id.* at 161–62.

¹⁴⁰ *Id.* at 162.

¹⁴¹ The district court’s recent ruling on the Navy’s motion to dismiss in *Larsen* suggests that RFRA itself will apply to few, if any, of the various claims, because the chaplains’ claims attack intentionally discriminatory policies rather than laws or regulations of neutral or general applicability. *Larsen*, 346 F. Supp. 2d at 137–38. While claims under RFRA may be precluded by this latest ruling, the underlying allegations of violations of First Amendment rights are not. See *supra* n.135 (describing an earlier ruling by the district court that First Amendment strict scrutiny analysis would apply to the claims).

¹⁴² *Id.* at 163–64. One, Father Rigdon, believed his faith compelled him to urge members of the congregation to engage in a certain activity. *Id.* The other priest, a Navy chaplain who was not a party to the suit, did not feel so compelled. *Id.*

¹⁴³ *Id.* at 164.

¹⁴⁴ *Id.* (citing *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), involving a university’s refusal to pay a religious student group’s printing costs because of the religious content of the publication while paying other nonreligious student groups’ printing costs). Having noted that expressive, religious activity was the underlying purpose for having chapels, the court held that the speech at issue in *Rigdon* was within the limitations of the proper forum and protected from such viewpoint discrimination *Id.* at 163, 164.

[W]hat we have here is the government's attempt to override the Constitution and the laws of the land by a directive that clearly interferes with military chaplains' free exercise and free speech rights, as well as those of their congregants. On its face, this is a drastic act and can be sanctioned only by compelling circumstances. The government clearly has not met its burden. The "speech" that the plaintiffs intend to employ to inform their congregants of their religious obligations has nothing to do with their role in the military. They are neither being disrespectful to the Armed Forces nor in any way urging their congregants to defy military orders. The chaplains in this case seek to preach only what they would tell their non-military congregants. There is no need for heavy-handed censorship, and any attempt to impinge on the plaintiffs' constitutional and legal rights is not acceptable.¹⁴⁵

The directive referred to here came from headquarters-level officers, not front-line supervisors.¹⁴⁶ If similar reasoning under the First Amendment is followed in the pending cases, *Rigdon* suggests that the Navy -- or any chaplain, no matter how senior in grade -- cannot tell a chaplain what he or she may or may not say while preaching or praying when leading faith-group worship.

B. Religious Speech Beyond Faith-Group Worship

But what of chaplains' activities and speech outside of worship, having more to do "with their role in the military"¹⁴⁷ than with their role as worship leaders? The mission of the Chaplain Corps extends beyond formal acts of worship to include responsibilities to: "advise commanders to ensure the free exercise of religion; provide religious ministry support to authorized personnel; advocate for and promote the well-being of all personnel; and serve as command liaison to civilian religious leaders, communities, organizations and agencies."¹⁴⁸ In carrying out this mission, chaplains find themselves speaking in forums far removed from faith-group worship.¹⁴⁹ Navy chaplains

¹⁴⁵ *Id.* at 165.

¹⁴⁶ *Supra* n.132.

¹⁴⁷ *Supra* n.145 and accompanying text.

¹⁴⁸ U.S. Navy, *U.S. Navy Chaplain Corps Strategic Plan 2001 to 2007*, 3 (undated) (available at <http://www.chaplain.navy.mil/CoC/StrategicPlan.asp>).

¹⁴⁹ The court in *Rigdon* took note of "the government's clear intent that certain facilities on military property (e.g., chapels) and personnel (e.g., chaplains) be dedicated exclusively to the free exercise rights of its service people." *Rigdon*, 962 F. Supp. at 163. If certain facilities are

engage in counseling sessions one-on-one with Sailors, Marines, other service members, and family members; attend and participate in staff meetings with other officers; visit workspaces and dining facilities; travel to far-flung lands; lead workshops on healthy relationships, planning for deployment, and return and reunion issues; offer invocations and benedictions at assemblies ranging in size from a handful to hundreds of attendees; spend weeks or months at sea, interacting daily with the rest of the crew; accompany forces encountering hostile fire; broadcast an evening prayer over a ship's public address system just before "Taps" at the end of each day; visit patients in sickbays or hospitals; and myriad other activities.¹⁵⁰ While any or all of these may involve religious speech, many are certainly not strictly religious activities.¹⁵¹

Both courts and military regulations expressly recognize a distinction between a chaplain's conduct as an officer and a chaplain's conduct as a religious leader.¹⁵² While current Navy instructions seem to attempt to include "the entire spectrum of professional duties performed by Navy chaplains" under the term "religious ministry,"¹⁵³ and to subsume nearly anything a chaplain might do under the heading of "Religious Ministry Tasks,"¹⁵⁴ earlier documents offer clearly separate instructions regarding "The Chaplain as a Professional Representative of His Church" and "The Chaplain as a Naval Officer."¹⁵⁵ Training materials and conferences have focused separately on

included in this intent, others presumably are not. See *Rigdon*, 962 F. Supp. at 162-63 (describing the Supreme Court's forum analysis developed in *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)).

¹⁵⁰ The list is by no means all-inclusive, but reflects the author's personal experiences as a chaplain or those of others known to him over more than twenty years of reserve and active duty.

¹⁵¹ While reluctant to assert that a chaplain uttering religious speech might make any activity religious, this author is also concerned about courts drawing too fine a distinction. In ruling against a defendant's claim of clergy-penitent privilege for statements made in a counseling setting, one court has drawn just such a line between secular marriage counseling performed by a minister and religious counseling performed by that same minister. *United States v. Shelton*, 59 M.J. 727 (A. Ct. Crim. App. 2004). The author is encouraged by an appellate court decision to grant review on the question of "whether the United States Army Court of Criminal Appeals erred in upholding the ruling of the military judge that denied the defense motion to suppress any evidence obtained as a result of communications between appellant and his pastor." *United States v. Shelton*, 60 M.J. 314 (Armed Forces App. 2004). No final decision has been reported as of this writing.

¹⁵² *Rigdon*, 962 F. Supp. at 158-61 (reviewing distinctions regarding the roles of chaplains as found in various provisions of the Manual for Courts-Martial, Army and Navy instructions, and the Military Rules of Evidence, along with interpretations of those distinctions in several court cases).

¹⁵³ OPNAVINST 1730.1D, *Religious Ministry in the Navy*, ¶ 4.a.

¹⁵⁴ *Id.* at ¶ 5.b.

¹⁵⁵ OPNAVINST 1730.1, *Chaplains Manual*, art. 1202, 1203 (1973) (as amended through *Change Transmittal 5*, (1980)) (available at <http://www.chaplain.navy.mil/CoC/History.asp>, select 1973 Chaplain Corps Manual).

spiritual development issues¹⁵⁶ and the need for chaplains to understand their leadership role as commissioned officers in “the command structure, as staff officers, and as supervisors”¹⁵⁷ Rules concerning privileged communications between chaplains and service members extend the privilege to communication “made either as a formal act of religion or as a matter of conscience” to a chaplain in his or her “capacity as a spiritual advisor” but not in any other capacity.¹⁵⁸

Beyond worship, regulations limit a chaplain’s duties solely to religious service “while assigned to a combat area during a period of armed conflict.”¹⁵⁹ Outside of combat, prohibited duties include any that would violate “the religious practices of the chaplain’s religious organization, undermine privileged communication . . . or involve the management of funds other than the [Religious Offering Fund].”¹⁶⁰ Although at least one author asserts that “anything that a chaplain touches must be related to religion and religious activities,”¹⁶¹ nothing in the regulations currently precludes assignment when not in a combat area as: Division Officer supervising enlisted Religious Program Specialists running a shipboard library and computer lab; Voting Rights Officer; member of an Awards Board; Command Liaison to a local chapter of the U.S. Navy League; member of a Community Relations Board; Project Officer for a Predeployment/Change of Homeport Workshop; member of a Special Cases Board reviewing requests to delay or defer mobilization; Zone Inspector of berthing and workspaces aboard ship; Ombudsman Liaison assisting key family-member volunteers in helping other family members; member of an Examination Board proctoring enlisted advancement exams; Enlisting Officer administering an Oath of Enlistment to a new Sailor; or even Project Officer responsible for directional signs throughout an aircraft carrier for a “Family Day” cruise.¹⁶² Construing all these activities

¹⁵⁶ *Chaplain Corps Professional Development Training Course Fiscal Year 89: Spiritual Development and Pastoral Care* (Dept. of the Navy 1988).

¹⁵⁷ *Chaplain Corps Professional Development Training Course Fiscal Year 94: Chaplain Leadership* (Dept. of the Navy 1993).

¹⁵⁸ Note that while the military rule extends the privilege beyond the “clergyman” to include communications with a “clergyman’s assistant,” and is thus broader than that offered in many civilian courts, it is also limited by the “formal act of religion” and “capacity as a spiritual advisor” requirements. Mil. R. Evid. 503(a), (b). *See also supra* n.151 (discussing a pending case reexamining this privilege).

¹⁵⁹ *Navy Regulations*, art. 1063 (1990). The regulation further explains that this restriction in combat areas flows from the requirements of the Geneva Conventions to protect the noncombatant status of medical, dental, and religious personnel. *Id.*

¹⁶⁰ OPNAVINST 1730.1D ¶ 5.e.(11).

¹⁶¹ Aden, *supra* n.15, at 209.

¹⁶² This list reflects many, but not all, of the collateral duties held by the author of this article over the years. One of these assignments, serving as member of a Special Cases Board reviewing requests to delay or defer mobilization, is in fact suggested by a regulation recommending that

as religious ministry would strain credulity, yet chaplains have done all these and more in their role as Naval officers.

Does the broad protection of religious speech enjoyed by chaplains leading worship extend to these other activities? Does the mere presence of a chaplain make something a “religious” activity? If so, then the protection may well extend to those other activities. One district court has observed that the government cannot restrict some forms of speech merely because a person has other opportunities to speak, and held that the government cannot restrict some religious exercise just because other religious practices might be available.¹⁶³ The court suggested that “[i]t would be curious to find that RFRA barred challenges to governmental restrictions on religion as long as the plaintiff could practice, say, two-thirds of his religion.”¹⁶⁴

C. Is Religious Speech Absolutely Protected in Any Military Forum?

Following that reasoning, a growing number of chaplains have asserted that their religious speech is protected in all forums, and that their faith and conscience require them to use every opportunity to promote the teaching of their respective faith groups.¹⁶⁵ But, while a right to individual interpretation of the Bible is a closely held tenet of faith for some groups,¹⁶⁶ that right does not extend to constitutional or statutory construction.¹⁶⁷ Also, military commanders and authorities enjoy substantial deference from courts

“board membership include a chaplain, a line officer, and a JAG Corps officer when available.” Commander, Naval Reserve Forces, Instruction (COMNAVRESFORINST) 3060.5A, *Commander, Naval Reserve Force Manpower Mobilization Support Plan*, Appendix B, para. 2. (April 3, 2000).

¹⁶³ *Muslim v. Frame*, 897 F. Supp. 215, 217 (E.D.Pa. 1995).

¹⁶⁴ *Id.*

¹⁶⁵ This observation comes generally from the author’s experience in conversations with other chaplains over the last twenty years, and particularly since the start of the present litigation.

¹⁶⁶ See generally ABINGDON DICTIONARY OF LIVING RELIGIONS, *supra* n.97, at 90 (describing beliefs of Baptist churches in general). Some traditions, though, expressly limit private interpretation to matters of faith or worship. See, e.g., GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.), PART II: THE BOOK OF ORDER 2003-2004, sec. G-1.0301(1)(a) (listing as one of that church’s “Historic Principles of Church Order” that “God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to his Word, or beside it, *in matters of faith or worship*” (quoting from the Westminster Confession of Faith) (emphasis added)).

¹⁶⁷ That such a right does not so extend has been clear from the Supreme Court’s earliest days: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

regarding certain types of speech and the threat that speech might pose to various military interests.¹⁶⁸ Judges have recently shown a willingness to show less deference to military authorities in cases of perceived “outright abuse,”¹⁶⁹ and showing any deference at all has its critics in some cases.¹⁷⁰ However, courts continue to appear willing to treat the military as a separate community,¹⁷¹ in which First Amendment principles are applied differently through necessity, and individual challenges to First Amendment restrictions rarely succeed.¹⁷²

The case of *Veitch v. Danzig*,¹⁷³ brought by a former Navy chaplain, presents a recent challenge to such restrictions. The case focuses on allegations concerning events that occurred while the plaintiff was on active duty and stationed in Naples, Italy, and involves perhaps the most publicized¹⁷⁴ allegations of limitations on a chaplain’s rights to free speech, free exercise, and equal protection, along with other claims.¹⁷⁵ In ruling on the plaintiff’s

¹⁶⁸ Carr, *supra* n.35, at 307 (commenting on an examination of case law involving articles of the Uniform Code of Military Justice (UCMJ), DOD and service regulations, and lawful orders of lower echelon commanders).

¹⁶⁹ *Id.* at 309 (citing *Rigdon*).

¹⁷⁰ *Id.* at 308 n.19 (citing as one example C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other Special “Contexts”*, 56 U. CIN. L. REV. 779, 799 (1988)).

¹⁷¹ See generally James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (describing development of “separate community” standard for reviewing constitutional claims brought by military members).

¹⁷² Carr, *supra* n.35, at 313. *Rigdon* appears to be one of those rare exceptions. An earlier review of Free Exercise challenges prior to 1987 found that most focused on appearance (beards) or dress (religious head coverings), and none on speech by chaplains. Michael F. Noone, Jr., *Rendering Unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces*, 18 ST. MARY’S L.J. 1233, 1252–62 (1987).

¹⁷³ *Veitch v. Danzig*, 135 F. Supp. 2d 32 (D.D.C. 2001). *But see supra* n.14.

¹⁷⁴ See generally Ward Sanderson, *War in the Chaplain Corps*, STARS AND STRIPES/STRIPE SUNDAY MAGAZINE (Nov. 23, 2003) ([at http://www.stripesonline.com/article.asp?section=126&article=18884](http://www.stripesonline.com/article.asp?section=126&article=18884)) (introducing a three-part series on the current litigation and describing testimony in *Veitch*); Letter from Louis V. Iasiello, Chief of Chaplains, U.S. Navy, in *Letters to the Editor for Thursday, December 18, 2003*, STARS AND STRIPES (Dec. 18, 2003) ([at http://www.stripesonline.com/article.asp?section=125&article=19125&archive=true](http://www.stripesonline.com/article.asp?section=125&article=19125&archive=true)) (responding to Sanderson series); *Chaplain’s Case Against Navy Can Continue, Judge Rules*, SAN JOSE MERCURY NEWS 3F (September 8, 2001) (available at 2001 WL 27027719); Dale Eisman, *Navy Chaplain Bucks “Vanilla Gospel,” Fights To Keep Job*, THE VIRGINIAN PILOT & THE LEDGER STAR A5 (September 26, 1999) (available at 1999 WL 21869096); Rowan Scarborough, *Chaplain Charges Navy Forced Him Out Over Views: Evangelical Complains Of Discrimination*, THE WASHINGTON TIMES A1 (August 23, 1999) (available at 1999 WL 3092688).

¹⁷⁵ As reported by the court:

Plaintiff’s complaint charges: (1) violation of the First Amendment’s Free Exercise and Establishment Clauses (based on [the supervisor’s] actions toward plaintiff); (2) violation of plaintiff’s First Amendment free speech rights and right to seek redress (the Navy’s insistence that he preach

request to enjoin the enforcement of certain regulations concerning the First Amendment, the court focused on the chaplain's behavior as a Naval officer, even as it recognized that his First Amendment claims would be substantial if the case focused instead on heresy or doctrine.¹⁷⁶ The chaplain asserted that the dispute centered on religious issues,¹⁷⁷ but two equal opportunity complaint investigations and an Inspector General's (IG) investigation concluded otherwise.¹⁷⁸ In denying the plaintiff's motion for a preliminary injunction, the court observed that "the dispute appear[ed] more to be centered upon [plaintiff's] military deportment than upon his religious convictions." The district court also noted that the IG concluded that "the disciplinary proceedings against [the plaintiff] were the product of his own military -- not theological -- misconduct."¹⁷⁹ In the most recent development in this case, the district court granted the Navy's motion to dismiss the case without reaching the constitutional issues, because the plaintiff failed to show the Navy's liability for the alleged claims.¹⁸⁰ Judge Barzilay seemed quite willing to separate a chaplain's protected religious speech from other forms of expression in forums beyond worship.¹⁸¹

Beyond worship, commanders call upon chaplains to engage in religious speech in situations that are otherwise wholly secular, asking them to pray at the start and end of change of command ceremonies, retirements, graduations, formal dinners and celebrations, and other events.¹⁸² While the

"pluralism among religions," and the Navy's retaliation for his complaining about religious discrimination); (3) violation of the Equal Protection Clause under the Fifth Amendment (inconsistent application of the Uniform Code of Military Justice); (4) illegal or constructive discharge (hostile working conditions); (5) violation of the Religious Freedom Restoration Act ("RFRA") (censoring what plaintiff could preach); (6) irreparable harm (his precipitous separation from the Navy); (7) violation of plaintiff's civil rights (withholding back pay); and (8) conspiracy to violate plaintiff's civil rights.

Veitch, 135 F. Supp. 2d at 34.

¹⁷⁶ *Id.* at 35.

¹⁷⁷ *Id.* at 33-36.

¹⁷⁸ *Id.* at 34.

¹⁷⁹ *Id.* at 36.

¹⁸⁰ *Veitch*, 2005 WL 762099 at *9.

¹⁸¹ *Veitch*, 2005 WL 762099 at *12 (discussing, as one example, the charge of "disrespect toward a superior commissioned officer" the plaintiff faced before he resigned from the Navy). Similarly, Judge Urbina has indicated he agrees with the District Court for the Southern District of California's conclusion in *Sturm*'s underlying action that the judiciary's traditional deference to the military "does not extend to practices that may subvert one's inalienable constitutional rights." *Adair*, 183 F. Supp. 2d at 52 (citing *Sturm v. U.S. Navy*, No. 99-2272 at 7 (S.D. Cal. 2000)).

¹⁸² The author has prayed at innumerable such events during his career. Although occasionally asked to pray for good weather as the chaplain in the movie *Patton* was asked to do, to date he has successfully demurred.

practice has not yet faced a formal challenge before the Supreme Court, as have prayers offered at high school graduations,¹⁸³ it may yet.¹⁸⁴ Although the Navy audience is older than that in the high school cases,¹⁸⁵ attendance at many Navy events is quite often mandatory¹⁸⁶ or arguably coerced.¹⁸⁷ Restrictions on speech that some might perceive as prejudicial “to good order and discipline in the armed forces”¹⁸⁸ have not yet extended formally¹⁸⁹ to the content of chaplains’ prayers in such settings. The growing religious diversity in the military,¹⁹⁰ however, may someday require it.¹⁹¹

D. Lane Markers in the Intersection: Some Dashed Lines

The chaplain’s dual role as a religious ministry professional and a Naval officer may necessitate tailoring of religious speech in settings beyond faith-group worship in recognition of the religious diversity in command assemblies. Generally, commanders ask “the chaplain” to pray, not “the Presbyterian chaplain,” or “the Catholic chaplain,” or “the Baptist

¹⁸³ *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁸⁴ Some media reports suggest the ACLU may file suit to end the practice of student-led prayer at mealtime at the United States Naval Academy. See generally Amy Fagan, *Bill Would Permit Military Academy Prayers; Move Aimed at Thwarting ACLU*, THE WASHINGTON TIMES A1 (Oct. 4, 2003) (describing successful litigation brought by the ACLU ending mealtime prayers at Virginia Military Institute, a following ACLU letter to the Naval Academy asking that it also end the practice, and a bill introduced in Congress designed to protect the practice).

¹⁸⁵ Though the Supreme Court declined to extend its holding in *Lee* to “mature adults,” *Lee*, 505 U.S. at 593, much of the audience at many military functions is not much older than those graduating high school. In 1997, 36.6% of the Navy was under 25 years old, and 58.3% of the Navy was under 30. Defense Manpower Data Center, *Active Duty Workforce Profile: March 31, 1997* (visited Feb. 28, 2004), at http://www.dmdc.osd.mil/ids/archive/act_prof2.htm.

¹⁸⁶ Change of command ceremonies ordinarily involve all unit members not on watch standing in formation. See, e.g., WILLIAM P. MACK, THE NAVAL OFFICER’S GUIDE 139-40 (9th ed., Naval Inst. Press 1983).

¹⁸⁷ Formal dinners or informal receptions, for example, may not officially be mandatory, but the author’s experience is that attendance at many so-called “optional” events is generally considered not genuinely optional.

¹⁸⁸ Article 134, Uniform Code of Military Justice.

¹⁸⁹ Allegations of attempts by senior chaplains to extend the restriction to the content of public prayers are at issue in the current litigation. See *supra* nn.17-29 (outlining the allegations).

¹⁹⁰ One example of the diversity is the growth in the number of personnel who identify themselves as Islamic, growing five-fold from 2,000 to 10,000 in a recent six-year period. Hutcheson, *supra* n.99, at 81.

¹⁹¹ While perhaps 98.9% of service members claiming a religious preference call themselves Christian, leaving only 1.1% identifying with non-Christian groups, “the religious rights of Americans have never depended on numbers.” *Id.* at 81. Also, the author’s personal experience of reviewing religious preference data in several commands suggests that many members’ records lack not only an indication of preference but also fail to show that many members were ever aware of the opportunity to record a preference.

chaplain.”¹⁹² Such settings are very different from faith-group worship and, absent a demonstrable faith group requirement for a particular formulaic ending to prayer, would seem to require a cooperative accommodation.

An interfaith resource often distributed and recommended to chaplains over the years offers guidelines for prayer given publicly in a diverse society.¹⁹³ Such a document offers lane markers to guide one through the fascinating four-way intersection. It suggests that “public prayer in a pluralistic society must be sensitive to a diversity of faiths.”¹⁹⁴ Public prayer that becomes divisive by using “forms or language [that] exclude persons from faith traditions different from that of the speaker”¹⁹⁵ might run afoul of the deference usually given to the military on matters prejudicial to good order and discipline.¹⁹⁶ Prayer that is “nonsectarian, general and carefully planned” can be “authentic prayer that also enables people to recognize the pluralism of American society.”¹⁹⁷ Recognizing such diversity, coupled with the idea that “prayer in such secular settings can and should bind a group together in a common concern,”¹⁹⁸ would reinforce, rather than offend, good order and discipline. This would also support the military necessity of unit cohesion¹⁹⁹ over a chaplain’s own interest in furthering a particular religious viewpoint.²⁰⁰

¹⁹² In commands having more than one chaplain, particularly for retirements, individual retirees or commanding officers sometimes ask for chaplains of their particular faith group to pray. But those attending seldom know about the particular request, understand the relationship between the honoree and the chaplain, or even care, especially if compelled to stand in formation for a long ceremony!

¹⁹³ NCCJ, *supra* n.11. Interestingly, this is an updated version of the brochure handed out to clergy invited to pray at the graduations in *Lee* and used as evidence to show an impermissible establishment violation when used to guide school prayer. *Lee*, 505 U.S. at 581, 588. Formerly known as The National Conference of Christians and Jews, NCCJ “changed its name in the 1990’s to better reflect its mission to build whole and inclusive communities.” NCCJ, *The National Conference for Community and Justice (NCCJ)*, (visited Mar. 1, 2004), at <http://www.nccj.org>. The author received his first copy of the brochure while a student at the Naval Chaplains School in 1984.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See supra* n.168 (discussing the usual deference).

¹⁹⁷ NCCJ, *supra* n.11.

¹⁹⁸ *Id.*

¹⁹⁹ General Colin Powell, while Chairman of the Joint Chiefs of Staff, and General H. Norman Schwarzkopf have reportedly commented on the singular importance of unit cohesion for success in battle. *See Carr, supra* n.35, at 347 (citing Congressional testimony of the two generals).

²⁰⁰ Such conduct would also be consistent with guidelines President Clinton issued on religious exercise and expression in the Federal civilian workplace, which state:

As a matter of law, agencies shall not restrict personal religious expression by employees in the Federal workplace except where the employee’s interest in the expression is outweighed by the government’s interest in the efficient provision of public services or where the expression intrudes upon the

Following such guidelines would also recognize that a chaplain's right to free exercise might end at the appearance of establishment, much like the right to free speech ends at falsely shouting "fire" in a crowded theater.²⁰¹ A chaplain praying in faith-group worship -- a purely religious forum -- seems to stand in a very different place from one praying on a platform in close proximity to military officials and the trappings of governmental authority.²⁰² While the one is permitted great freedom even where the Establishment Clause might ordinarily prohibit such activity,²⁰³ the other presents an Establishment problem of another magnitude. Just as the Establishment Clause may be limited in some settings by the Free Exercise Clause,²⁰⁴ so the Free Exercise Clause may be limited in this setting by the Establishment Clause.²⁰⁵

legitimate rights of other employees or creates the appearance, to a reasonable observer, of an official endorsement of religion.

The White House, Office of the Press Secretary, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, at <http://clinton6.nara.gov/1997/08/1997-08-14-guidelines-on-religious-expression-in-the-workplace.html> (August 14, 1997).

²⁰¹ Justice Holmes first used this illustration in a case involving charges of "causing and attempting to cause insubordination . . . in the military and naval forces of the United States." *Schenck v. United States*, 249 U.S. 47, 48-49 (1919). In words that might well be used to test the acts at issue in the present cases in tension with the Establishment Clause, he wrote:

But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. at 52 (internal citations omitted).

²⁰² A reasonable observer might easily see a chaplain in the latter setting as speaking and acting on behalf of the government, rather than merely representing a particular faith group, thus presenting facts for a compelling state interest that could lead to the Establishment Clause defeating both Free Exercise and Free Speech claims. Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religions Issues in the Army*, 1998 ARMY LAW. 14 (November 1998) (citing Justice Scalia's statement for the majority in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 761-62 (1995), that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech").

²⁰³ *Katcoff*, 755 F.2d at 233 (interpreting the Establishment Clause in tension with the Free Exercise and War Powers Clauses).

²⁰⁴ *Id.*

²⁰⁵ One might suggest that a closer proximity to the appearance of establishment requires a greater degree of restriction on a chaplain's free exercise.

V. CONCLUSION: REACHING THE OTHER SIDE OF THE INTERSECTION

The Navy and its Chaplain Corps will spend a great deal of time and energy on this intersection and the nearby interchange of related issues currently before the United States District Court for the District of Columbia. This cluster of cases presents overlapping constitutional questions regarding religious ministry in the Navy that go far beyond those examined by the Second Circuit in *Katcoff's* limited challenge. The plaintiffs in *Katcoff* challenged the constitutionality of the chaplaincy itself on Establishment grounds, and failed at both the district and appellate level.²⁰⁶ The current litigation goes to broader questions of the constitutionality of how the Navy operates its chaplaincy, and will likely impact religious ministry in the other branches as well.²⁰⁷

Unlike the litigants in *Katcoff*, who appeared *pro se*, used their own resources, and had little personal interest at stake,²⁰⁸ the plaintiffs in the current actions have retained counsel, sought the help of other organizations, and have great personal interests at stake.²⁰⁹ Like the Army before it, the Navy is likely to be willing to fight for its position to the utmost.²¹⁰ Given the great interests of both sides and the constitutional questions at issue, *Adair*,

²⁰⁶ The original action was *Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y. 1984). The Second Circuit Court of Appeals did remand one question regarding whether a government-funded chaplaincy in certain large urban areas in the United States would meet the test it adopted in evaluating the chaplaincy as a whole, *Katcoff*, 755 F.2d at 238, but the plaintiffs chose not to pursue the action further rather than face the prospects of paying the government's costs on appeal if they lost again. DRAZIN & CURREY, *supra* n.76, at 203.

²⁰⁷ *Supra* n.76 (describing the possible effects on the various services if a suit against one were to succeed).

²⁰⁸ Joel Katcoff and Allen Wieder were third-year law students when they first filed suit against the Army, and do not appear to have sought or accepted outside help at any point in the litigation. DRAZIN & CURREY, *supra* n.76, at 1-2. They based standing only on their status as federal taxpayers. *Katcoff*, 755 F.2d at 231.

²⁰⁹ Arthur A. Schulcz, Sr., Vienna, Va. is listed as counsel for the plaintiffs on *Adair*, *CFGC*, *Veitch*, and *Wilkins*, joined by Bradley L. Bollinger on the most recent *Adair* actions. *Supra* n.14 (listing citations for the various cases). Steven H. Aden, formerly head of litigation for the Rutherford Institute and now Chief Litigation Counsel for the Christian Legal Society, has also assisted. Telephone interview with Steven H. Aden, Christian Legal Society (October 16, 2003). More recently, John W. Whitehead and Douglas R. McKusick, of the Rutherford Institute, assisted with the petition for writ of certiorari in *CFGC*. *CFGC*, 125 S.Ct. at 1343 (listing Whitehead and McKusick as "of counsel" on the petition). The personal interests of the litigants include at least their personal and professional reputations, possible promotions to higher rank, and potential recovery of wages lost either to not being selected for promotion or allegedly forced resignation. *Supra* n.31.

²¹⁰ See generally DRAZIN & CURREY, *supra* n.76 (recounting the Army's determination to see the litigation through to the very end).

CFGC, Veitch, Larsen, or a name not yet at the top of any of the cases, may well achieve landmark status in Religion Clause jurisprudence.

The court currently responsible for these cases has stated clearly that “the Constitution prevents the Navy from regulating the religious speech of non-liturgical Christian chaplains but not that of liturgical Christian or Catholic chaplains.”²¹¹ If the court reinforces its holding in *Rigdon* supporting fully-protected speech in worship,²¹² the “General Protestant” service may become a rarity, subject to the willingness of individual chaplains to conduct such a service without regard to the wishes of chaplains from other faith groups.²¹³

But, just as the Navy cannot regulate the religious speech of one group of chaplains and not that of another, query whether it can regulate the speech of *all* chaplains when outside of the protected forum of faith-group worship. This appears a more challenging question, for logically, an unlawful restriction remains unlawful even if applied evenly. Only time will tell if the Supreme Court’s holding in *Lee* will extend beyond prayers offered before high school children to those offered before mature adults.²¹⁴ In the meantime, prayers in civic occasions that at least acknowledge the religious diversity in the audience and limit efforts to further a chaplain’s own religious viewpoint would seem a reasonable reconciliation between free exercise and establishment concerns.

One writer goes so far as to suggest that the decisions in these cases will determine whether a federally-funded military chaplaincy will survive at all.²¹⁵ How well the plaintiffs, the Navy, the courts, and the hundreds of chaplains ministering 24/7/365 around the world to the men and women of the Navy, Marine Corps, Coast Guard and Merchant Marine navigate this intersection will, at the very least, change the face of the Navy Chaplain Corps for years to come.²¹⁶

²¹¹ *Adair*, 183 F. Supp. 2d at 66.

²¹² *Supra* n.144 (quoting the conclusion of the opinion in *Rigdon*).

²¹³ That willingness, of course, would be subject to the “manner and forms of the church of the church of which [the chaplain] is a member.” *Supra* n.20 (quoting 10 U.S.C. § 6031a).

²¹⁴ *Supra* nn.183–85 (describing *Lee*).

²¹⁵ *Aden*, *supra* n.15, at 237.

²¹⁶ One sign of changes to come is an Equal Opportunity Symposium held for five days in May, 2004. The announcement for the symposium said it was “the first of its kind specifically designed for Chaplains.” (Announcement available at <http://www.chaplain.navy.mil/training/pdtw.asp>) (copy on file with author). The accompanying “information paper” called this workshop “a proactive approach to avoid future equal opportunity problems within the Chaplain Service,” and observed that “[r]ecent allegations of discrimination within the Chaplain Corps warrants consideration of additional training that may prevent unequal treatment or its perception within the naval chaplaincy.” (Dean Bonura, *Information Paper* (Defense Equal Opportunity Management

This article's focus on just some of the challenges facing military chaplaincies may also foreshadow challenges facing society at large in the new century. If religious diversity becomes to the twenty-first century what race relations were to the twentieth century,²¹⁷ then there is much more at stake here than the relief sought by plaintiffs and class members in a few court cases. How the Navy Chaplain Corps -- with or without help from the courts -- resolves questions of pluralism, diversity, and cooperative ministry may offer guidance not only to the other branches of the United States military, but also to our nation and the larger community of nations.

Institute - Chaplain, Jan. 27, 2003) (visited Jul. 12, 2005), *available at* [http://www.chaplain.navy.mil/Attachments/Training/EO%20 INFORMATION%20PAPER %20 US%20Navy.pdf](http://www.chaplain.navy.mil/Attachments/Training/EO%20INFORMATION%20PAPER%20US%20Navy.pdf) (copy on file with author).

²¹⁷ Knechtle, *supra* n.36, at 522-23 (describing the difficulty in even defining "religion" and asserting that religious diversity may be the greatest challenge we face both locally and globally on this side of September 11, 2001).

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