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## *MILITARY CHAPLAINS: FEDERALLY FUNDED FANATICISM AND THE UNITED STATES AIR FORCE ACADEMY*

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### **I. Introduction**

[1] Prompted into action by recent controversy,<sup>1</sup> including negative press and legal action surrounding the United States Air Force Academy (“USAF Academy”), the United States Air Force (“USAF”) has launched investigations into the role of military chaplains in spreading the “good word.”<sup>2</sup> Subsequent interim guidelines have been introduced at the USAF Academy to

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<sup>1</sup> Lt. Gen. John W. Rosa, Jr., Superintendent, U.S. Air Force Academy, Anti-Defamation League, Air Force General Acknowledges Intolerance At Academy, Address Before the ADL National Executive Committee Meeting (June 3, 2005), [http://www.adl.org/misc/gen\\_speech.asp](http://www.adl.org/misc/gen_speech.asp). This is the second instance in recent years that the Academy has received public criticisms (and adverse legal action). In the first instance, several cadets came forward and said, “I have been sexually assaulted, and I was punished for my behavior, and that nobody took me seriously.” *Id.* Lt. Gen. Rosa continues to explain that proselytizing was so pervasive that “if everything goes well, you are talking about probably six years” to rid the Academy of such divisive behavior. *Id.* Further, Lt. Gen. Rosa noted, “[a]nd normally, it is six to eight years. You obviously make improvements in the first couple years, but to get to the end of that red line, it takes time.” *Id.*

<sup>2</sup> See UNITED STATES AIR FORCE, THE REPORT OF THE HEADQUARTERS REVIEW GROUP CONCERNING THE RELIGIOUS CLIMATE AT THE U.S. AIR FORCE ACADEMY i-iv (June 25, 2005) [hereinafter USAF REPORT], [http://www.af.mil/pdf/HQ\\_Review\\_Group\\_Report.pdf](http://www.af.mil/pdf/HQ_Review_Group_Report.pdf). This report (“*USAF Report*”) was generated in collaboration with an array of governmental departments (including Headquarters (“HQ”) representatives from the Judge Advocate General, General Counsel, Chaplain Service, Office of the Secretary of Defense, and others) investigating 55 complaints alleging religious proselytizing and institutional discrimination based on religion. The findings do not substantiate institutionalized discrimination; however, isolated instances of

quell the seemingly active religious practices of both Academy staff and chaplains.<sup>3</sup> Legions on both sides of the issue have mobilized to protect their respective interests. On one side, plaintiffs to a recent action against the USAF, and their proponents, allege rampant proselytizing and denominational favoritism at the USAF Academy violates the Establishment Clause of the Constitution.<sup>4</sup> On the other side, conservative religious groups and their supporters claim that

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abuse are corroborated. Additionally, the *USAF Report* provides recommendations to remedy the relatively few substantiated cases of discrimination. The purported central aim of the recommendations is to “nurture a climate of respect for the diversity of beliefs at the Academy.” *Id.* at i. See also *infra* note 58.

<sup>3</sup> See REVISED INTERIM GUIDELINES CONCERNING FREE EXERCISE OF RELIGION IN THE AIR FORCE (2006), available at <http://www.usafa.af.mil/superintendent/pa/religious.cfm>. These reactionary guidelines (“*Guidelines*”) were promulgated after media coverage alleged inequities regarding treatment of various religious groups at the United States Air Force Academy. Their focus is on mandating that endorsement or preferential treatment will not be accorded to any particular religion. All Air Force members and civilian employees are expected to follow the *Guidelines* which, it is hoped, would resolve the atmosphere of religious intolerance at the Academy. See also Staff Sgt. Julie Weckerlein, *Air Force releases revised religious guidelines*, AIR FORCE PRINT NEWS, Feb. 9, 2006, available at [http://www.af.mil/news/story\\_print.asp?storyID=123016168](http://www.af.mil/news/story_print.asp?storyID=123016168). A further revised version of religious guidelines was released on February 9, 2006, “after a review at the U.S. Air Force Academy indicated a need for additional guidance . . . . The newly revised version was written after getting diverse feedback and careful consideration of the U.S. Constitution, laws and military necessity.” *Id.* See *infra* Part IV.E and accompanying notes.

<sup>4</sup> See AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, REPORT OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE ON RELIGIOUS COERCION AND ENDORSEMENT OF RELIGION AT THE UNITED STATES AIR FORCE ACADEMY (2005) [hereinafter *AUSCS REPORT*], available at <http://www.au.org/pdf/050428AirForceReport.pdf>. The report (“*AUSCS Report*”) was drafted after Americans United for Separation of Church and State “receiv[ed] numerous complaints from a variety of sources, representing diverse religious backgrounds” that complained of “troubling religious practices at the United States Air Force Academy.” *Id.* at 1. The *AUSCS Report* claims that such practices are in violation of the Establishment Clause. *Id.* In particular, it notes that proselytizing by the Permanent Party (Staff and Faculty) and senior cadets is not only pervasive, but also institutionally accepted. *Id.* The findings point to a number of specific instances and deem the remedial actions attempted by the Air Force Academy (i.e., promulgation of the initial interim guidelines) insufficient. *Id.* at 1-14. See also Letter from Barry Lynn, Executive Director, Americans United for Separation of Church and State to Donald Rumsfeld, Secretary of Defense (Apr. 28, 2005) (on file with author). This letter seeks the Secretary of Defense’s assistance to combat the entanglement of the U.S. Air Force Academy

stifling the ability of chaplains and military personnel to express their faith contravenes the Free Exercise Clause of the Constitution.<sup>5</sup> Groups on both sides of this issue seek to utilize the newly filed legal action, *Weinstein v. United States Air Force*,<sup>6</sup> as a proving ground to set the tone for future religious practices in the military.

[2] Congress has codified the parameters of the military chaplain program,<sup>7</sup> but many institutions, including the USAF Academy, have greatly expanded the role of the chaplaincy.<sup>8</sup>

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with religion, which is a clear third-prong *Lemon* test violation, by providing him with the *AUSCS Report* and urging the Secretary to take prompt action. *Id.*

<sup>5</sup> See, e.g., Adelle Banks, *Christian Conservatives Ask Bush to Protect 'Muzzled' Chaplains*, RELIGION NEWS SERVICE, Nov. 17, 2005, <http://www.bennyhinn.org/yourlife/InTheNews-One-Nation-Under-God/Christian-Conservatives-Ask-Bush-to-Protect-Muzzled-Chaplains.html> (outlining actions taken by conservative groups to allow military chaplains to perform their ministry properly). Alan Cooperman, *A Noisy Takeoff for Air Force Guidelines on Religion*, WASH. POST, Oct. 31, 2005, at A20 (outlining reactions on both sides to the newly implemented USAF Academy rules regarding religion). Interestingly, the USAF Academy's Chief Chaplain, Charles Baldwin, released a video maintaining his commitment to allowing senior officers to discuss religion with their subordinates. *Id.*

<sup>6</sup> *Weinstein v. U.S. Air Force*, No. 05-CV-1064 JP/LAM (D.N.M. filed Oct. 6, 2005).

<sup>7</sup> 10 U.S.C. § 3073 (2005) (providing for the existence of chaplains in the military and outlines their organizational structure). See 10 U.S.C. § 3547 (2006), which outlines Congressionally enumerated duties:

- (a) Each chaplain shall, when practicable, hold appropriate religious services at least once on each Sunday for the command to which he is assigned, and shall perform appropriate religious burial services for members of the Army who die while in that command.
- (b) Each commanding officer shall furnish facilities, including necessary transportation, to any chaplain assigned to his command, to assist the chaplain in performing his duties.

*Id.*

<sup>8</sup> See, e.g., *Katcoff v. Marsh*, 755 F.2d 223, 226-28 (2d Cir. 1985). Although the "primary function of the military chaplain is to engage in activities designed to meet the religious needs of a pluralistic military community," their duties have grown over time to include non-traditional services. *Id.* at 226. Presently, the military chaplaincy also serves to alleviate soldiers' serious

Today, USAF chaplains receive substantial amounts of subsistence,<sup>9</sup> enjoy greater latitude in terms of job duties,<sup>10</sup> and openly offer, even to non-buyers, a chance at salvation via their particular religion.<sup>11</sup> Congress has failed to safeguard the right of military personnel to an existence without the omnipresence of religion.<sup>12</sup> Scant specificity with respect to the number of

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stresses resulting from their military service via counseling and spiritual assistance. *Id.* at 227-28. Common situations that chaplains deal with today in their counseling role include “tensions created by separation from their homes, loneliness when on duty in strange surroundings involving people whose language or customs they do not share, fear of facing combat or new assignments, financial hardships, personality conflicts, and drug, alcohol or family problems.” *Id.* at 228. Thus, modern-day chaplains serve in quasi-therapist capacities. *See also* Sgt. 1st Class Reginald P. Rogers, *Army offers help for returning Soldiers*, TRADOC NEWS SERVICE, Apr. 20, 2004, [http://www.tradoc.army.mil/pao/Web\\_specials/H\\_and\\_PWB/042504.htm](http://www.tradoc.army.mil/pao/Web_specials/H_and_PWB/042504.htm). This article outlines new roles chaplains assume as soldiers return from the front lines of Iraq. *Id.* With many soldiers experiencing post traumatic stress disorder, chaplains are increasingly serving as counselors to help ease readjustment into society. *Id.*

<sup>9</sup> *See Katcoff*, 755 F.2d at 229. Congress appropriated funds in excess of \$85 million in fiscal year 1981. *Id.* “More than \$62 million [in 1981] was used to pay the salaries and other compensation of chaplains, chaplain’s assistants and auxiliary chaplains.” *Id.*

<sup>10</sup> *See, e.g., id.* at 228. The chaplain’s principal duties are to:

[C]onduct religious services (including periodic worship, baptisms, marriages, funerals and the like), to furnish religious education to soldiers and their families, and to *counsel soldiers with respect to a wide variety of personal problems*. In addition the chaplain, because of his close relationship with the soldiers in his unit, *often serves as a liaison between the soldiers and their commanders, advising the latter of racial unrest, drug or alcohol abuse, and other problems affecting the morale and efficiency of the unit, and helps find solutions*. In some areas the Army *also makes available religious retreats*, in which soldiers voluntarily withdraw for a short period from the routine activities of daily living to another location for spiritual reflection and renewal.

*Id.* (emphasis added). *See also supra* note 8.

<sup>11</sup> *See, e.g.,* Memorandum from Chaplain Captain Melinda Morton to Chaplain Colonel Michael Whittington (July 30, 2004) (on file with author), *available at* [http://www.yale.edu/divinity/notes/050516/AFA\\_Report.7.04.pdf](http://www.yale.edu/divinity/notes/050516/AFA_Report.7.04.pdf) [hereinafter Memo] (outlining instances of religious intolerance perpetrated by senior cadets and staff).

chaplains, ratios of chaplains to religious constituents, and, most importantly, “chaplains gone wild,”<sup>13</sup> i.e., proselytizing, has led to the recent controversy presented in this note.<sup>14</sup>

[3] This note will briefly examine the exception carved out of the Establishment Clause<sup>15</sup> of the Constitution for military chaplains. Specific attention will be paid to the current conflict arising out of USAF Academy policies which, arguably, condone rampant proselytizing and provide preferential treatment to one religious group – Evangelical Christians – at the expense of others. This note will also review the remedial steps taken by the USAF to remedy the current crisis. Finally, the author will discuss and attempt to predict the potential effects of the recent *Weinstein* litigation and tomorrow’s federally-funded religious landscape.

## II. Chaplains

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<sup>12</sup> See generally AUSCS REPORT, *supra* note 4, at 52-65 (noting Establishment Clause violations); Gustav Spohn, *Kristen Leslie, Assistant Professor of Pastoral Care and Counseling, in Center of National Debate over Religion at Air Force Academy*, YALE DIVINITY SCH., May 2005, [http://www.yale.edu/divinity/notes/050516/notes\\_050516\\_kl.shtml](http://www.yale.edu/divinity/notes/050516/notes_050516_kl.shtml) (last visited Oct. 18, 2006); see also *infra* note 51.

<sup>13</sup> See Memo, *supra* note 11, at § 5.5 (describing Major Watties instruction to cadets that the penalty for refusing to accept his encouraged proselytizing would be to “burn in the fires of hell.”) (quoting Major Watties).

<sup>14</sup> Although statutory language does provide for chaplains and a cursory outline of their major duties, much regarding their numbers, denominations and other key issues is left in the hands of the Department of Defense, Secretary of Defense, Office of the Chief of Chaplains or other executive personnel. Thus, the key issues regarding the chaplaincy are decided in-house. Such an arrangement, with its corresponding potential for lack of oversight, gives rise to an increased risk of infractions.

<sup>15</sup> See *Mellen v. Bunting*, 341 F.3d 312, 329 (4th Cir. 2003) (“[T]he purpose of the Establishment Clause . . . [is] to promote the freedom of religion by assuring the disestablishment of particular religions that had been selected and favored by State statutes and by custom and by promoting the equality of other religions.”).

[4] The history of the chaplaincy dates back approximately 232 years to the Revolutionary War.<sup>16</sup> Chaplains were officially recognized on July 29, 1779, when the Continental Congress authorized remuneration for chaplains.<sup>17</sup> Chaplains have continued to serve in every major conflict since that time.<sup>18</sup>

[5] Although the Constitution expressly prohibits Congress from establishing a religion,<sup>19</sup> courts have held that Congress may create a military chaplaincy.<sup>20</sup> The rationale behind such a departure from a clear reading of the Constitution is that the military has deemed military chaplains essential to the effective mobilization of the armed forces in times of war.<sup>21</sup> Congress,

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<sup>16</sup> A BRIEF HISTORY OF THE UNITED STATES CHAPLAIN CORPS: PRO DEO ET PATRIA (William J. Hourihan ed., 2004), <http://www.usachcs.army.mil/HISTORY/Brief/TitlePage.htm>.

<sup>17</sup> *Id.* at ch. 1.

<sup>18</sup> *Id.*

<sup>19</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I. Both the Establishment Clause and Free Exercise Clause, which have frequently been cited by both sides of this controversy in support of their views, emanate from this amendment and have been further refined by case law.

<sup>20</sup> *See Parker v. Levy*, 417 U.S. 733, 760 (1974) (holding courts should give deference to military decisions even if those decisions infringe upon constitutional rights). *But see Adair v. England*, 183 F. Supp. 2d 31, 50 (D.D.C. 2002) (“[A]lthough this Court is mindful of the Supreme Court's admonishment that the judiciary should give substantial deference to matters related to management of the military, such protection does not extend to practices that may subvert one's inalienable constitutional rights.”).

<sup>21</sup> *See Katcoff*, 755 F.2d at 235 (“In our view 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.”). *Cf. Parker*, 417 U.S. at 758. The *Parker* court noted that “[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.” Additionally, the Court found that the essence of the military, which is obedience and discipline, “may render permissible within the military that which would be constitutionally impermissible outside it.” *Id.*

charged with providing for the safety of the populous,<sup>22</sup> has established an army for the purpose of “preserving the peace and security, and providing for the defense, of the United States.”<sup>23</sup>

Courts, therefore, traditionally have given deference to the military’s funding of religious employees with federal monies<sup>24</sup> because the military is supposedly better equipped to determine whether the availability of religious services affects national safety.<sup>25</sup>

### III. Jurisprudential Development

[6] Under the Establishment Clause of the Constitution,<sup>26</sup> the State may not impose, sponsor or support religion or force one to remain away from the practice of religion.<sup>27</sup> However, as

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<sup>22</sup> U.S. CONST. art. I, § 8, cl. 1 (“Congress shall have the power to . . . provide for the common defense and general welfare of the United States.”).

<sup>23</sup> 10 U.S.C. § 3062 (2006) (outlining the ability of Congress to establish an Army to protect our borders that, during the ordinary peace establishment, consists of all persons “necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency.”).

<sup>24</sup> *See, e.g., Katcoff*, 755 F.2d at 229.

<sup>25</sup> *See, e.g., id.* at 238 (holding an exception to the Establishment Clause for military chaplains is deemed constitutional because of deference given to the military in deciding what is needed to mobilize our defense in times of war).

<sup>26</sup> U.S. CONST. amend. I. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (“[T]he clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state.’” (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878))).

<sup>27</sup> *Katcoff*, 755 F.2d at 231.

[The] establishment or religion clause means at least this: Neither a state nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

outlined above, the state may provide military chaplains under the auspice that soldiers need to commune with their god in times of war to be more effective combatants.<sup>28</sup> Nonetheless, “military chaplaincies must realistically be viewed as an official governmental promotion of religion over non-religion, making them constitutionally suspect institutions under the broad scope of the Establishment Clause.”<sup>29</sup> Accordingly, the Court has recognized that state and federal governments must be “neutral in matters of religious theory, doctrine, and practice. They may not be hostile to any religion or to the advocacy of no-religion; and they may not aid, foster or promote one religion or religious theory against another or even against the militant opposite.”<sup>30</sup>

[7] Also found in the First Amendment is the Free Exercise Clause which acts to protect an individual’s right to practice any religion or none at all.<sup>31</sup> The government may conscribe one’s

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*Id.* (quoting *Everson*, 330 U.S. at 15-16).

<sup>28</sup> See *Katcoff*, 755 F.2d at 235; see also *supra* note 9 and accompanying text.

<sup>29</sup> 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, 186 (Spring 2004). *But see* *Rigdon v. Perry*, 962 F. Supp. 150, 159 (D.D.C. 1997) (“While military chaplains may be employed by the military to perform religious duties, it does not follow that every word they utter bears the imprimatur of official authority . . .”).

<sup>30</sup> *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). See also *infra* text accompanying note 95; Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 30 (2005) (“The Establishment Clause essentially only prohibits the government from singling out one or more religious sects for preferential/nonpreferential legal or economic treatment, or in a way that coerces or restricts religious liberty.”). The Establishment Clause seeks to prohibit the preferential and coercive tactics which are currently pervasive at the USAF Academy.

<sup>31</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (“Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities.”); *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). According to the court in *Cantwell*, the Free Exercise Clause:



ability to practice their religion, or not, only when a compelling interest is demonstrated.<sup>32</sup> Thus, the government must walk the thin line of protecting an individual's right to practice while remaining free from the promotion of a particular religion. When tensions exist between the two, "the free exercise principle should be dominant in any conflict with the anti-establishment principle."<sup>33</sup> However, the Establishment Clause should "control when government accommodation of religion reaches the point that one or more sects have been singled out for special benefits or burdens, or when government accommodation begins to infringe on some other individual's or group's religious exercise rights."<sup>34</sup>

[8] There are a number of tests employed by the courts to determine whether a statute respecting religion meets the requirements of the Establishment Clause.<sup>35</sup> The predominant test

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[F]orestsalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.

*Id.*

<sup>32</sup> See, e.g., *Rigdon*, 962 F. Supp. at 160 (D.D.C. 1997) (holding that the military leader's prohibition on chaplains' encouraging soldiers to lobby Congress to vote for the Partial Birth Abortion Ban Act imposed a substantial burden on the chaplains' free exercise rights without a compelling governmental interest). See also *Adair v. England*, 183 F. Supp. 2d 31 (D.C.C. 2002) (holding that military chaplains' First Amendment right to free speech and free exercise of religion is subject to strict scrutiny). But see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) ("A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

<sup>33</sup> Garry, *supra* note 30, at 30 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 833 (1978)).

<sup>34</sup> *Id.* at 42.

<sup>35</sup> See, e.g., David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 563 (2002). This article discusses Justice Sandra Day

was articulated in *Lemon v. Kurtzman*.<sup>36</sup> For a law to pass constitutional muster under this three-prong test, the law (1) must have a secular legislative purpose, (2) its primary effect must neither inhibit nor advance religion, and (3) it must not foster an “excessive government entanglement with religion.”<sup>37</sup>

[9] Under the secular purpose prong, a law must have at least one plausible purpose that is not religious.<sup>38</sup> The Court has noted that only laws which are “entirely motivated by a purpose to advance religion” are deemed in violation of the Establishment Clause.<sup>39</sup> Conversely, laws which are simply “motivated in part by a religious purpose” may satisfy the first prong of the *Lemon* test.<sup>40</sup>

[10] In analyzing the second prong of the test, the primary effect prong, the Court attempts to determine whether the law’s primary effect is to advance or deter religion.<sup>41</sup> The excessive entanglement prong is the most hotly debated prong of the *Lemon* test because it is so difficult to

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O’Connor’s Endorsement Test, which “asks whether a reasonable observer would interpret challenged government conduct as approving or disproving religion. It provides that the government must avoid messages that make adherence to religion relevant to political standing in the community.” See also Emilie K. Bindon, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247 (2004) (exploring Establishment Clause tests issues involved in chaplain selection, particularly focusing on the dilemmas of choosing Muslim chaplains in a post 9/11 climate).

<sup>36</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>37</sup> *Id.*

<sup>38</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984).

<sup>39</sup> *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

<sup>40</sup> *Id.*

<sup>41</sup> *Comm. for Pub. Educ. And Religious Liberty v. Nyquist*, 413 U.S. 734, 743-46 (1973).

apply. Hence, “entanglement is a question of kind and degree”<sup>42</sup> which is normally dealt with on a case by case basis.

[11] The United States Supreme Court has never decided the question of whether military chaplaincies are constitutionally valid.<sup>43</sup> However, the Court did affirm the constitutionality of legislative chaplaincies in *Marsh v. Chambers*.<sup>44</sup> In deciding that case, the Court provided insight into the particular areas which it might analyze in determining whether a military chaplaincy is constitutional.<sup>45</sup>

[12] In his article on the Navy’s chaplaincy, Steve Aden eloquently sums up the Court’s potential analysis:

Thus, for the Supreme Court, a legislatively created chaplaincy system may pass constitutional muster if 1) it were undergirded by a historical pedigree; 2) it furthered no stated or actual preference for any denomination or sect; and 3) the program was not in actual effect designed to proselytize religion or promote a particular religious denomination or creed.<sup>46</sup>

#### **IV. Current Controversy**

[13] The current controversy stems from actions taken by USAF Academy faculty, staff, members of the Chaplain’s Office, and upper-class cadets.<sup>47</sup> Allegations range from preferential

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<sup>42</sup> *Lynch*, 465 U.S. at 684.

<sup>43</sup> Aden, *supra* note 29, at 189.

<sup>44</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>45</sup> Aden, *supra* note 29, at 189.

<sup>46</sup> *Id.* at 190-91.

<sup>47</sup> *See, e.g.*, AUSCS REPORT, *supra* note 4, at 52-65.

treatment of members of one denomination over other denominations,<sup>48</sup> to religious intolerance,<sup>49</sup> to outright recruitment attempts.<sup>50</sup> While some of the alleged behavior is performed on an individual basis, much seems to occur with the help and/or under the direction of various representatives of the USAF Academy.<sup>51</sup> Various individuals and organizations have

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<sup>48</sup> *Id.* at 52-60. According to the *AUSCS Report*, Christian cadets were given special passes (non-chargeable passes) to leave the Academy grounds to attend religious services and study sessions on Sundays, while cadets with religious holy days not falling on Sundays were not granted such passes for these religious events. *Id.*

<sup>49</sup> Devlin Buckley, *Evangelicals exploit Air Force Academy; military officials interlocked with local activists*, ONLINE J., Dec. 23, 2005, [http://www.onlinejournal.com/artman/publish/article\\_363.shtml](http://www.onlinejournal.com/artman/publish/article_363.shtml) (“A Jewish cadet was told the Holocaust was revenge for the death of Jesus and another was called a Christ killer by fellow cadets. The son of Mikey Weinstein, the father who is suing the academy, was called a ‘filthy Jew,’ among other slurs.”).

<sup>50</sup> *See, e.g.*, Memo, *supra* note 11. The Memo provides in pertinent part:

Section 5.4 Challenges to Pluralism. YPT observed consistent specific articulations of Evangelical Christian themes during general protestant services. (BCT and GE) Protestant Cadets were encouraged to chant the phrase, “This is our Chapel and the Lord is God.” Protestant Basic Cadets were encouraged to pray for the salvation of fellow BCT members who chose not to attend worship. *During general protestant worship in Jack’s Valley, attending Basic Cadets were encouraged to return to tents, proselytize fellow BCT members, and remind them the consequences of apostasy. (Protestant Basic Cadets were reminded that those not “born again will burn in the fires of hell.”) Protestant Basic Cadets were regularly encouraged to “witness” to fellow Basic Cadets . . . .*

*Id.* (emphasis added).

<sup>51</sup> *See, e.g.*, Spohn, *supra* note 12. This article outlines Yale Assistant Prof. Kristen Leslie’s work as former advisor to the military on sexual assault issues and the “stridently evangelical themes” witnessed during that time and during a week-long summer 2004 practicum. *Id.* The Yale Divinity School (“YDS”) and other groups and individuals observed the following instances of institutional abuse:

- Commandant Brig. Gen. Johnny Weida, a born-again Christian, sent an email to cadets saying, “The Lord is in control. He has a plan . . . for every one of us.”

spoken out against the alleged overt religious behavior.<sup>52</sup> Indeed, some have faced unwarranted reprimands due to their vocal opposition.<sup>53</sup>

[14] Many believe that the USAF Academy is susceptible to religious favoritism due to its proximity to Evangelical centers of power.<sup>54</sup> Colorado Springs is home to the nation's largest,

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- Faculty members have introduced themselves to their classes as born-again Christians and have encouraged their students to become born-again during the course of the term
  - A “Christmas Greeting” published in the Academy newspaper was signed by 300 Academy personnel who declared a belief that “Jesus Christ is the only real hope for the world” and that there is “salvation in no one else.”
  - A banner hanging in the Academy football team locker room said, “I am a Christian first and last . . . I am a member of Team Jesus Christ.”
  - Although Christian students are able to obtain “non-chargeable” passes to attend religious study sessions off campus on Sundays, Jewish or Seventh-Day Adventist cadets are unable to obtain such passes to worship off-campus on Saturday.

*Id.*

<sup>52</sup> The main vocal opposition to the religious practices includes Michael Weinstein, Chaplain Captain Melinda Morton, Rep. Lois Capps, D-CAL, Rep. Steve Israel, D-NY, Rep. David Obey, D-WIS, AUSCS, the Anti-Defamation League, the YDS and Civil Rights.org.

<sup>53</sup> The whistleblower author of the Memo, *supra* note 11, Chaplain Melinda Morton, was censured for voicing her concerns regarding institutional support for proselytizing. *See* William Fisher, *Whistleblower's Career Over*, COMMON DREAMS, May 15, 2005, available at <http://www.commondreams.org/views05/0515-20.htm> (“Chaplain Morton is but the latest in a long string of people who summon the courage to speak out – and are rewarded by losing their careers. And if the evangelical right wing of Christianity continues to blindly support the governmental power structure, she won’t be the last.”); Spohn, *supra* note 12 (“Morton reported in mid-May that she had been fired from her post as executive officer of the chaplain unit . . . . [S]he remains a chaplain until a pending transfer to Okinawa takes place.”).

<sup>54</sup> *See generally* Buckley, *supra* note 49 (Mike Weinstein, pontificating on the concentration of religious groups and the Academy’s current dilemma, said, “it would be counterintuitive in the extremist to presume that there isn’t a strong nexus between [the problems and] the incredible amount—there’s over 100 of the nation’s largest evangelical organizations in Colorado Springs.”). *See also* Spohn, *supra* note 12 (“One of the biggest issues, Morton contends, is the extent to which the Academy’s location in politically and religiously conservative Colorado Springs has had an impact on the Academy’s religious culture.”).

most influential and politically active evangelical organizations, including Ted Haggard's<sup>55</sup> New Life Church and James Dobson's Focus on the Family.<sup>56</sup> Of particular interest is Haggard's "strong ideology of the use of power, of military might, as a public service."<sup>57</sup>

[15] Although accounts of what transpires in terms of religious favoritism differ, even the USAF Headquarters ("HQ") has found that concerns have been consistently expressed by those interviewed during an Academy-wide investigation over inappropriate religious behavior.<sup>58</sup>

### A. Weinstein Action

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<sup>55</sup> See Buckley, *supra* note 49. Many consider this religious leader, "who meets with President Bush or his advisors every Monday" and who "leads the nation's most powerful religious group: the National Association of Evangelicals ("NAE"), which claims about 45,000 churches consisting of 30 million members worldwide," to be more influential than Dobson. *Id.*

<sup>56</sup> See Buckley, *supra* note 49 ("[Dobson's Focus on the Family] is so large that it maintains its own zip code, claims more than 200 million followers worldwide, and is located directly across the highway from the academy.").

<sup>57</sup> Buckley, *supra* note 49. Cf. Garry, *supra* note 30, at 30 ("Indeed, many Americans are suspicious of 'high intensity faiths' and of churches that can be considered 'conservative' or 'evangelical.' [I]n 1993, 45% of Americans admitted to 'mostly unfavorable' or 'very unfavorable' opinions of 'religious fundamentalists . . .'" (citing Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 760 (1999)).

<sup>58</sup> USAF REPORT, *supra* note 2, at 35-37. The major findings of the *USAF Report* include: (1) Senior faculty and staff members have made inappropriately influential or coercive public expressions of faith; (2) Cadets utilized flyers and a public announcement system to advertise religious events in an offensive manner; (3) Cadets have made disparaging remarks and religious slurs; (4) Faculty and staff paid for their names to appear in an overtly religious holiday advertisement published in the base newspaper, the *Academy Spirit*; (5) The Commandant led cadets at a Christian retreat in a cheer regarding Jesus and later led the same cheer in a group of mixed-faith cadets; and (6) The U.S. Air Force Academy football coach hung banner on the wall with an overtly Christian message. *Id.* All of the foregoing instances involved Evangelicals; from the coach's banner to the Commandant's cheer. *Id.* The *USAF Report*, however, does not specifically cite the religious denominations engaging in inappropriate behavior nor does it acknowledge widespread religious proselytizing. *Id.*

[16] On October 6, 2005, Michael Weinstein, former USAF Academy cadet, along with his son, current USAF Academy cadet, and other former and current USAF Academy cadets, filed an action against the USAF and Peter Geren, acting Secretary of the Air Force. Plaintiffs sought injunctive relief prohibiting chaplains from proselytizing.<sup>59</sup> The Department of Justice filed a motion to dismiss on December 23, 2005, alleging that there was no official policy of proselytizing cadets or other military personnel.<sup>60</sup> According to the Justice Department's motion, "[p]laintiffs cannot demonstrate they are in imminent danger of being subject to an Air Force-wide policy of unconstitutional proselytizing for the additional and important reason that such a policy does not exist."<sup>61</sup> It yet remains unclear as to when the case will be decided. However, Weinstein simply wants the USAF to "stop wasting time, effort, blood, sweat, tears and money" and agree to comply with the Establishment Clause.<sup>62</sup>

## **B. Conservative Response**

[17] Conservatives have responded to Weinstein's allegations and those of others in the press with disdain. Conservative lawyers, educated gratis<sup>63</sup> by the likes of James Dobson and Jerry

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<sup>59</sup> See Motion to Intervene by Major James Glass and Captain Karl Palmberg on Behalf of Defendants, *Weinstein v. U.S. Air Force*, No. 05-CV-1064 JP/LAM (D.N.M. filed Oct. 6, 2005) ("Plaintiffs made the following request in their Complaint: No member of the USAF, including a chaplain, is permitted to evangelize, proselytize, or in any related way attempt to involuntarily convert, pressure, exhort or persuade a fellow member of the USAF to accept their own religious beliefs while on duty.").

<sup>60</sup> Tim Korte, *U.S. Seeks Dismissal of Bias Suit*, THE GAZETTE, Jan. 19, 2006.

<sup>61</sup> *Id.* (quoting the DOJ motion to dismiss).

<sup>62</sup> Buckley, *supra* note 49 (quoting Michael Weinstein).

<sup>63</sup> See, e.g., ADF, National Litigation Academy – Alliance Defense Fund, <http://www.alliancedefensefund.org/whatwedo/training/default.aspx?cid=3151> (last visited Oct. 18, 2006). The Alliance Defense Fund's ("ADF") National Litigation Academy program enables lawyers to benefit from this leading public interest law firm's funding of religious battles. *Id.*

Falwell, have flipped the issue to resemble a Free Exercise Clause violation.<sup>64</sup> These proponents of work-place proselytizing recently won a political round in the House of Representatives when an amendment rebuking “coercive and abusive religious proselytizing” at the USAF Academy was dropped from the 2006 Defense Appropriations bill.<sup>65</sup>

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Academy sessions . . . [are] an intense course of study conducted by some of the nation's top law school professors, litigators, and constitutional experts in the country. These experts instruct on public interest practice topics such as the Free Exercise Clause of the First Amendment, the Establishment Clause of the First Amendment, Equal Access law, 42 USC § 1983 actions, Family and Marriage law, legal aid to the poor, and other matters.

*Id.* Attorneys are provided the above noted legal education in exchange for their promise to “provide 450 hours of pro bono legal work on behalf of the Body of Christ.” *Id.* See also Barbara Bradley Hagerty, *ADF a Force Behind Conservative Court Victories*, ALL THINGS CONSIDERED, May 6, 2005, <http://www.npr.org/templates/story/story.php?storyId=4633563> (“ADF also provides lawyers with legal arguments and manpower. It has trained more than 800 allied lawyers nationwide . . . .”); Barbara Bradley Hagerty, *Religious Schools Train Lawyers for Culture Wars*, ALL THINGS CONSIDERED, May 6, 2005, <http://www.npr.org/templates/story/story.php?storyId=4632072> (“Some religious leaders, including Pat Robertson and Jerry Falwell, have set up schools to train their own battalion of lawyers.”).

<sup>64</sup> According to Sen. Sam Brownback, R-Kansas, who expressed his disappointment with a provision of the new USAF religious guidelines in a letter to President Bush: “Dictating how they [chaplains] pray and approach religious discussion not only hampers” their duties, “but is also government interference in the conduct of religious exercise of clergy.” Adelle M. Banks, *Christian Conservatives Ask Bush to Protect ‘Muzzled’ Chaplains*, RELIGION NEWS SERVICE, Nov. 17, 2005, <http://www.bennyhinn.org/yourlife/InTheNews-One-Nation-Under-God/Christian-Conservatives-Ask-Bush-to-Protect-Muzzled-Chaplains.html>.

<sup>65</sup> *House Amendment Criticizing Religious Proselytizing at Air Force Academy Dropped from Defense Bill*, CIVIL RIGHTS.ORG, July 8, 2005, <http://www.civilrights.org/issues/religious/details.cfm?id=33233>. The Amendment was proposed by Rep. David Obey, D-WIS, who had relied on the Yale Divinity Report, outlined in Memo, *supra* note 11. According to the Yale Divinity Report, “Protestant Basic Cadets were reminded that those not ‘born again will burn in the fires of hell.’” *Id.* at § 5.5. Barry Lynn, AUSCS, criticized Congress for dropping the amendment, maintaining that religious bias in the military should not be condoned. *House Amendment Criticizing Religious Proselytizing at Air Force Academy Dropped from Defense Bill*, CIVIL RIGHTS.ORG, July 8, 2005, <http://www.civilrights.org/issues/religious/details.cfm?id=33233>. See also ADL Statement on the



[18] According to *Citizen Magazine*, a website of Focus on the Family,<sup>66</sup> liberal critics are on the war path against religion, specifically targeting evangelicals.<sup>67</sup> The “architecture of smear” perpetrated by liberals<sup>68</sup> and the USAF’s subsequent promulgation of policies hindering true believers from practicing their faith further the goal of eliminating “all expressions of faith in the American military.”<sup>69</sup>

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*Religious Climate at The U.S. Air Force Academy to the House Armed Services Committee Subcommittee on Military Personnel*, ANTI-DEFAMATION LEAGUE, June 28, 2005, [http://www.adl.org/religious\\_freedom/us\\_airforce\\_climate.asp](http://www.adl.org/religious_freedom/us_airforce_climate.asp) (“That amendment was defeated by a vote of 198-210. The House then approved a weakened amendment which omitted any reference to proselytizing.”).

<sup>66</sup> Focus on the Family is an organization spearheaded by its founder, James Dobson, “one of the most powerful and influential religious leaders in the world.” Buckley, *supra* note 49.

<sup>67</sup> Stephen Adams, *The Architecture of Smear*, CITIZEN MAG., at 1, Nov. 2005, available at <http://www.family.org/cforum/citizenmag/features/a0038338.cfm>.

<sup>68</sup> *Id.* The Yale liberal and feminist, Rev. Dr. Kristen Leslie, who had been initially hired to investigate sexual harassment charges, apprised the nation via major media outlets of the religious remarks and findings she found offensive while at the Academy. However, according to *Citizen Magazine*, the media failed to report that Rev. Dr. Leslie was an anti-war protester, who supported free access to abortions, homosexual ministers, same-sex marriages and even co-taught, with radical feminist Letty Russell, a lesbian/gay Yale course. *Id.* at 5.

<sup>69</sup> *Id.* at 2. *But see* Congressman Walter B. Jones’ (R-NC) attempt to guarantee the rights of servicemen and women to include voluntary, nondenominational prayers codified in H.R. 3430, 109th Cong. (2005), 2005 H.R. 3430 (LEXIS):

SECTION 1. PRAYER AT MILITARY SERVICE ACADEMY ACTIVITIES.

(a) In General. The superintendent of a service academy may have in effect such policy as the superintendent considers appropriate with respect to the offering of a voluntary, nondenominational prayer at an otherwise authorized activity of the academy, subject to such limitations as the Secretary of Defense may prescribe.

(b) Service Academies. For purposes of this section, the term "service academy" means any of the following:

- (1) The United States Military Academy.
- (2) The United States Naval Academy.
- (3) The United States Air Force Academy.

[19] Some governmental leaders claim there is no wrongdoing transpiring at the Academy.<sup>70</sup> Conversely, others believe that a cloud of secularism is descending upon the nation, in particular, its military. Many congressional leaders have spoken out in support of their faith and have petitioned President Bush to ensure that he, “as Commander and Chief, protect by Executive Order the constitutional right of military chaplains to pray according to their faith.”<sup>71</sup> Additionally, Representative John Hostettler (R-IN), during the above noted debate on the Obey

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*Id.* However, note that Congressman Jones vests the Superintendent with sole authority, subject to the Secretary of Defense’s limitations (whatever they might be), to determine the propriety of such prayer. As already demonstrated by voluminous data, the military has recently failed to exercise appropriate discretion with respect to proselytizing by the chaplaincy and military officials. How can the rights of non-evangelicals (i.e., minority denominations) be safeguarded against abusive behavior, such as the proselytizing and coercion pervasive at the Academy, if left in the hands of the current violators of the Establishment Clause’s prohibition on preferential treatment of religions? Clearly, they cannot.

<sup>70</sup> Rep. Kay Granger, R-Texas, wrote her colleagues warning, “I am very concerned about the long-term impact this excessively negative publicity will have on these bright, energetic young people from all over America who are dedicating themselves to the service of our Nation . . . . The steady stream of untrue, and sometimes outlandishly unfair, assertions leaves the totally inaccurate impression of . . . rampant proselytizing.” Adams, *supra* note 67, at 2.

<sup>71</sup> Letter from Walter Jones, U.S. Congressman, to George Bush, U.S. President (Oct. 25, 2005) (on file with author), available at <http://jones.house.gov/html/content.cfm?id=415>. Congressman Jones (R-NC) continues in his letter to President Bush:

We believe that the Air Force’s suppression of religious freedom is a pervasive problem throughout our nation’s Armed Forces, and it has come to our attention that in all branches of the military it is becoming increasingly difficult for Christian chaplains to use the name of Jesus when praying. There are currently no laws or regulations that prohibit chaplains from praying according to their respective denominations or different faiths, and we are deeply concerned that chaplains are now being instructed on what to say when they pray . . . . [W]e believe these restrictions raise constitutional issues involving the Establishment, Free Exercise and Free Speech Clauses of the First Amendment . . . . Officially inhibiting or defining what chaplains can and cannot say in effect establishes an official religion and burdens our military’s chaplains’ right of free speech.

*Id.*

Amendment,<sup>72</sup> “accused Democrats of ‘denigrating and demonizing Christians’ and suggesting that those who supported the amendment were part of a ‘long war on Christianity in America.’”<sup>73</sup>

### **C. Official Findings**

[20] The U.S. Air Force initiated an investigation after allegations of proselytizing and religious fanaticism surfaced. Entitled, *The Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air force Academy* (2005) (“*USAF Report*”), is a lengthy document filled with statistical data and potential courses of action and is seen by many as a failing to address the real problem of institutionalized discrimination and proselytizing.<sup>74</sup>

### **D. Official Response: Part I**

[21] In response to the ameliorated findings outlined in the *USAF Report*, the USAF Academy promulgated new rules concerning religious behavior. The rules, dubbed *Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force* (“*Guidelines*”),<sup>75</sup> offer “guiding principles” aimed at increasing religious accommodation and understanding. Interestingly, Free Exercise Clause concerns are stressed whereby the government may not constrict one’s ability to exercise her or his religion or personal beliefs without passing a strict scrutiny constitutional test.<sup>76</sup>

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<sup>72</sup> See Mike Allen, *GOP Congressman Calls Democrats Anti-Christian*, WASH. POST, June 21, 2005, at A04.

<sup>73</sup> *Id.* (statement of Rep. Hostettler).

<sup>74</sup> See USAF REPORT, *supra* notes 2 and 58.

<sup>75</sup> *Supra* note 3.

<sup>76</sup> *Id.* at 1. (citing The Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 (a)-(b) (West 1994) (The “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling

[22] Of particular note is the Air Force's statement that "WE WILL NOT OFFICIALLY ENDORSE OR ESTABLISH RELIGION EITHER ONE SPECIFIC RELIGION, OR THE IDEA OF RELIGION OVER NON-RELIGION."<sup>77</sup> Although the grammatical correctness of this statement may be in doubt, it seems clear enough that the government is attempting to distance itself from persons who may in an individual capacity act to endorse or establish a religion. Due to the structure of the statement, it is unclear to whom the "we" refers. Thus, it is plausible that the "we" could mean the collective Air Force apparatus or individual personnel. Nonetheless, the Air Force is not only concerned about infringing on one's right to practice her or his faith, but also whether one's actions constitute endorsement or establishment of religion.

[23] These rules seek to minimize criticisms of the USAF Academy chaplaincy and staff resulting from the current religious controversy. However, the *Guidelines* and the *USAF Report* fail to explicitly acknowledge the degree of illicit behavior perpetrated by staff, senior cadets and chaplains.

#### **E. Official Response: Part II**

[24] On February 9, 2006, the USAF issued new behavioral guidelines. The release was the result of increased investigations and consultations with various groups, both secular and religious.<sup>78</sup> Already, within days of their release, critics, like Barry Lynn, Executive Director of AUSCS, have asserted that the "document reads like a bill of rights for chaplains . . . . It doesn't

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governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

<sup>77</sup> *Id.* at 1 (emphasis in original).

<sup>78</sup> *See, e.g.,* Weckerlein, *supra* note 3 ("[T]he Air Force received feedback from members of Congress, the public, religious groups, members of groups professing no faith, legal and civil liberties groups and individual citizens. In addition, more than 500 active, Reserve and Guard Airmen from eight Air Force bases were also interviewed.").

deal with the fact that a lot of nonbelievers exist in the Air Force.”<sup>79</sup> According to Lt. Gen. Roger Brady, Air Force deputy chief of staff for personnel, the new “guidelines address prayer at military events, but in no way restrict private prayer or chaplains’ activities in religious settings.”<sup>80</sup>

## V. Analysis

[25] Current law does not adequately safeguard against the religious abuses found at the USAF Academy. Although, as noted above, governmental sanctioning of religious employees is permissible, adequate behavioral guidelines are nonexistent.<sup>81</sup> If the U.S. military, in general, and USAF Academy, in particular, is to employ religious leaders, then there must be concrete, enforceable regulations with respect to the appropriate conduct of such religious leaders.<sup>82</sup>

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<sup>79</sup> Tom Roeder, *Air Force refines its policy on faith*, THE GAZETTE, Feb. 10, 2006 (quoting Barry Lynn) (internal quotations omitted). Mr. Lynn, continuing in his description of the new guidelines, stated, “[t]he rules show that if you don’t believe, you’re a second-class member of the U.S. Air Force.” *Id.* However, Jay Sekulow, chief counsel for the American Center for Law and Justice (“ACLJ”), a conservative legal organization, thought the new rules demonstrated a move in the proper direction. *Id.* The ACLJ gathered more than 200,000 signatures for a petition against the previously released revised interim guidelines. *Id.*

<sup>80</sup> Weckerlein, *supra* note 3 (quoting Lt. Gen. Roger Brady).

<sup>81</sup> The USAF Academy’s current guidelines do not effectively protect cadets and soldiers from proselytizing. Additionally, perhaps the pervasive nature of evangelistic denominations at the Academy accounts for the non-enforcement of existing prohibitions created by the Establishment Clause.

<sup>82</sup> Otherwise our country would be left in a situation similar to the one which occurred during the framing of our Bill of Rights. During that period, our founders were wary of the State’s proclivity to bestow economic and political benefits upon select “established” or entrenched religious denominations. For these astute statesmen:

[T]he Establishment Clause was a protection for non-established religions, designed to eliminate State differentiation among religions, thereby advancing an equal freedom of religious practice. The dissenters of the period, members of non-established denominations, objected to establishment because of the financial

[26] Congress' original conception of chaplains' limited duties — Sunday services and burials<sup>83</sup> — has increased over the years. Today, the military's self-defined purpose of hiring chaplains is delineated in DOD Directive 1304.19(3): "It is the DoD policy that professionally qualified clergy shall be appointed as chaplains to provide for the free exercise of religion for all members of the military services, their dependents, and other authorized persons."<sup>84</sup> Such an open-ended job description is a recipe for disaster. Accordingly, chaplains are afforded free reign to engage in any activity they feel fit under this broad job description. In order to curb proselytizing or other religious concerns such as molestation, detailed regulations of what is and what is not deemed acceptable must be promulgated and enforced irrespective of denominational biases.

[27] Although Congress has recently failed to set standards of acceptable behavior with respect to blatant efforts at recruitment,<sup>85</sup> the courts might have hit the mark. Albeit almost all

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benefits and public control States conferred upon established churches and correspondingly denied non-established churches.

*Mellen v. Bunting*, 341 F.3d 312, 330 (4th Cir. 2003). Such rhetoric is apropos with respect to the current controversy at the USAF Academy. The fact that the evangelical Christians are located across the street from the USAF Academy or that Colorado Springs is the home to the largest denomination of evangelical Christians should not have an effect on the State's treatment of members of such denominations. Allowing evangelicals to proselytize or granting them special preference over other denominations contravenes the historical intent of the Establishment Clause.

<sup>83</sup> *See generally supra* note 8.

<sup>84</sup> DOD Directive No. 1304.19(3) (Sept. 18, 1993).

<sup>85</sup> *See generally* Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148. However, Rep. David Obey (D-WIS) did introduce an amendment to the 2006 Defense Appropriations Bill which reads in pertinent part:

SEC. 9012. SENSE OF CONGRESS AND REPORT CONCERNING

cases dealing with separation of church and state in the military have not addressed the question of whether public servants may proselytize, *Katcoff v. Marsh* did discuss the issue.<sup>86</sup>

[28] In *Katcoff*, the Court of Appeals for the Second Circuit dealt with the question of whether the military chaplaincy itself was violative of the Establishment Clause of the Constitution.<sup>87</sup>

The plaintiff felt that the work performed by military chaplains could be done effectively by private denominations, easing the apparent Establishment Clause violation.<sup>88</sup> The court held that plaintiffs had not evinced conclusive proof (1) that the military chaplaincy was not necessary to military effectiveness, and (2) that the program could be replaced by private sector chaplains.<sup>89</sup>

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INAPPROPRIATE PROSELYTIZING OF UNITED STATES AIR FORCE  
ACADEMY CADETS.

(a) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) the expression of personal religious faith is welcome in the United States military, but *coercive and abusive religious proselytizing at the United States Air Force Academy by officers assigned to duty at the Academy and others in the chain of command at the Academy, as has been reported, is inconsistent with the professionalism and standards required of those who serve at the Academy;*

(2) the military must be a place of tolerance for all faiths and backgrounds; and

(3) the Secretary of the Air Force and other appropriate civilian authorities, and the Chief of Staff of the Air Force and other appropriate military authorities, must continue to undertake corrective action, as appropriate, to address and remedy the inappropriate proselytizing of cadets at the Air Force Academy.

H.R. REP. NO. 109-119, at 366 (2005), 109 H. Rpt. 119 (emphasis added).

<sup>86</sup> 755 F.2d 223 (2nd Cir. 1985). *But see* *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986) (holding that although the government could provide public-hospital chaplains, those chaplains shall not proselytize because the government must “ensure that the existence of the chaplaincy does not create establishment clause problems” and “[u]nleashing a government-paid chaplain who sees his primary role as proselytizing upon a captive audience of patients could do exactly that.”).

<sup>87</sup> *Katcoff*, 755 F.2d at 224.

<sup>88</sup> *Id.* at 235-36.

<sup>89</sup> *Id.* at 236.

[29] However, in this seminal case on the military chaplaincy, the court noted on numerous occasions that recruitment is outside the scope of job duties that chaplains may perform.<sup>90</sup> The court further clarified its stance by stating that “[n]o chaplain is authorized to proselytize soldiers or their families.”<sup>91</sup> Under any type of reading of that statement, the current revelries perpetrated by the deviant evangelical USAF Academy chaplains is illegal.

[30] Additionally, the court’s finding that the military chaplaincy itself is not violative of the Establishment Clause was premised on the notion of “voluntariness.”<sup>92</sup> In its analysis, the *Katcoff* court looked to whether the military chaplaincy sought to “establish” a religion by involuntary means.<sup>93</sup> The court relied on the prohibition expressed in *Zorach v. Clauson*: “The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce

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<sup>90</sup> *Id.* at 228, 235.

<sup>91</sup> *Id.* at 228. *See also Mellen*, 341 F.3d at 322. Although the court ultimately denied a rehearing, Judge Wilkinson speaking about the Virginia Military Institute’s (“VMI”) mandatory supper prayer noted, “it is critical to my view that VMI uses a non-sectarian prayer with no intent to proselytize.” *Id.* Judge Wilkinson’s decision that such religious activity was in accordance with the prohibitions under the Establishment Clause was premised upon the notion that it was free from coercion or proselytizing. *Id.* Hence, under the same line of analysis proffered by the court, current religious practices at the USAF Academy would not withstand Constitutional scrutiny due the proselytizing aspect. Furthermore, the court notes that “[a] primary aim of the Establishment Clause is to prevent divisiveness over matters of religion.” *Id.* at 324. Additionally, the court notes there exists “not the slightest evidence that officials at VMI have introduced religious division in the ranks.” *Id.* at 323. Again, one can adduce by the court’s repetitious condemnation of proselytizing and its direct effects that had such behavior transpired, the court would have likely found it violative of the Establishment Clause.

<sup>92</sup> *See also Mellen*, 341 F.3d at 372. The court, looking at whether a real choice was provided cadets with respect to being exposed to religious prayer, noted, “[t]he technical ‘voluntariness’ of the supper prayer does not save it from its constitutional infirmities.” *Id.*

<sup>93</sup> *Katcoff*, 755 F.2d at 231-33.



anyone to attend church, to observe a religious holiday, or to take religious instruction.”<sup>94</sup>

Moreover, the *Katcoff* court explained, “[s]ince the program meets the requirement of voluntariness by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma, it might be viewed as not proscribed by the Establishment Clause.”<sup>95</sup>

[31] The problem with applying these precedents to the current situation lies in “voluntariness.” The actions of chaplains and staff at the USAF Academy seemingly diminish one’s voluntary compliance with a proposed religious activity.<sup>96</sup> For instance, when certain Christian groups are provided with “special” access to the Academy facilities and cadets or “Sabbath” leave-passes,<sup>97</sup> the government is not being neutral with respect to competition between sects. Also, when a diverse array of governmental representatives<sup>98</sup> publish a message in the official USAF Academy newspaper<sup>99</sup> declaring the belief “that Jesus Christ is the only

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<sup>94</sup> *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

<sup>95</sup> *Katcoff*, 755 F.2d at 231-232.

<sup>96</sup> *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 594 (1992) (noting that “the government may no more use social pressure to enforce orthodoxy than it may use more direct means”)).

<sup>97</sup> *See, e.g., Spohn, supra* note 12; AUSCS REPORT, *supra* note 4, at 60.

<sup>98</sup> AUSCS REPORT, *supra* note 4, at 55 (“16 heads or deputy heads of the Academy’s academic departments, 9 permanent professors, the then-Dean of the Faculty, the current Dean of the Faculty, the then-Vice Dean of the Faculty, the Academy’s Director of Athletics, and the Academy’s Director of Athletics, and the Academy’s head football coach, as well as spouses of these and other members of the Academy faculty and staff”).

<sup>99</sup> THE ACADEMY SPIRIT

real hope for the world” and “there is salvation in no one else” and “directed cadets to contact them in order to ‘discuss Jesus,’” such government is thrusting a sect upon any person.<sup>100</sup>

[32] Furthermore, “voluntariness” is conscribed when senior-ranking military personnel engage in conversations about their religious beliefs with subordinate personnel.<sup>101</sup> A subordinate does not have the realistic ability to tell her or his commanding officers that she or he is not interested in her or his religious propaganda for fear of reprisals. Thus religious conversations or religious recruiting pitches (i.e., coercive tactics) in the senior-subordinate context pose a potential for stigma or discipline explicitly prohibited by the *Katcoff* court.<sup>102</sup> The USAF Academy’s response to such delicate situations has not been to curb the potential for

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<sup>100</sup> AUSCS REPORT, *supra* note 4, at 55.

<sup>101</sup> *See Mellen*, 341 F.3d at 362-63. The U.S. Court of Appeals for the Fourth Circuit dealt with the issue of whether an officially enacted VMI policy, whereby all cadets desiring to eat supper at the first seating were required to participate in formation, march into the mess hall, and listen to the supper prayer, was violative of the Establishment Clause. The court held such actions were indeed in violation of the Establishment Clause and enjoined the Superintendent who imposed the mandatory policy from sponsoring prayer. *Id.* The court duly noted:

Although VMI's cadets are not children, in VMI's educational system they are uniquely susceptible to coercion. VMI's adversative method of education emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code . . . . In this context, VMI's cadets are plainly coerced into participating in a religious exercise. Because of VMI's coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults.

*Id.* at 371-72.

<sup>102</sup> *Katcoff*, 755 F.2d at 228.

discipline, but rather, to foment the turmoil by encouraging religious conversations between personnel of disparate authority.<sup>103</sup>

[33] It is apparent that the current proselytizing occurring at the USAF Academy is in direct contravention of the Establishment Clause tests explicitly laid out in *Katcoff* and *Zorach*.<sup>104</sup>

Congress has abstained from creating any legislation which would effectively prohibit the use of coercion found in the proselytizing attempts by senior staff and cadets alike.<sup>105</sup> As noted above, an opportunity was recently presented to insert language into the recent 2006 Defense

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<sup>103</sup> See Cooperman, *supra* note 5, at A20. (noting Chief Chaplain Baldwin’s strategy to retain his party line of proselytizing). See also Laurie Goodstein, *Evangelicals Are Growing Force In the Military Chaplain Corps*, N.Y. TIMES, July 12, 2005, at A1. This article describes the disparate evangelical presence in relation to other denominations at the Air Force Academy. Additionally, the article demonstrates the dominant official view with respect to religious communications. Of particular interest is Brig. Gen. Cecil R. Richardson’s view of the propriety of religious communications. Brig. Gen. Richardson, the Air Force deputy chief of chaplains, said in an interview, “‘We will not proselytize, but we reserve the right to evangelize the unchurched.’ The distinction, he said, is that proselytizing is trying to convert someone in an aggressive way, while evangelizing is more gently sharing the gospel.” *Id.* (statement of Brig. Gen. Richardson). This official response is one not of compromise or reconciliation, but rather, seeks to facilitate continued religious discussions between members (comprised of varying levels of authority) of the USAF and USAF Academy. *But see id.* (“Gen. John P. Jumper, the Air Force chief of staff, sent a personal message to commanders on June 28, warning them against promoting their religious beliefs, saying, ‘The expression of personal preferences to subordinates, especially in a professional setting or at mandatory events, is inappropriate.’”).

<sup>104</sup> See also David Coles’ analysis of the ramifications of *Bowen v. Kendrick*, 487 U.S. 589 (1988) and *Rust v. Sullivan*, 500 U.S. 173 (1991) in David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 591 (2002) (“When Title X or AFLA counselors speak, they speak for the government. If a counselor expressing the government’s message does so through religious proselytization, *it is akin to the government proselytizing, a paradigmatic violation of the Establishment Clause.*”) (emphasis added).

<sup>105</sup> However, existing law regarding controversial faith-based initiatives does prohibit the use of direct government funds for religious proselytizing. See, e.g., 42 U.S.C. § 604a(j) (Supp. III 1997) (“Limitations on use of funds for certain purposes. *No funds* provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) *shall be expended for* sectarian worship, instruction, or *proselytization.*”) (emphasis added).

Appropriations bill.<sup>106</sup> Unfortunately, the conservative majority was convinced that such legislation was unnecessary.<sup>107</sup> When Congress fails to act, the courts are forced to legislate from the bench.<sup>108</sup> In the present situation, it seems that this is the only logical alternative to ensure that the Constitutional prohibitions on governmental endorsement of a religion are followed.

[34] Although many might argue that the law laid down in *Katcoff* suffices to ensure compliance with Establishment Clause restrictions, other more conservative-minded individuals might argue that the above noted plain language is simply dicta. Which argument is correct depends on which side of the fence one sits. However, it seems like the moral majority might prove correct because previous cases may be differentiated upon the facts. Today's allegations are novel to the extent that the issue of governmentally sponsored proselytizing has not been on

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<sup>106</sup> See *supra* note 65.

<sup>107</sup> See Adams, *supra* note 67. But see *Congress Should Oversee Implementation of Recommendations in Air Force Report on Religious Intolerance*, ANTI-DEFAMATION LEAGUE, June 28, 2005, [http://www.adl.org/PresRele/RelChStSep\\_90/4745\\_90.htm](http://www.adl.org/PresRele/RelChStSep_90/4745_90.htm) (last visited Oct. 18, 2006). This article examines ADL's stance on the initial revised guidelines released by USAF HQ. ADL is committed to increased legislative oversight. According to Abraham H. Foxman, ADL National Director, "*Congress has a responsibility to ensure that the young men and women they recommend for admission into the military's elite training schools are getting the best education possible in a climate free of religious intimidation.*" *Id.* (emphasis added).

<sup>108</sup> See, e.g., Peter M. Manus, *Federalism Under Siege at the Rocky Mountain Arsenal: Preemption and CERCLA after United States v. Colorado*, 19 COLUM. J. ENVTL. L. 327, 388 (1994) ("CERCLA's indistinct language and broad policy goals of protecting human health and the environment practically force courts to legislate from the bench."); see Alex Hortis, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U.L. REV. 1099, 1110 (Oct. 1999) (In describing the dilemma of interpreting 18 U.S.C. § 1346, the author notes "§ 1346 is so vague that it forces federal courts to define the statute's terms and legislate the offense from the bench."); see also Ryan J. Donohue, *Thou Shalt Not Reorganize: Sacraments for Salefirst Amendment Prohibitions and Other Complications of Chapter 11 Reorganization for Religious Institutions*, 22 BANK. DEV. J. 293, 334 (Fall 2005) ("Inaction by Congress . . . could leave dangerous precedents in place . . . by forcing the judicial system to act beyond its powers by constructively legislating from the bench.").

the Court's docket. If this rings true, then *Weinstein* will provide the Court or courts an opportunity to address this issue and hopefully bring certainty to this area of the Establishment Clause.

[35] It is of utmost importance that the United States District Court for the District of New Mexico set the record straight with respect to the issue of whether the federal government may, via government employee, promote certain religions over others.<sup>109</sup> Allowing preferred sects (due to their geographic proximity or other) to proselytize flies in the face of two hundred years of American jurisprudence. “The Founding Fathers ‘led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid [this] sort of governmental activity.’”<sup>110</sup> “Indeed, ‘one of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer.’”<sup>111</sup>

## **VI. Conclusion**

[36] Fundamentalism is on the rise; not only in the East, but also here at home. We, as a nation, must attempt to curb the negative effects of such divisive phenomena. In order to be unified, we must encourage diversity and religious accommodation. We cannot allow certain

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<sup>109</sup> Although some might contend that the relief requested by plaintiffs is inappropriate. *See, e.g.*, Motion to Intervene by Major James Glass and Captain Karl Palmberg on Behalf of Defendants, *Weinstein v. United States Air Force*, No. 05-CV-1064 JP/LAM (D.N.M. filed Oct. 6, 2005) (“Plaintiffs’ proposed remedy is outrageously broad and would silence essentially all religious speech throughout USAF.”). However, in order to stem the flow of religious intolerance and coercive recruitment tactics, such relief is warranted. Plaintiffs’ request to prohibit proselytizing while on duty would not necessarily result in the predicted moratorium on religious speech (of which there is no data/proof supplementing this claim). Rather, plaintiffs’ requested relief would ensure that soldiers and cadets are not subjected to the sort of pressure tactics that are currently pervasive.

<sup>110</sup> *Mellen*, 341 F.3d at 376 (quoting *Engel v. Vitale*, 370 U.S. 421, 435 (1962)).

<sup>111</sup> *Mellen*, 341 F.3d at 376 (quoting *Engel*, 370 U.S. at 429).

religions to gain preferential treatment over others. We cannot allow coercive attempts at religious recruitment. The military is a closed universe in which one cannot simply walk away if displeased with an official practice. Thus, by allowing proselytizing to exist in the military, in particular at military academies, we are allowing cadet captives to be subjected to illegal religious brainwashing. The only hope these cadets now have is that the judiciary will seize the opportunity presented by *Weinstein* to deliver a clear standard for religious practices by governmental employees. What is needed is a judicial decision prohibiting proselytizing at the USAF Academy.