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The Devil Is In the Details: Policing the Implementation of the Military Chaplaincy

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I. Introduction

Imagine you are a congressmen and you receive a letter from a constituent proposing a new federal program. This program would require the government to build hundreds of churches and religious facilities throughout the world, to stock those facilities with all necessary religious implements, and to maintain, heat, and otherwise care for this network of churches and chapels. What’s more, he proposes that the government hire a literal army of clergy to minister to the congregants in these facilities. In fact, Congress will vest them with the power and image of the government by giving them rank and uniforms. The government will pay their salary, provide them with healthcare and retirement benefits, and shuttle them to the four corners of world to provide their ministry. We won’t simply ask these clergy to preach to their own faith; they will be required to preach to the widest possible variety of faiths and beliefs, even where such preaching directly conflicts with their own beliefs. Your constituent is even so kind as to estimate the cost of the program to you: without even considering the initial start-up cost, it will cost the government approximately $100 million per year.

Sound farfetched? Such a system exists and is paid for by the United States government every year. The hypothetical, of course, refers to the military chaplain program. There is perhaps no institution that presents a greater set of challenges to the separation of church and state than the military chaplaincy. And yet, in popular culture at least, it receives little more than a passing glance or an occasional news story. This may indicate that the military chaplaincy is so rooted in our society that it does not challenge our values. Indeed, constitutional doctrine places great weight on tradition, and the depth of this tradition, some would argue, favors simply leaving the military chaplaincy alone.
While this argument might be persuasive regarding the chaplaincy as a whole, it fails to recognize that the implementation of the military chaplain program deserves careful scrutiny. If society and our courts permit the continued existence of an institution that clearly violates church and state doctrine, that institution must be implemented in a constitutionally permissible manner. This is particularly true because the legal basis of that allowance was poorly reasoned and failed to recognize important flaws in the institution as a whole.

The recent expulsion of Don Larsen from the Army, a formerly-Christian Army chaplain, illustrates a particular flaw in the chaplaincy’s implementation. When Larsen decided that he no longer felt called by Christianity and instead wanted to be a member of the Wiccan faith, the Army quickly pulled him from Iraq and soon thereafter expelled him from the Army altogether.¹ This untimely departure directly resulted from military’s selection of chaplains through civilian ecclesiastical endorsing entities, a system that raises fascinating and important issues regarding both the Establishment and Free Exercise clauses.

Using Larsen as a case study, this paper will examine the constitutional and legal implications of this chaplain endorsement system. In Part II, I will lay the foundation for this discussion, outlining the facts surrounding Larsen’s departure along with a brief history of the military chaplaincy and an examination of the difficult issues raised by the chaplain program as a whole and faced by individual chaplains themselves. In Part III, I will discuss the legal basis for the chaplaincy and the legal challenges to it. I include in this a close examination of the only court decision addressing a facial challenge to the chaplaincy. While I will ultimately conclude that the military chaplaincy is constitutional, this examination will reinforce the importance of ensuring the program is constitutional not only in its actual existence, but also in its

implementation. Part IV will tie together all of these threads by applying the doctrine to the military chaplain endorsement system and Larsen’s attempt to become the first Wiccan chaplain.

**II. Background**

**A. Factual Background**

Before his change of faith, Don Larsen was a Pentecostal Christian chaplain stationed with the Army in Iraq. The bombing of the Golden Mosque in Samarra in 2006 triggered in him a serious crisis of faith and disgust with killing in the name of God. Ultimately, Larsen felt called by the Wiccan faith and in July of 2006 applied to become the Army’s first Wiccan chaplain. By the end of 2006, his application was denied, his official civilian religious endorsement by the Chaplaincy of the Full Gospel Churches was revoked, he was withdrawn from his men in Iraq, and he was separated from the Army altogether. With his departure, the Army lost – in the words of Larsen’s direct superiors – an excellent chaplain and the estimated 4,000 practicing Wiccan service members lost a chance to have their first official spiritual leader.²

At the local level, the Army has proven rather enlightened in accommodating Wiccan practice. Wiccans are permitted to have their symbol on their dog tags and the Army recognizes the faith in its handbook on religious practices, a guiding directive for its chaplains.³ In 1997, the Army recognized its first official Wiccan worship service at Fort Hood in Texas.⁴ Indeed, the Army is not the only branch of the federal government that has proven accommodating. The

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² Id.
Bureau of Prisons employs a Wiccan chaplain at one of its facilities in California. The Army has used this chaplain as a consultant in response to acts of intolerance toward Wiccans.

Nonetheless, Wiccan service members face a great deal of adversity throughout the military. One major current controversy was the Veterans’ Administration’s repeated denial of Wiccan symbols on grave markers, although the VA recently approved the pentacle marker. And in the military itself, many Wiccans report efforts by mainstream chaplains to convert them and even that other service members threw rocks at them when they attempted to practice their faith in Iraq.

The vehemence of these protests, and of the political controversy that attends them, stems in part from a fundamental misunderstanding of the basic precepts of the faith. Wicca is a modern revival of ancient pagan European religions that likely predate Christianity, although the length of this historical pedigree is disputed. While they call themselves witches and meet in covens, their philosophy is more in line with “New Age Philosophy than with traditional witchcraft.” Modern dislike of Wiccans hearkens back to the misogynistic persecution of witches in the 1400s, a practice that endured through to the Salem Witch Trials in this country.

Many people incorrectly associate Wicca with devil worship or Satanism, a fact the Army itself

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12 EDWARDS, *supra* note 10, at 482.
13 Id. at 482–84.
dispels in its handbook on religions.\textsuperscript{14} Although admittedly bad practices do occur in the name of Wicca, they expressly are not Satanists, and practice no animal sacrifice or abuse.\textsuperscript{15} Instead, the faith presents itself as a “life-affirming, positive system of spiritual beliefs and ritual practices.”\textsuperscript{16} They tend to be polytheistic and nature oriented, worshiping various forms of a female goddess along with gods of the harvest, forest, or hunt.\textsuperscript{17}

It is estimated that the number of Wiccans in the United States grew from about 8,000 in 1990 to approximately 134,000 in 2001.\textsuperscript{18} By one account, there are 1,511 self-identified Wiccans in the Air Force and 354 in the Marines.\textsuperscript{19} While there are no similar figures available for the Army or Navy, the fact that both of those services dwarf either the Air Force or Marines indicates that there must be far more. One Wiccan group places it at about 4,000 total military adherents, with the possibility of many more hiding their beliefs for fear of being persecuted or ostracized.\textsuperscript{20} Other estimates place it lower, at about 1,500\textsuperscript{21} or 1,800,\textsuperscript{22} but most agree that it is a fast growing faith in the military.

Despite this small but growing presence and despite the fact that the Army allows more than 130 ecclesiastical groups from a myriad of faiths to officially endorse chaplains, both Judeo-Christian and otherwise, it has repeatedly denied efforts by Wiccan organizations to become official endorsers.\textsuperscript{23} Such endorsement is a threshold requirement for any chaplain candidate and this endorsement system will be a focal point of the analysis below.

\textsuperscript{15} EDWARDS, supra note 10, at 482.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 485. See also www.wicca.org (last visited Apr. 19, 2007).
\textsuperscript{18} Coopperman, supra note 1.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Myers, supra note 6.
\textsuperscript{22} Leaming, supra note 3.
\textsuperscript{23} Coopperman, supra note 1. Likewise, the VA certifies 214 different religious organizations as endorsers under an identical process, but not a Wiccan group. VETERANS HEALTH ADMIN., DEP’T OF VETERANS AFFAIRS,
B. History of the Military Chaplaincy

The history of the military chaplain program is exhaustively catalogued in much of the case law and the historical overview that follows will therefore be broad in its brush. The concept of a military chaplain has its earliest roots in Roman times, although the resemblance is only a faint one. Nonetheless, the “military chaplaincy has existed in a recognizable form for more than sixteen hundred years.” The first recorded instance of an American military chaplain occurred in 1637, when American settlers responding to an Indian raid took a local pastor along with them. When the settlers balked at pressing their pursuit into a heavily wooded area, they followed the advice of this pastor to continue.

The chaplain program grew slowly in the early years of the American republic. Early chaplains were layman who accepted the title in exchange for supplemental pay. The first Navy chaplains were only implied through regulations requiring religious services to be conducted on U.S. warships. There were only two chaplains in the continental Navy and only nine until 1842, when the program began to be more formalized and professional. In 1841, the Navy officially mandated that chaplains be ordained ministers, validating a practice it had unofficially followed since 1823.

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26 Id. at 1.
28 Id.
30 In re England, 375 F.3d at 1171.
31 Id.
32 Odom, supra note 29, at 6.
The Civil War ushered in significant changes to the chaplain program and transformed international treatment of chaplains. At the outset of the Civil War, individual chaplains were used to gather intelligence under the cover of their religious role and many even fought alongside the soldiers. By 1864, however, no chaplain would be an active combatant, due in large part to efforts by President Lincoln to formalize the law of war through the Lieber Code, which was “the first attempt to check whole conduct of armies by precise written rules” and the precursor to the modern Law of Armed Conflict. Article 52 of the Lieber Code stated that chaplains were not to be considered prisoners of war, but could be permitted to remain with their men at their own request. From the Civil War forward, the chaplain program ebbed and flowed, reaching its peak during World War II when the Navy even funded the education of chaplains through the V-12 program. This program was ended soon after the war, however, and chaplains now must fund their own education.

The chaplain program has knitted a patchwork of diversity, embracing new faiths in fits and starts, often in spite of both internal barriers and barriers erected by the faiths themselves. For instance, the first unofficial Jewish chaplain entered Army service during the Civil War, when a regiment from a predominantly Jewish neighborhood in Philadelphia selected a Jewish officer as their spiritual leader, Captain Michael Allen. This was illegal by Army standards at the time, which mandated that military chaplains be both Christian and ordained, and the YMCA

\(^{33}\) Id. at 6–7.

\(^{34}\) Id. at 7–8.

\(^{35}\) Id.


soon pressured him out of the military. The Seventh Day Adventist faith did not endorse its first Army chaplain until 1943, followed by its first Navy chaplain in 1953. It remains a registered endorser today, despite reservations with potentially endorsing the militarism and war that are so contrary to it tenets. The Wisconsin Evangelical Lutheran Synod is completely opposed to the military chaplain concept and refuses to endorse chaplains altogether. They do, however, try to reach military personnel in other ways, such as providing civilian ministers for their members in the military, including an attempt to send one to Vietnam during the war.

As far back as the pre-Civil War era, the military gave chaplains a wealth of secular duties, such as education, recreation, and librarian and medical duties. Such practices survive today on large U.S. warships, where chaplains and their enlisted religious specialists maintain the ship’s library and public computer systems. On the other hand, the modern chaplain differs significantly from her ancestors. For example, in Vietnam, one report has chaplains carrying side arms, taking turns firing a machine gun from a helicopter, and even leading an assault on a Viet Cong village when the “green lieutenant” faltered. Such practices would be unthinkable for a military chaplain today, due in part to the transformative effect of the Vietnam War. As the military went through the throes of moral uncertainty and drug and alcohol abuse stemming

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38 Id. at 13–14.
41 Katcoff, 755 F.2d at 229–30; Kaplan, supra note 40, at 1222.
42 Odom, supra note 29, at 5.
43 Honest to God—Or Faithful To the Pentagon, TIME, May 30, 1969.
44 See, e.g., MILITARY CHAPLAINS: FROM A RELIGIOUS MILITARY TO A MILITARY RELIGION (Harvey G. Cox, Jr. ed., 1969) (collecting essays by various authors questioning the role of the military chaplain in the Vietnam conflict, some of whom call for an end to the program).
from that war, both commanders and individual soldiers increasingly turned to their chaplains for moral advice, a role chaplains continue to fulfill today.45

Military chaplains played significant roles in some of the most important events in our history. They were present at Nuremberg, where two chaplains ministered to some of the most notorious Nazi war criminals, including denying holy communion to Hermann Goering when he refused to accept Christianity just hours before he killed himself.46 Chaplains have been awarded the Medal of Honor47 and in World War II, the “chaplain branch was third in combat deaths on a percentage basis, behind the Air Forces and the Infantry” with 478 total casualties, including 164 deaths.48 An American Jewish chaplain held the first Jewish service in the former Nazi empire.49 Finally, military chaplains have played an important role in effecting social justice in the military, working to end flogging in the Navy in 1850, bringing about the end to the daily ration of “grog” on Navy ships in 1872 (although many sailors would protest that this amounts to positive progress), and constituting three of the five black officers in the entire army in 1941.50

C. Role Conflicts of the Military Chaplain

The military chaplaincy today faces a myriad of challenges, some old, some new. For instance, the army is experiencing a significant shortage of chaplains today, with more than 450

45 Bergen, supra note 25, at 11.
46 William J. Hourihan, U.S. Army Chaplain Ministry to German War Criminals at Nuremberg, 1945–1946, in TODAY’S BEST MILITARY WRITING 199, 204 (Walter J. Boyne ed., 2004) (describing the role of two military chaplains at Nuremberg and noting that “[f]or a year they had played an intimate part in one of the most historically significant episodes of twentieth century special ministry”).
49 Id. at 153.
total vacancies leading them to offer a significant signing bonus to new chaplains. In addition, military chaplains face an environment starkly different from that which their civilian counterparts face, rife with a number of significant challenges. One of the primary challenges any military chaplain must face is what is known as “role conflict.” Role conflict recognizes that chaplains fill two distinct functions: man of God and representative of their faith group, and military officer. As one chaplain put it, they must walk a tightrope between the two religion clauses and between their two roles.

In a seminal study in the 1950s, Waldo Burchard interviewed seventy-one current and former chaplains about their attitudes regarding various aspects of their careers. He found that chaplains tend to compartmentalize the various role conflicts they face rather than rationalizing them. In other words, rather than facing the dilemma and reasoning the conflicts, chaplains often refuse to recognize the conflict altogether: “the greater the dilemma, the greater the tendency to withdraw from it . . . and to refuse to recognize conflict.”

This role conflict manifests itself in a number of ways. For instance, military chaplains are part of military hierarchy and must obey their commanders, even at the expense of their own

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53 Bill Nisbet, Editorial, Military Chaplains Should Service All Faiths, ATLANTA J.-CONST., Apr. 25, 2006, at A13. See also U.S. ARMY, SERVE GOD AND COUNTRY AS AN ARMY CHAPLAIN 16 (1987) ([Y]ou live in two worlds. You are a [chaplain] with military responsibilities. You are also a member of the clergy . . . with ecclesiastical ties.”);
Richard G. Hutcheson, Jr., The Chaplain and the Structures of the Military Society, in CHURCH STATE AND CHAPLAINCY, supra note 36, at 68 ("The effective chaplain must be sensitive to the dual responsibilities he owes to the military service . . . [and] the reality of the tension between the two."); William A. Wildhack III, Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection, 51 NAVAL L. REV. 217, 240–43 (2005) (noting the dual role of the chaplain and listing some of his more “military roles” such as counseling, attending staff meetings, conducting workshops and classes, and fulfilling other collateral duties).
55 Burchard, supra note 54, at 534.
56 Id.
faith. Burchard notes that fully 50% of chaplains and 40% of former chaplains dealt with a “non-cooperative commanding officer.”\textsuperscript{57} As an example, during the first Gulf War in 1990, for fear of offending their Saudi hosts the Army initially ordered its chaplains to hide religious symbols, to conduct services and holiday celebrations in relative secrecy, and to abstain from posting \textit{any} announcement regarding Jewish services on base.\textsuperscript{58} While these restrictions eased significantly by the end of that war, this must have been a serious challenge to chaplains, both logistically and morally.

Chaplains in the current Middle Eastern conflicts face similar problems, albeit under less serious restrictions. Because they must minister to a broad plurality of faiths, chaplains in Iraq are shuttled around the country, carrying with them Qurans, Bibles, the Book of Mormon, and even Sioux warrior medicine implements. In one poignant episode, a military rabbi held the hand of a dying Muslim boy, comforting him by chanting a few verses from the Quran that he had memorized.\textsuperscript{59}

Wearing officer rank grants chaplains some measure of military authority. This, in fact, is a common criticism of the program.\textsuperscript{60} with some advocating that the United States military adopt the British model of chaplains wearing officer uniforms with no rank insignia. Chaplains deal with this in various ways, such as by asking to be referred to as “Chaplain Smith” rather than “Commander Smith” and by reassuring their faithful that they assume the rank of the service member to whom they are talking. The military likewise limits their authority by

\textsuperscript{57} \textit{Id.} at 531.
\textsuperscript{60} See, e.g., Randolph N. Jonakit, The Abuses of the Military Chaplaincy 28–29 (1973) (unpublished manuscript, on file with the Library of the ACLU).
designating them as staff officers and refusing to vest them with “sovereign power” by barring them from sitting on courts martial and from directing funds.\(^61\) Burchard’s study illustrates this, noting that only 10% of respondents would reprimand an enlisted person for not saluting him properly.\(^62\) His chaplains indicated that their rank enables them to advocate for troops with the officer corps, gives them added credibility, and fits them into the military pay structure.\(^63\)

The life of a military chaplain can be lonely and quite dangerous.\(^64\) This loneliness is emphasized by the military itself. As one Navy Rear Admiral noted, “Few parishes demand as much of a clergyman as we do . . . . [We] expect you to minister to our loneliness with unfailing cheerfulness[, caring for our wounded and sharing in our discomforts].”\(^65\) While this Admiral went on to note that this allowed chaplains to share in the life of the service member, the chaplain appears in American literature in a less complimentary light. In Herman Melville’s *Billy Budd*, a military chaplain is characterized at once as irrelevant, futile, and associated with death.\(^66\)

World War II chaplains bore more than their fair share of danger. This was attributed to the “presence ministry, the ‘be there’ school of thought.”\(^67\) Catholic chaplains were often killed giving last rites on the very front of the battlefield and Protestant chaplains “often felt that faith


\(^{62}\) Burchard, *supra* note 54, at 532.

\(^{63}\) *Id.* at 532–33.

\(^{64}\) For a gripping and current account of the loneliness of a chaplain in the Iraq conflict, see Eve Conant, *Faith Under Fire*, Newsweek, May 7, 2007, at 26–36. The story tracks the arc of a chaplain who completed two tours in Iraq, strong in faith at the beginning and full of doubts by the end. Nonetheless, he pressed forward and continues to minister to wounded soldiers at the U.S. Army Walter Reed Medical Center.


\(^{67}\) GUSHWA, *supra* note 48, at 141.
in the Lord gave men courage to face danger.”

The first Jewish chaplain combat deaths occurred during World War II, with four of them killed in 1943.

Perhaps the most acute role conflict military chaplains face is the morality of war and violence. In the words of Melville, “Bluntly put, a chaplain is the minister of the Prince of Peace serving in the host of the God of War – Mars.”

Not a single chaplain in Burchard’s study said they would raise questions of morality or killing and noted that if a soldier came to them with such a concern, they would attempt to reason it out on a “common sense basis rather than religious basis.”

Indeed, the military views chaplains as vital cogs in its machine, “indispensable when it came to fielding an effective military machine. The chaplain played a crucial military role by helping to convince GI’s that they were fighting a just fight and by working to motivate them and raise their morale.”

Chaplains must minister to an increasingly pluralistic military (the military recognizes more than 109 distinct faiths) while still remaining true to their own. This, in fact, is mandated explicitly in military regulations.

Some view this pluralism as an opportunity for dialogue among various faiths and a chance to bring together Americans from diverse religious

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68 Id. at 141–42.
69 Id. at 153. See also Lisa Miller, The Calm in the Chaos, Newsweek, May 7, 2007, at 32 (chronicling the legendary story of four chaplains who gave up their life jackets after their ship was torpedoed by a German U-boat).
70 Bergen, supra note 25, at 18.
71 Burchard, supra note 54, at 534.
72 HERSPRING, supra note 27, at 17–18, 47. See also U.S. COAST GUARD, CHAPLAIN SERVICE: U.S. COAST GUARD 2 (2000) (exhorting Coast Guard sailors to “use your chaplain to enhance both your personal life and your performance as part of Team Coast Guard!”); Bergen, supra note 25, at 18 (quoting Melville in Billy Budd: “[The chaplain] lends the sanction of the religion of the meek”); Jonakit, supra note 60, at 48.
73 Kelleher, supra note 59.
74 See Dep’t of Defense, DoD Instruction 1304.28 (June 11, 2004) (mandating that a chaplain must be willing to function in a “pluralistic environment . . . and to support directly and indirectly the free exercise of religion by all members”); Dep’t of Defense, DoD Directive 1304.19 (setting as DoD policy that chaplains advise and assist commanders in discharging their responsibility to provide for free exercise in the context of military service and that they must serve in a religiously diverse population).
backgrounds.75 On the other hand, some chaplains handle this pluralism in negative ways. For example, one chaplain in Iraq allegedly guarded his supply of fresh water by only allowing soldiers to bathe in it if they agreed to be baptized by him.76 Likewise, some of the current legal controversy in the Navy chaplain program stems from superior officer chaplains allegedly quashing certain methods of worship by subordinate chaplains.77

Whatever one’s stance is on the military chaplain system, it is clear that chaplains face very sensitive issues on a daily basis. They advise their commanders on the propriety of religious dress in uniform, the use of prayer at official functions, the character of holiday displays on base and much more.78 If for no other reason than this, it is important to strictly examine the military chaplain program, both as a whole and as regards its implementation.

III. Legal Basis for and Challenges to the Military Chaplaincy

A. Laws and Regulations Governing the Military Chaplain Program

The chaplaincy in all three services is established by statute.79 Further statutes lay out extremely broad duties of chaplains, including that they must “when practicable, hold appropriate religious services at least once on each Sunday” and must also hold appropriate

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76 Meg Laughlin, Army Chaplains Offers Baptisms, Baths, MIAMI HERALD, Apr. 4, 2003, at A22; Military Should Rein in Baptizing Chaplain In Iraq, Americans United Urges, CHURCH & ST., May 2003. This chaplain was cleared of wrongdoing by the military. Rosanna Ruiz, Army Clears Houston Chaplain in Inquiry Over Iraq Baptisms, HOUSTON CHRON., Apr. 24, 2003, at A33.
77 See, e.g., Veitch v. England, 471 F.3d 124, 125 (D.C. Cir. 2006) (noting that the suit stemmed in part from the alleged refusal of a command chaplain to allow the plaintiff to preach the doctrine of solo scriptura, which holds that biblical teaching alone is authoritative); Alan Cooperman, Military Wrestles With Disharmony Among Chaplains, WASH. POST, Aug. 30, 2005, at A1 (noting the current conflict in the chaplaincy between evangelical and “mainstream” chaplains).
78 See Michael J. Benjamin, Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army, ARMY LAWYER, Nov. 1998, at 1, 1; see also Steven R. Obert, Public Prayer in the Navy: Does It Run Aftoul of the Establishment Clause, 53 NAVAL L. REV. 321, 335–47 (2006) (discussing some of the problems of religion in the Navy with which chaplains are confronted).
burial rites. These same statutes mandate that commanding officers support chaplains in these functions by providing facilities and transportation. Chaplains are also authorized by statute to lead programs for “building and maintaining strong family structures;” to wear religious symbols with their uniforms (within certain strictures), and to wear full vestments when conducting religious services. It is estimated that the military chaplain program in 1981 cost the government in excess of $85 million, $62 million of which went to pay salaries. This amount has assuredly grown, in both real and adjusted dollar amounts, and today likely eclipses $100 million annually.

A few key Department of Defense instructions and directives provide the bulk of guidance for chaplains. For instance, DoD Directive 1300.17 outlines religious accommodation in the military. It mandates that worship, holy days and the Sabbath be accommodated except when precluded by military necessity. It dictates that religious belief be a factor in deciding whether or not to provide special rations to a sailor and in whether to waive immunization requirements. It also fleshes out the requirements governing religious apparel in uniform, as mandated by 10 U.S.C. § 774. Finally, it outlines factors for commanders to consider when dealing with an accommodation request, including the military requirements of safety, readiness, and morale, the importance of the accommodation to the requester, the cumulative impact of repeated similar requests, and alternate means available to meet the request.

More important for this paper, DoD Instruction 1304.28 provides guidelines for appointment of chaplains to the military. A chaplain must possess two years of leadership

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83 Katcoff, 755 F.2d at 229.
experience and have a baccalaureate degree representing more than 120 hours of credit. They must also possess a post-baccalaureate degree in theology or related studies, representing more than seventy-two hours of study. Finally, they must meet the same physical qualifications as any other military recruit.  

With these individual qualifications met, a potential chaplain must obtain the endorsement of a qualified “Religious Organization” or RO. Along with various administrative requirements, the RO must be “organized as an entity functioning primarily to perform religious ministry to a non-military lay constituency” and must hold tax exempt status. They must also agree to provide chaplains who can function in a pluralistic environment and to abide by the directives of the Department of Defense. Finally, they must inform the military immediately if they withdraw their endorsement of a chaplain.  

B. Legal Challenges to the Military Chaplain System

I. Foundational Doctrine on Military and Religion and Early Statements Regarding the Military Chaplaincy

Before addressing the direct challenges to the military chaplain system, both as a whole and as to certain manifestations of it, it is necessary to first examine the foundational military religious freedom case, along with specific dicta from School District of Abington Township v. Schempp that discuss the chaplaincy.

Whereas earlier cases displayed some willingness to censure the military for its heavy handed treatment of religious freedom, in 1986 the Supreme Court concluded that military regulations can trump the First Amendment. In Goldman v. Weinberger, Justice Rehnquist

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85 Dep’t of Defense, DoD Instruction 1304.28 (June 11, 2004).
86 Id.
88 See, e.g., Anderson v. Laird, 466 F.2d 283, 290 (D.C. Cir. 1972) (striking down, in ringing language, Naval Academy regulations that required midshipmen to attend religious services).
brushed aside any real scrutiny of military regulations that punished an Orthodox Jewish serviceman for wearing a yarmulke on duty. While Goldman applied generally to the clash of military regulations and religion (and did not address the chaplaincy), it is notable for its treatment of a First Amendment challenge to military regulations: such review is “far more deferential than similar laws in civilian society” and courts must give “great deference” to the military in the application of its own regulations. This “super-Chevron” deference to military regulations led Justice Rehnquist to dispose of an extremely sensitive and important issue in just five pages, with no reference to any of the Establishment Clause tests defined by the Court in the nearly forty years since Everson v. Board of Education. As one commentator noted, Goldman acted effectively to delegate questions of religious freedom in the military to the legislative and executive branches, discouraging the courts from intervening.

In concurrence, Justice Stevens tried to cabin the debate by crafting a more specific neutral rule for the case: that the military is free to bar religious accoutrements that are visible. He posited that this rule actually served to quell divisive Air Force regulation and prevented the Air Force from “drawing distinctions between such persons when it is enforcing commands of universal application.” Justice Brennan dissented vigorously, rejecting the majority’s cursory review and stating that Justice Stevens’s test was constitutionally flawed and not neutral.

A federal court did not meet the specific issue of the military chaplaincy until 1985 in Katcoff v. Marsh. But long before Katcoff, multiple references to the chaplaincy curiously

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90 Id. at 507.
91 330 U.S. 1 (1947).
94 Id. at 513.
95 Id. at 515–21.

First, Justice Clark for the majority noted specifically that the Court was not faced with the issue of religious services in the military, where “military personnel would be unable to engage in the practice of their faiths,” hinting that this would be a permissible accommodation. In concurrence, Justice Brennan noted that the military chaplaincy is one example of a practice that conceivably violates the Establishment Clause but is permissible because striking it down “might seriously interfere with certain religious liberties also protected by the First Amendment.”

Justice Goldberg echoed Justice Brennan in his concurrence, noting that “it seems clear . . . that the Court would recognize the propriety of providing military chaplains.” But the most famous discussion in that case regarding military chaplains comes from Justice Stewart in his dissent, where he expressed his well known “lonely soldier” formulation:

> 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.

While *Schempp* is the only direct indication of any Supreme Court justice’s opinion of the military chaplaincy, other justices hinted through oblique references to the chaplain program that they think the program is unconstitutional. For instance, Justice Douglas, concurring in *Engel v. Vitale,* noted that the federal government was “honeycombed” with

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98 Id. at 226 n.10.
99 Id. at 296.
100 Id. at 306.
101 Id. at 309.
102 See also M. Albert Figinski, *Military Chaplains – A Constitutionally Permissible Accommodation Between Church and State,* 24 Md. L. Rev. 377, 379 (1964) (positing that the dicta outlined above soothes “those who would not have all religious manifestations of public life erased”).
103 370 U.S. 421 (1962)
government financing of religion and stated firmly that he would find it an “unconstitutional undertaking in whatever form it takes.”

2. Katcoff v. Marsh

By the early 1980s, challenges to the military chaplaincy were by no means novel. In the nineteenth century through the 1920s, protests against the chaplain program were largely directed at Congress rather than the courts and did not evoke any serious debate. In 1853 the Senate addressed the problem and dismissed it out of hand, noting that the Founders clearly were not concerned with chaplaincy.

The courts faced the issue on at least two prior occasions. In 1928, a citizen filed suit in the D.C. Circuit, challenging the chaplaincy program as an impermissible use of taxpayer dollars for the establishment of religion. The court dismissed the suit on standing grounds per the doctrine of Frothingham v. Mellon. A similar suit was filed in 1956, but was dismissed by the District Court for lack of jurisdiction and failure to state a claim upon which relief could be granted. Both of these suits pre-dated Flast v. Cohen, which opened the floor to suits against the chaplaincy on the basis of taxpayer standing.

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105 Id. at 462.
106 Id.
107 Elliot v. White, 23 F.2d 997 (D.C. Cir. 1928).
108 Id. at 998.
111 392 U.S. 83 (1968). In addition to these legal challenges, in 1972, the ACLU issued an official policy statement against the military chaplaincy along with an extensive analysis of its reasons for doing so. Jonakit, supra note 60, at 67. It called for an end to “pervasive military” control of chaplains in favor of a “right of mutual access” that would allow service members free access to civilian ministers of their choice and civilian ministers free access to military installations and personnel. Id.
112 Weber, supra note 104, at 462 n.16. The Supreme Court recently narrowed taxpayer standing even further, making it doubtful whether a challenge like that in Katcoff could be brought today. See Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007). But the Court based this limitation on the fact that Congress had not directly allocated the funds at issue. Id. at 2568. Because the chaplain program is directly authorized by Congress, Hein does not foreclose the possibility of a future Katcoff-type challenge.
The plaintiffs in *Katcoff v. Marsh*, two Harvard law students who concluded that the military chaplaincy was a violation of the Establishment Clause, took advantage of such taxpayer standing. While the Second Circuit quickly resolved standing in favor of the plaintiffs, it just as quickly found the military chaplain program constitutional. The court started by noting that the program was completely voluntary and imposed no affirmative obligation on service members to worship. Echoing the various dicta in *Schempp*, the court asserted that if the Army prevented soldiers from worshipping by removing them to areas with no available minister, it would be an Establishment Clause violation because it would inhibit their practice of religion. While it noted that there was “little doubt” that the program would fail the *Lemon v. Kurtzman* test when “viewed in isolation,” it reasoned that the program must be viewed against its historical background and stated that the Supreme Court disavowed the uniform applicability of *Lemon* in cases like *Lynch v. Donnelly* and *Walz v. Tax Comm’n*. In place of *Lemon*, the court more generally relied on various Supreme Court precedents mandating deference to military regulations (this case just preceded *Goldman*; had it not, it surely would have relied heavily on the strong language therein). It also noted that the War Powers Clause of the Constitution was in this case a counterweight to the First Amendment, reinforcing Congress’s ability to create the chaplain program.

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

115 Id. at 232, 234–35.


119 *Katcoff*, 755 F.2d at 233.

120 U.S. CONST. art. I, § 8.

121 *Katcoff*, 755 F.2d at 233.
The Katcoff court established a circumscribed role for itself through a lenient test: “whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense.” The plaintiffs asserted that a civilian chaplaincy was just such a practical alternative, but the court quickly dismissed this contention, noting that the plaintiffs failed to adduce any evidence of how such a program would be funded and whether civilian chaplains would accept military discipline. It also noted that Congress considered and rejected the idea in the 1800s and again in both 1924 and 1973. It concluded that, regardless, the civilian alternative did little to cure any Establishment Clause issues. The court did, however, remand as to whether there was a need for military chaplains in populace areas for the “arm chair” military and retirees.

While the Solicitor General considered petitioning for certiorari to further narrow taxpayer standing and to achieve finality, he ultimately decided not to pursue the issue. Faced with an expensive battle back in the District Court, the plaintiffs offered to drop the case in exchange for freeing them from liability for court costs, provided they could drop the case without prejudice. Despite the strong desire of the Chief of Chaplains to push the case and achieve final resolution on all issues, the government eventually agreed to the plaintiffs’ offer and the case was dropped.

IV. Flaws in the Chaplain Endorsement System

What does all this mean for the chaplain system today and specifically for Larsen’s problem? The answer to this question is not an easy one precisely because the courts have left

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122 Id. at 235.  
123 Id. at 236.  
124 Id. at 237.  
125 Id.  
126 Id. at 238.  
127 DRAZIN & CURREY, supra note 50, at 201.  
128 Id. at 203.  
129 Id. at 204–05.
the doctrine so muddled. Little coherent guidance emerges from case law, which often avoids the substantive issues and when it does address them, posits a wide range of tests and different levels of deference for clashes between military necessity and religious freedom. Indeed, Katcoff itself provides little guidance here because it was essentially “all or nothing.”

By way of review, the endorsement system requires that, in addition to meeting the other requirements (education, physical standards, etc.), every military chaplain candidate be backed by an approved Religious Organization (RO). Among other things, ROs must be recognized as tax-exempt religious entities, willing to provide a chaplain able to minister to a pluralistic constituency, and “organized as an entity functioning primarily to perform religious ministry to a non-military lay constituency.” The final section of this paper will examine this system by applying it to the case of Don Larsen. This examination will show that the system is rife with constitutional flaws and deserves close scrutiny.

The idea that the military chaplain endorsement system is constitutionally problematic is not a new one. As far back as 1980, for instance, one commentator predicted Don Larsen’s very problem: a chaplain that fundamentally alters his belief such that his endorser no longer is willing to support him. Pointing out some of the general problems with the endorsement system, the author sharpened the issue by asking how the military might respond if the

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130 See, e.g., Veitch v. England, 471 F.3d 124 (D.C. Cir. 2006) (dismissing a suit by a former Navy chaplain on the basis of standing); Chaplaincy of the Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006) (hearing substantive appeals on the issue of injunctive relief); Rigdon v. Perry, 962 F. Supp. 150 (D.D.C. 1997) (largely avoiding scrutiny of a First Amendment challenge to restrictions on military chaplains’ political communications with their parishes until shoehorned into such scrutiny by the Religious Freedom Restoration Act of 1993). See also Kenneth J. Schweiker, Note, Military Chaplains: Federally Funded Fanaticism and the United States Air Force Academy, 8 RUTGERS J.L. & RELIGION 5, 16 (2006 (examining alleged proselytizing Air Force Academy cadets by Air Force chaplains and commanders); Aden, supra note 61 (discussing, in an article by one of the plaintiff’s consulting attorneys, the various recent suits against the Navy); Wildhack, supra note 53 (discussing recent challenges to the Navy chaplaincy, including the issue of Protestant pluralism).

131 Aden, supra note 61, at 197–98. See also Emilie Kraft Bindon, Commentary, Entangled Choices: Selecting Chaplains for the United States Armed Forces, 56 ALA. L. REV. 247, 273 (2004) (noting that the military chaplaincy as a whole has been declared constitutional but that the endorsement system itself has not been addressed).

132 Dep’t of Defense, DoD Instruction 1304.28 (June 11, 2004).

133 Weber, supra note 104, at 472.
Metropolitan Community Church, which he described as an avowedly homosexual-oriented church, requested approval to be an approved RO.\textsuperscript{134} Clearly the military would be faced with a difficult choice: discriminate against this religious group and deny them endorser status or contravene their (already controversial) anti-homosexual policies.\textsuperscript{135}

More recently, Emilie Bindon, a law student at the University of Alabama, authored a Note questioning the endorsement system in the context of the recent controversy over Muslim chaplains and Guantanamo Bay.\textsuperscript{136} Concerns regarding alleged terrorist ties of the two approved Muslim chaplain endorsing groups have led to political pressure to change the way the military chooses its ROs.\textsuperscript{137} Her basic premise is that if the DoD were to adopt policies that substantively analyze the beliefs of an organization before accepting them as an endorser, they likely would violate the Establishment Clause.\textsuperscript{138} Bindon concluded that such an analysis of Muslim endorsers would violate the \textit{Larson v. Valente}\textsuperscript{139} test, stating that this test “applies when the government appears to favor one denomination over another.”\textsuperscript{140}

Leaving aside Bindon’s choice of Establishment Clause test, it is not clear that she is correct on the substantive issue. Were the military to question whether the Muslim religion is a true religion within the regulation’s definition of “Religious Organization,” she would indeed be correct. This seems patently unlikely: no one today would seriously assert that the Muslim faith is not a “religion.” Instead, the military might investigate the \textit{sincerity} of a Muslim endorser’s

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\item[134] \textit{Id.} at 467. \textit{See generally} http://www.mccchurch.org.
\item[135] This same author also pointed out that the stringent chaplain education requirement bars certain candidates because it is higher than many endorsers themselves require and cuts off groups that tend to have less educated clergy (he cites the Black Muslims as an example). Weber, \textit{supra} note 104, at 469. \textit{See also} Jonakit, \textit{supra} note 60, at 67 (ACLU official policy statement stating that the selection process “seriously discriminates against minority religious groups, for reasons more related to military convenience than to the religious needs of members of the armed services”).
\item[136] Bindon, \textit{supra} note 131. For a first-hand account of how this controversy affected one particular Muslim chaplain, \textit{see JAMES YEE \\& AIMEE MOLLOY, FOR GOD AND COUNTRY: FAITH AND PATRIOTISM UNDER FIRE} (2005).
\item[137] Bindon, \textit{supra} note 131, at 253–54.
\item[138] \textit{Id.} at 258.
\item[139] 456 U.S. 228, 229 (1982).
\item[140] Bindon, \textit{supra} note 131, at 282.
\end{enumerate}
\end{footnotesize}
belief for evidence that they are pretextually seeking endorser status in order to somehow infiltrate military ranks with suspect chaplains. Given the Court’s repeated deference to military necessity, especially during times of war, it likely would allow such a sincerity-based inquiry regarding Muslim endorsers.\textsuperscript{141} Even if not, the military could assert a wholly secular ground for de-certifying a Muslim endorser. For instance, were they to unearth actual ties to terrorist groups, they could revoke that group’s status with no reference to religion.

Nonetheless, along with Weber, Bindon makes some important contributions to the idea that the endorser system is potentially flawed and if nothing else, it is troubling that the system is susceptible to such political pressures. Don Larsen’s situation raises even further considerations: both general in nature and specific to his desire to be the Army’s first Wiccan chaplain.

A. Establishment Clause Issues

It is not clear what Establishment Clause standard will apply to Don Larsen’s potential challenge to the chaplain endorsement system. In \textit{Katcoff}, the court was able to dismiss the \textit{Lemon} test because of the countervailing factors of tradition, military necessity and the war powers of Congress, and assurance of free exercise.\textsuperscript{142} Each of these seems weaker relative to the endorsement system.

First, tradition supports this system far less than it supports the chaplaincy as a whole. As to the chaplaincy, the government can point to more than two centuries of established practice. While, as we note above, this might not be quite as firmly rooted as the legislative chaplaincy in

\textsuperscript{141} See Clay v. United States, 403 U.S. 698, 700 (1971) (requiring, in order to be found eligible to be a conscientious objector, that the person “show that this objection is sincere”); \textit{see also} Welsh v. United States, 398 U.S. 333, 337 (1970) (“There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh.”) (emphasis added); United States v. Seeger, 380 U.S. 163, 166 (1965) (“Within [the reach of the conscientious objector statute] would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.”) (emphasis added).

\textsuperscript{142} \textit{Katcoff}, 755 F.2d at 232–33.
Marsh v. Chambers,\textsuperscript{143} it nonetheless is on relatively firm footing. In contrast, as Bindon notes, “[e]cclesiastical endorsing organizations, developed during the post-Civil War era, are not as old and do not bear the seal of approval of the First Congress. It would seem, then, that the policies concerning the endorsing organizations would not be entitled to the same sort of historical weight that the entire military chaplaincy would likely receive from a court.”\textsuperscript{144} Justice Breyer’s formulation of “tradition” in Van Orden v. Perry might make this sufficient,\textsuperscript{145} especially given that the endorsement system has largely not been divisive to this point. Regardless, tradition is weaker as to this specific aspect of the chaplaincy, in contrast to the chaplaincy as an institution.

In addition, Marsh did not rest wholly on tradition. The court implied that it might have ruled differently had there been a suggestion that the choice of legislative chaplain “advance[d] the beliefs of a particular church” or had the prayer there “advance[d] any one, or . . . disparage[d] any other, faith or belief.”\textsuperscript{146} As will be shown below, the endorsement system does have the effect of advancing particular faiths and disparaging others, thus potentially undermining the tradition argument in this specific context.

Second, the military necessity argument is weaker in this specific context. There are compelling justifications for the chaplaincy as a whole, such as securing the free exercise of service members and boosting their morale and courage. But the government cannot as clearly avail itself of such arguments here. As Bindon points out, one federal district court refused to apply Goldman deference where the issue did not implicate operational, strategic, or tactical matters and because Goldman only implicated free exercise issues whereas the claim there

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\textsuperscript{143} 463 U.S. 783 (1983). See also Walz, 397 U.S. at 678 (“[A]n unbroken practice . . . is not something to be lightly cast aside.”).
\textsuperscript{144} Bindon, supra note 131, at 274.
\textsuperscript{145} 545 U.S. 647, 701–02 (2005) (Breyer, J., concurring) (finding it persuasive that a Ten Commandments monument had been in place for just forty years, but only because the monument had not been divisive or contentious during that time).
\textsuperscript{146} Marsh, 463 U.S. at 794–95.
\end{flushright}
implicated both free exercise and establishment issues. Because the endorsement system does not implicate any operational concerns of the military and is more properly viewed as an administrative process, appeals to military necessity or the War Power Clause seem inapposite.

In fact, the endorsement system could be viewed as irrational. The military chooses personnel for far more sensitive positions with no endorsement system. A potential military pilot is not asked to present an endorsement from a flight school: she simply applies, takes the necessary tests, and is considered on the basis of her education and fitness for training. This in no way is a barrier to the military assuring minimum qualifications for its pilots. It can simply set them as part of regulation. There seems no rational reason that a chaplain could not be considered on an individual basis as well. The military already considers whether the person has sufficient education and physical qualifications. The only real purpose of the endorsement system seems to be that the endorser ensures that the person comes from a “valid” faith. In essence, the military is punting the screening of faith “validity” to its endorsers. The military cannot constitutionally undertake such a process itself and nor can it delegate it to an ecclesiastical board. The endorsement system seems far less related to assuring free exercise for service members and far more related to acting as a screen for the military against constitutional liability.

Because the countervailing factors that were so prevalent in Katcoff and Goldman are not as strongly present here, a court would seem less likely to discard some of the more strict tests of establishment. By this logic, if Larsen asserts an Establishment Clause claim, Lemon may be found directly to apply. Under Lemon, “a statute passed this test only if it had ‘a secular legislative purpose,’ if its ‘principal or primary effect’ was one that ‘neither advance[d] nor

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inhibit[ed] religion,’ and if it did ‘not foster an excessive government entanglement with religion.’”

Secular purpose is not generally a difficult hurdle for the government to surmount. Generally, a court will defer to the legislature’s stated good faith purpose (or in this case, the military’s since they drafted the regulation). However, “the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” The chaplain endorsement system regulation is facially neutral and there is no evidence that any secular purpose is a sham.

Under modern Supreme Court jurisprudence, the effect and entanglement prongs of Lemon can to some extent be analyzed together. This is because

the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect.’ That is, to assess entanglement, we have looked to ‘the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.’

One key aspect of the endorsement system is that it involves the government on one side of the transaction and an ecclesiastical organization on the other. The military does cover expenses for the endorsers, but this remuneration is nominal, especially relative to the total amount spent on the program annually. But money is not the only consideration under the effect/entanglement inquiry. The power to endorse a chaplain is itself a benefit conferred upon these ecclesiastical bodies, as is the power to revoke an endorsement and have the chaplain removed from service. It is entirely plausible that a group gains prestige among its congregants based on its RO status, and

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150 See Agostini v. Felton, 521 U.S. 203, 233 (1997) (“[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.”).
151 Id. at 232 (quoting Lemon, 403 U.S. at 612–13).
152 Bindon, supra note 131, at 279.
can tout this prestige to solicit donations from its members. In short, this power is definitively a benefit the government is conferring on specific ecclesiastical organizations.

Were it to provide this benefit to any religious group, it would probably survive constitutional scrutiny. But we have seen that the Army has “repeatedly denied” attempts by a Wiccan group to gain endorser status.\textsuperscript{153} The Court has specifically noted that “[i]n our Establishment Clause cases, we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion.”\textsuperscript{154} Denying the Wiccans endorser status manifests government disapproval of the faith, in spite of the fact that federal courts have definitively answered the question of the “validity” of the Wiccan faith. That Wicca is a “religion” within the meaning of the First Amendment is reinforced by the Court’s standard in \textit{United States v. Seeger}, where the court held that a faith is protected by the First Amendment, so long as the “given belief . . . is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”\textsuperscript{155} Applying this test, the Fourth Circuit recognized Wicca as a valid faith under the Constitution in \textit{Dettmer v. Landon}, holding that “the Church of Wicca occupies a place in the lives of its members parallel to that of more conventional religions. Consequently, its doctrine must be considered a religion.”\textsuperscript{156}

Although there are some efforts to organize the faith,\textsuperscript{157} Wiccans resist hierarchy, disclaiming “large organizations and holy gurus” in favor of local covens and decentralization.\textsuperscript{158}

\textsuperscript{153} Cooperman, \textit{supra} note 1.
\textsuperscript{155} \textit{Seeger}, 380 U.S. at 166.
\textsuperscript{157} \textit{See} Cooperman, \textit{supra} note 1.
\textsuperscript{158} \textit{EDWARDS, supra} note 10, at 485.
These small groups and individuals are granted the full freedom to disagree with their leaders.\textsuperscript{159} This decentralization is a key factor in their inability to endorse a military chaplain and gives one reason to doubt that Wiccans could ever achieve the requisite qualifications. Were a Wiccan group to organize such that they met military criteria, the endorsement system would be tangibly affecting a religious group by shaping its conduct. This alone should be viewed as an impermissible effect of the regulation. Given the breadth of religious plurality in this country, it is likely that there are other faiths similarly situated.

Suppose that Wiccans achieved endorser status by organizing a large group in contravention to their religious tenets. Suppose further that Larsen was endorsed and his commission reinstated but that then the group disbanded, its purpose fulfilled. The regulation expressly mandates that endorsers re-certify with the DoD every year.\textsuperscript{160} If they fail to do so, “[s]erving chaplains endorsed by that organization shall be considered to have had their endorsements revoked.”\textsuperscript{161} In addition, any time a chaplain has a “change of career status” their endorser must re-certify them. If they fail to do so, the person’s endorsement is revoked. Given these facts, the Wiccans would be left to choose either to keep their uncomfortably large endorsement group or to cause Larsen to lose his endorsement and be ousted from the military. Once again, the military is shaping the conduct of this religious faith and this is impermissible, both in its effect and in the entanglement it induces.

Finally, the fact that an endorsing group has the power to unilaterally remove a chaplain’s endorsement, just as was the case with Larsen, is equally troubling. The endorser need not explain its reasons for doing so: it simply must immediately inform the military that it no longer supports the chaplain. Once it does so, the military initiates the removal process

\textsuperscript{159} Id.
\textsuperscript{160} Dep’t of Defense, DoD Instruction 1304.28 (June 11, 2004).
\textsuperscript{161} Id.
“immediately.” While there are procedures in place to remedy this (such as seeking a new endorser), they would be unavailing for Larsen given that there is no alternate Wiccan endorser to whom he could appeal.

In addition, the power to both endorse and to remove raises another interesting issue. Military officers are “Officers” within the meaning of the Appointments Clause of the Constitution and therefore must be appointed in accordance with that clause. There can be few, if any, other instances wherein an outside group has the power to control who the President appoints to such an “Officer” position. This is not a mere recommendation, as with the ABA certifying a potential federal judge. On the contrary, if an ecclesiastical organization withholds endorsement, the President may not appoint that person to the position. Further, it is hard to imagine another area where a presidential appointee can be removed by an outside organization, let alone a religious one, with no justification whatsoever. Yet that is precisely the effect of the chaplain endorsement system.

Not only is this a potential violation of the Court’s Appointments Clause jurisprudence, but it raises issues similar to those addressed in Larkin v. Grendel’s Den, Inc. In Grendel’s Den, the Court found that a statute granting churches the power to veto liquor license applications by anyone within 500 feet of their church violated the Establishment Clause. In reaching this conclusion, the court specifically noted that “[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or

163 U.S. CONST. art. II, § 2, cl. 2.
164 See Weiss v. United States, 510 U.S. 163, 170 (1994) (holding that the Appointments Clause applies to military officers); Buckley v. Valeo, 424 U.S. 1, 126 (1976) (holding that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by s 2, cl. 2, of that Article”).
shared with religious institutions.”\textsuperscript{166} The chaplain endorsement system delegates to a civilian ecclesiastical organization the power to remove a military officer from the service. That organization may effect the removal for a whole host of impermissible reasons: for instance, because they dislike the content of his sermons or because they disagree with a particular war. While the military retains the ability to separate the chaplain as well, it delegates to the endorser the effective veto power over his continued service. While not precisely analogous to \textit{Grendel’s Den}, the endorsement system is similarly an important, discretionary power that is delegated to (not even shared with) religious institutions.

Further, the Court in \textit{Grendel’s Den} specifically noted that “[t]he churches’ power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals.”\textsuperscript{167} Again, this is roughly parallel to the endorsement system, wherein the endorser may de-certify a chaplain with absolutely no explanation to the government. Such a delegation is a clear entanglement and therefore is an impermissible establishment.

Slightly altering the facts further reveals the unacceptable nature of this system. The Golden Rule of the Wiccan faith is “An ye harm none, do what ye will.”\textsuperscript{168} Wiccans are therefore largely pacifist due to their belief that what one does in this life comes back three-fold in subsequent lives.\textsuperscript{169} Suppose that on this basis every potential Wiccan endorsement body (if there is one) decided that they could simply not be true to the pacifist tenets of their faith by acting as an endorser. This would put them in line with groups such as the Quakers or the

\begin{footnotes}
\footnote{166} Id.
\footnote{167} Id. at 125.
\footnote{168} Rosin, \textit{supra} note 4.
\footnote{169} Id. \textit{See also} \url{www.wicca.org} (last visited Apr. 19, 2007).
\end{footnotes}
Wisconsin Lutheran Synod, who likewise refuse to endorse chaplains. Suppose, too, that Larsen, after much reflection, decides that he sincerely disagrees with the Wiccan organizations and concludes that nothing in the faith is contrary to being a military chaplain. Under the current endorsement system, his sincerely held belief would be subordinated to the decision of the church hierarchy as to church doctrine. In a real sense, this is the flip side of the problem in *Thomas v. Review Board of Indiana Employment Security Division.*¹⁷⁰ In *Thomas,* the Court found that the state of Indiana unconstitutionally denied the plaintiff unemployment benefits by concluding that his beliefs were merely a “personal philosophical choice” and not in conformance with the Jehovah’s Witness faith generally.¹⁷¹ The Court held that this infringement on the plaintiff’s sincerely held individual beliefs violated the First Amendment.¹⁷² *Thomas* is not completely analogous, in part based on factual differences and in part because it was set in the oddly unique unemployment compensation context. But the ideal underlying *Thomas* is instructive: just as Thomas’s sincerely held religious belief could not be infringed upon by government action, neither can Larsen’s sincerely held religious belief under this hypothetical be infringed upon by denying him employment as a military chaplain.

Suppose, too, that the Roman Catholic Church decides the war in Iraq is unjust and thereafter orders all of its military priests to resign their commissions, simultaneously withdrawing their endorsements. What if an individual priest disagrees, concluding that the war is just and further, that he has a moral obligation to continue serving his men (we will have to assume the Church allows him nonetheless to continue as a priest)? Under the current system, the priest would have no choice but to leave the military, despite his sincere individual

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¹⁷¹ *Id.* at 713.
¹⁷² *Id.* at 720.
conclusion that military service is not contrary to his religious belief. Again, this is excessive entanglement and an impermissible delegation to an ecclesiastical body.

B. Free Exercise Claims

Don Larsen could also assert that his right to free exercise was infringed by the chaplain endorsement system. Precisely because he changed his religious beliefs, he was immediately separated from the military and lost his livelihood. This is directly analogous to the cases where the Court found that denying unemployment compensation on the basis of religious beliefs was impermissible.\textsuperscript{173}

After establishing tests that provided rigorous protection to free exercise in \textit{Wisconsin v. Yoder}\textsuperscript{174} and \textit{Sherbert v. Verner}, the Court in the late 1980s and early 1990s began to erode such protections. In \textit{Lyng v. Northwest Indian Cemetery Protective Association}, the Court, speaking through Justice O’Connor, noted that the “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.”\textsuperscript{175} Justice O’Connor went on to note that “incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions.”\textsuperscript{176} \textit{Lyng} concerned the government’s interest in managing federal lands, but this language is especially damaging in the military context where the government can assert even more compelling interests and where courts have demonstrated even stronger deference. A court hearing Larsen’s free exercise claim might very well find that because he was not coerced into acting contrary to his religious beliefs by the endorsement

\textsuperscript{173} See, \textit{e.g.}, \textit{Sherbert v. Verner}, 374 U.S. 398 (1968).
\textsuperscript{174} 406 U.S. 205 (1972).
\textsuperscript{175} 485 U.S. 439, 452 (1988).
\textsuperscript{176} \textit{Id.} at 450–51.
system, the government need not supply a compelling justification for the strictures of that system.

In 1990, the Court went even further in *Employment Division, Department of Human Resources of Oregon v. Smith*.\(^{177}\) In *Smith*, the court held that burden on the exercise of religion that is “merely the incidental effect of a generally applicable and otherwise valid” law does not offend the First Amendment.\(^{178}\) While *Smith* concerned the application of a criminal law, its general principle applies to the application of all neutral laws that infringe upon one’s free exercise: the applicability of a law of general application cannot be made to turn on an evaluation of one’s religious beliefs.\(^{179}\)

*Smith* did, however, allow for two exceptions. First, where the religious free exercise being infringed upon is combined with some other constitutional right, the traditional “compelling interest test” in *Yoder* and *Sherbert* still applies.\(^{180}\) This is the so called “hybrid exception.” Second, carving out an exception that kept *Yoder* at least somewhat viable, the Court noted that it had applied the compelling interest test in cases of an individual exemption. Specifically, the court noted that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”\(^{181}\)

It is unclear what either of these mean, but if Larsen can show that he falls under either one of them, he can avoid the strictures of *Smith*. Unfortunately, the hybrid claim seems inapposite here. It is possible that Larsen could assert that both his right to free exercise and his freedom of expression were infringed. This, however, seems to be a stretch: the military took no

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\(^{178}\) *Id.* at 878.
\(^{179}\) *Id.* at 885.
\(^{180}\) *Id.* at 881–82.
\(^{181}\) *Id.* at 884.
action to infringe on his ability to express Wiccan beliefs. It merely ousted him from the military on the basis of those beliefs. He might also be able to assert that his right to associate with fellow service member Wiccans was infringed and thereby hybridize his claim. But the Court is highly unlikely to find that a person has an inherent right to associate with the military: the military has a strong interest in regulating its membership. Finally, he could assert that both his Fifth Amendment Due Process rights and his free exercise were both being infringed. These are all, however, asserted at a rather high level of generality and overall, the hybrid claim will probably prove unavailing.

The individual exemption exception is even less clear but perhaps is a more likely source of relief for Larsen. Under this theory, Larsen could claim that the military has in place a system that provides individual exemptions from separation for chaplains who attain alternate endorsements when they change faiths. By not extending him the same exemption on the basis of now being a Wiccan, Larsen could assert that he has a valid individual exemption claim under Smith and that the compelling interest test should therefore apply. This is an intriguing possibility in this context and one which Larsen will need in order to overcome the strict application of the Smith standard, which is rarely friendly to a plaintiff. Given the lack of clarity in defining this exception, though, its application to Larsen is uncertain.

There is one other way to circumvent the strictures of Smith: by showing that the endorsement system constitutes “non-facial non-neutrality.” In Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, the Court considerably lessened the difficulty of showing that a law is not “neutral” within the meaning of Smith.182 In Lukumi, the court applied a totality of the circumstances test to find that the law in question was not neutral and therefore was invalid. Some of the factors the court considered included the fact that the government failed to consider

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less restrictive means of achieving its objective; that the political context in which the laws were passed was hostile to the Santeria faith; that one of the package of laws contained a specific reference to restricting “ritual” (and this then proved fatal to the entire package, not just that one law); and that the law essentially acted to “gerrymander” by excluding a whole host of other faiths and leaving the Santeria church as the “last man standing.”

The *Lukumi* test is likely to have mixed results for Larsen. He can probably assert that the government has not considered less restrictive means of qualifying chaplains that to some extent the Wiccan faith is penalized by the endorsement system while a wide swath of other faiths are not. However, the *Lukumi* test cannot turn on any one of these factors: the plaintiff must show a combination of some or even all of them. Larsen will be wholly unable to show any kind of defective political process surrounding the adoption of the endorsement system and the regulations and laws that implement the system are completely devoid of defective language like that in the *Lukumi* package of laws. Likewise, the “gerrymandering” effect here is both less obvious and less complete. Wiccans are not the only faith effectively excluded by the endorsement system and there is no evidence that they were specifically targeted to be excluded, as the Santeria church was specifically targeted in *Lukumi*. Thus, on balance, Larsen is unlikely to find any comfort in *Lukumi*’s gloss on *Smith*.

Beyond any constitutional considerations, Larsen has another route to a strict examination of his free exercise rights: the Religious Freedom Restoration Act of 1993. RFRA may be the only way to get a federal court to meaningfully review the constitutional

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183 *Id.* at 542.
issues in a military-religious freedom clash, and *Gonzales v. O Centro Espirita Beneficente Uniao De Vegetal* demonstrates that RFRA may continue to have real bite against the federal government, its unconstitutionality against state governments notwithstanding.

It is unclear, though, how a court would compare parallel actions by Congress, one establishing the military chaplaincy and the other setting the very strict standard in the RFRA. Unlike *O Centro*, where a specific application of a federal statute (the application of controlled substance law to ceremonial tea) was being examined under RFRA, a direct challenge to the regulations governing selection of military chaplains would place one federal statute (RFRA) in direct conflict with a series of other federal statutes and the regulations that implement them (the various chaplaincy statutes and regulations outlined in Part III.A., supra). Had the court found a First Amendment violation in *Katcoff*, the hierarchy would have been clear: the constitutional command would override any statutory chaplain program. Congress seems to have expressed the intent that RFRA apply to any federal statute or regulation, specifically stating that it “applies to all Federal law, and the implementation of that law, whether statutory or otherwise.”

In addition, while Congress is free to exempt whatever federal statutes it pleases, it has not done so relative to any of the chaplaincy provisions.

In addition, a court could plausibly find RFRA altogether inapplicable. As we have seen, one of the primary justifications for the chaplaincy program is to secure the free exercise rights of service members involuntarily removed from their ability to worship freely. Indeed, the dicta

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185 See, e.g., Rigdon v. Perry, 962 F. Supp. 150 (D.D.C. 1997) (largely avoiding scrutiny of a First Amendment challenge to restrictions on military chaplains’ political communications with their parishes until shoehorned into such scrutiny by RFRA).

186 546 U.S. 514 (2006). Were the court directly confronted by the issue of RFRA’s application to a federal program, Justice Stevens would likely disagree that RFRA can be applied to the federal government given his view that the statute constitutes a violation of the Establishment Clause. See City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (“In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a ‘law respecting an establishment of religion’ that violates the First Amendment to the Constitution.”).

in *Schempp* essentially outlined this as the only reason such an obvious Establishment Clause violation would be tolerated. That being the case, it would be ironic if a court were then to invalidate the chaplaincy using a statute that is expressly intended to secure the free exercise of religion.

Assuming it is applicable, to survive scrutiny under the RFRA, the government must first assert a compelling government interest. In virtually every case involving a military imposition on the rights of its service members, this has not proven challenging for the government. As noted above, the compelling government interest could take a number of forms. It is sure to include securing the free exercise of the “lonely soldier.” The government could also assert military necessity by citing some of the passages above that show that chaplains are essential to morale and the motivation to fight. Regardless, whatever interests the military asserts, courts are predisposed to accepting them as compelling.

Such interests are asserted at a high level of generality, though, and while they support the military chaplaincy as an institution, they do little to support the endorsement system as embodied in military regulations. As discussed in Part IV.A., *supra*, the standard military interests find a far less comfortable home in the context of the endorsement system and there is a strong argument that the system is little more than a liability shield for the military. In the end, though, no matter how a court finally comes out on the merits of the RFRA claim as a whole, it seems highly unlikely given its past expressions of deference to the military that it would reject the government’s claim of compelling interest here.

With the compelling interest prong satisfied, the government must then show that the endorsement program “is the least restrictive means of furthering that compelling governmental

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188 § 2000bb-1(b)(1).
interest” and it is here that RFRA might provide some of the bite that has been absent in past decisions regarding military free exercise. Bindon suggests that rather than investigating specific endorsers (such as the Muslim endorsers), the military should instead investigate every endorser for potential issues. This system seems worse than the current one, though. It certainly is inadvisable for the military to engage in wholesale investigations of ecclesiastical organizations to determine if they potentially should not be endorsers. The entanglement of this is worse than the hands-off endorsement system as it now stands.

Alternatively, the military could abolish the endorsement system altogether and, as alluded to above, have chaplains apply for positions in the military like any other potential commissioned officer. This, of course, is fraught with hazards for the military and it must tread lightly here to avoid inquiries into the validity of an applicant’s religious convictions. With that said, the military is already requiring chaplains to meet certain minimum educational

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189 § 2000bb-1(b)(2)
190 The application of this prong of RFRA to the chaplaincy program as a whole presents some fascinating issues. It is beyond the scope of this paper to address all of the various alternatives to the military chaplain program that have been proposed, but suffice it to say that courts have not warmly received them. For instance, in Katcoff, the court summarily dismissed the plaintiff’s proposed civilian alternative, noting that Congress has specifically addressed and rejected this idea. Katcoff, 755 F.2d at 237. For other proposed alternatives, see Cavanaugh, supra note 162, at 218–21 (discussing various alternatives, including demilitarizing the chaplaincy, changing how chaplains fit within the military hierarchy, and using military chaplains only when civilian chaplains are not possible and concluding that the issue is too difficult and intractable for any definitive conclusion); Kaplan, supra note 40, at 1232 (proposing a system whereby the military contracts with civilian clergy); Scott Poppleton, Editorial, What the Military Shouldn’t Preach, WASH. POST, Mar. 14, 2006 (proposing that the chaplaincy be reformed into a non-religious counseling service with a parallel program allowing civilian clergy to preach on base and using lay sailors to preach at sea).

The key difference, though, is that in Katcoff (to date the only real direct challenge to the military chaplaincy), the court did not have RFRA as an option. As we note above in connection with Rigdon, the RFRA has a channeling function regarding military free exercise issues such that it shoehorned the court into a genuine consideration of the constitutional issues it had heretofore avoided addressing. See Rigdon 962 F. Supp. at 161. If the “least restrictive means” test in RFRA were strictly applied to the military chaplaincy, a court would be forced to give the alternatives a much stricter consideration than the court gave the civilian alternative in Katcoff. In the end, it is likely that the court would decide that the current system is the least restrictive means, but under RFRA, this is not a foregone conclusion. It may well be that a more sophisticated plaintiff could bring resources to bear that fully analyze the feasibility of a system wherein the military only provides chaplains to deployed and overseas troops and uses some version of a local civilian alternative in the United States: in other words the very issue that the Katcoff court remanded. Even pre-RFRA, the court seemed intrigued by the idea. With RFRA in its quiver, a court might take an even closer look at this alternative.

191 Bindon, supra note 131, at 282–83.
192 Id. (discussing such an alternative).
requirements and it certainly seems permissible for the military to ensure its chaplains meet such requirements, just as it requires all of its officers to meet minimum threshold requirements.

The goals of the endorsement system could be accomplished through less formal means that confer far less power on ecclesiastical agencies than is conferred on them by the current system. For instance, the military could ask each potential chaplain to submit a letter of recommendation from either an endorsing ecclesiastical organization or her congregation. This would allow clergy from large, established faiths to continue to have their church’s recommendation while also allowing chaplains from smaller, more dispersed faiths (like the Wiccans) access to the program. In addition, it would solve some of the issues that are loosely analogous to Thomas: a chaplain who individually decides that the chaplaincy conforms to his religious beliefs in contravention to the decision of his larger ecclesiastical structure is far more likely to find like-minded congregants willing to recommend him than he would be to convince his ecclesiastical authority to endorse him despite their pacifist views.

In addition, these letters of recommendation would be advisory and the military could accept a chaplain even without one. Again, chaplains are already being evaluated based on their individual qualifications. There is no reason the military could not accept a chaplain based solely on his individual qualifications, even absent a letter of recommendation. The advisory nature of the letters would also cure all of the Appointments Clause and Grendel’s Den issues discussed above. By making them simply recommendations and removing the power to control a chaplain’s military career, the entangling nature of the endorsement system is largely, if not wholly, alleviated.

Finally, by opening the chaplaincy up to a greater variety of faiths, in particular those that – like Wicca – resist central organization, the military will better achieve the express goal of its
chaplain program: to provide for the free exercise of religion within one of the most pluralistic congregations in the world. As demonstrated by the example of the Fort Hood accommodation of Wiccans in the late 1990s, at the local level the military has proven exceptionally enlightened and willing to accommodate a wide variety of faiths and beliefs, even in the face of high-level political pressure. The Fort Hood chaplains themselves were right there alongside the Wiccans, helping them realize their goal of safe and open practice of their beliefs. The upper level leadership of the chaplaincy must be made to support the same ideals of pluralism and accommodation that their followers are already demonstrating every day.

Of course, given that the chaplaincy as a whole is such a clear, albeit necessary, establishment of religion, no alternative to the current system will be perfect. But the letter of recommendation idea is certainly preferable to the ecclesiastical endorsement system. If nothing else, were it to fail it would sharpen the issues between the chaplain candidate and the military and would create a justiciable controversy that could more easily survive judicial avoidance doctrines.

Thus, for all these reasons, the endorsement system is not the least restrictive means of achieving the government’s compelling interest. While Congress might be able to override a ruling based on RFRA by exempting the chaplaincy statutes, at the very least a court ruling prior to such exemption would send a clear signal to Congress and the military that there are better ways to achieve their goals than through the seriously flawed endorsement system. The letter of recommendation idea is just one reasonable alternative to the endorsement system and while not perfect is certainly less restrictive and far less problematic.

V. Conclusion

Given its long tradition, its implication of strong military interests, and its
necessity for guaranteeing free exercise of religion, the chaplaincy program is probably a necessary accommodation of church and state, despite its very real “establishment” of government religion through millions of dollars of expenditures on personnel and facilities. The military chaplaincy is interwoven into the very fabric of our society and chaplains are some of the best and most heroic this country has to offer. Every day they are faced with reconciling very real and difficult conflicts, both of their own conscience and those that occur as government and religion are brought into real conflict.

Given the very important justifications for the chaplaincy and the very difficult position into which we place our chaplains, it is vital that we ensure that they are selected so that the pluralistic needs of the military are properly addressed and so that we administer this clear establishment of religion in the most constitutionally permissible manner. The current endorsement system roundly fails to meet this objective and even as the Court has loosened its jurisprudence on both establishment and free exercise issues, the legal tools for challenging this endorsement system are adequate to the task. We must maintain fidelity to the constitutional principles that the military and its chaplains are charged to protect and the military must take note of the flaws in its endorsement system and work to correct them. We owe this to our chaplains, we owe it to sincere and hardworking people like Don Larsen who want to serve our troops, and most of all we owe it to the soldiers, sailors, airmen and Marines who place themselves in harm’s way on our behalf.