Justice, Justice Shall You Pursue:[1] Legal Analysis of Religion Issues in the Army

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Introduction

Religious practice in the Army raises highly charged and occasionally newsworthy legal and leadership issues. A judge advocate can expect to grapple with varied questions involving religion. Consider the following:

> A female Muslim soldier in the finance office wants to wear a khimar, the traditional Islamic head scarf, during duty hours.
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> A company commander protests her battalion commander's initiation of staff meetings with a sectarian Christian prayer. Each meeting the prayers seem to get longer and more "religious." At the last meeting the battalion commander suggested that the company commanders "might want to attend his church on Sundays."
>
> A Jewish soldier gripes about the installation holiday display, located on the parade grounds, because it only contains a crèche scene and not a menorah or other winter season decorations.
>
> A soldier complains that his roommate "keeps preaching at me and asking me to convert and attend church and save my soul, and all that stuff." Other soldiers in the same squad are grumbling about the evangelizing soldier.

These real life scenarios implicate both legal and leadership concerns. A judge advocate must understand the legal consequences of these scenarios to advise commanders competently. Commanders have considerable—but not unlimited—discretion in this area. Limits stem from Department of the Army (DA) and Department of Defense (DOD) regulations, congressional statutes, and case law.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] Analyzing a military "religion" issue is a complex task. First, the two constitutional religion clauses yield two very different types of "religion" issues—the government improperly establishing religion and the government preventing an individual's free exercise of religion. The first clause, the Establishment Clause, forbids the creation of a state church or state religion.[3] In addition, this clause normally bars the government from actively supporting or sponsoring religion. The Free Exercise Clause prevents government from unduly interfering with an individual's practice of religion.[4]

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1. *Deuteronomy* 16:20.

2. U.S. Const. amend. I.

3. *See infra* notes 9-13 and accompanying text.

In the last five years, the Supreme Court has decided six cases that focus, at least in part, on the Establishment Clause. *See* Agostini v. Felton, 521 U.S. 203 (1997) (upholding a program in which federally funded government employees provided remedial instruction to disadvantaged children on sectarian school grounds, if it is provided on a neutral basis); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (holding that when a state school funds various student publications, the denial of funds to a student newspaper, solely on grounds of the newspaper's religious message, violates free speech; providing funds does not violate the Establishment Clause); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (holding that a private, unattended display of a religious symbol, in this case a Ku Klux Klan Cross, in a public forum, does not violate the Establishment Clause); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (holding that the creation of a special school district on religious grounds violated the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause does not prevent state government from furnishing a disabled child enrolled in a sectarian school with a sign-language interpreter in order to facilitate his education when the government neutrally provides benefits to a broad class of citizens); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (allowing access to a school premises for presentation of all views about family issues and child rearing except those from a religious standpoint is an unconstitutional violation of free speech; church film series about family rearing in the school, after normal school hours, would not violate the Establishment Clause).

In addition, there are other modern cases that have dealt with the Establishment Clause. *See*, *e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (finding that a nonsectarian prayer offered by a school selected clergyman at a middle school graduation ceremony is unconstitutional); Allegheny v. ACLU, 492 U.S. 573 (1989) and Lynch v. Donnelly, 465 U.S. 668 (1984) (both examining crèche displays under the Establishment Clause); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the practice of opening sessions of the Nebraska State Legislature with a prayer); Lemon v. Kurtzman, 403 U.S. 602 (1971) (deciding three cases involving state support of church affiliated nonpublic schools; set forth three-prong test for impermissible establishment of religion).

The constitutional contours of the two clauses are imprecise and in flux. The Supreme Court has not developed bright line rules in either area.[5]

Tension between the two constitutional clauses further muddies the waters. The military chaplaincy is an example of this tension.[6] In the abstract, direct government funding of clergymen and religious programs would violate the Establishment Clause. The absence of military chaplains, however, would deprive service members of the right to freely exercise religion. Resolving this tension requires balancing the two clauses.[7] In some situations the exercise of religion may implicate the two religion clauses and freedom of speech.[8]

Finally, in all areas of constitutional jurisprudence, the United States Supreme Court urges deference to Congress and the military in military matters;[9] religion is no exception. Particularly in the free exercise area, the judiciary takes a hands-off approach. Thus, legal questions that involve religion in the military focus on statutes and regulations, rather than constitutional theory. For the most part, statutory and regulatory certainties have trumped constitutional nuances. Frequently, a judge advocate need look no further than Army regulations to determine what is permissible.

This article will discuss three types of "religion in the military" problems: limits on the government establishing religion, the limited need to accommodate soldiers' free exercise of religion, and "hybrid" cases—expressions of religion which implicate the Establishment Clause, the Free Exercise Clause, and free speech concerns. Each subsection will explore relevant case law, statutes, and regulations. In the final section, the article will provide a method for analyzing "real-world" religion questions.

The Establishment Clause

Establishment Clause Case Law

In the civilian world:

> [T]he 'establishment of religion' clause of the First Amendment 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 to or to remain away from church against his will. . . . No person can be punished . . . for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions.[10]

4. The leading modern Supreme Court Free Exercise Clause cases include: Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (finding that a city ordinance that prohibits ritual animal sacrifices discriminated against religion and was unconstitutional); Oregon v. Smith, 494 U.S. 872, 879 (1990) (affirming a state refusal to grant unemployment benefits to two native Americans who were fired for ingesting peyote as part of religious ceremonies); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest); Sherbert v. Verner, 374 U.S. 398 (1963) (denying unemployment compensation for a Seventh Day Adventist who would not accept work on Saturday violated Free Exercise Clause, even though state officials concluded she refused to seek alternative suitable employment).

The Religious Freedom Restoration Act (RFRA) was Congress' reaction to *Oregon v. Smith.* The RFRA stated that any law that substantially burdened a person's exercise of religion was valid only if the law served a compelling state interest and it was the least restrictive means of accomplishing that interest. The Supreme Court, however, held that the RFRA was unconstitutional because it exceeded Congress' legislative powers. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

5. For example, in *Rosenberger*, Justice O'Connor, concurring wrote: "Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging(sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

Justice Thomas, also concurring in *Rosenberger*, wrote "though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus. . . ." *Id.* at 861 (Thomas, J., concurring).

Additionally, each of the Court's recent decisions has produced numerous opinions, making it difficult, if not impossible, to discern a single line of reasoning.

6. *See infra* notes 18-29 and accompanying text. *See also* Julie B. Kaplan, Note, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210 (1986); William T. Cavanaugh, Jr., Note, *The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society?*, 59 NOTRE DAME L. REV. 181 (1983).

7. *See infra* notes 18-29 and accompanying text.

8. *See infra* notes 107-113 and accompanying text.

9. *See*, *e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (discussing the free exercise of religion, *see infra* notes 58-64 and accompanying text); Rostker v. Goldberg, 453 U.S. 57 (1981) (discussing equal protection; the court held that the male only draft was constitutional, the court used a lesser scrutiny test than in non-military gender discrimination cases); Brown v. Glines, 444 U.S. 348 (1980) (upholding an Air Force regulation over a free speech challenge, that required prior approval by a commander before an airmen could circulate petitions); Parker v. Levy, 417 U.S. 733, 743 (1974) (upholding the court-martial conviction, against vagueness and overbreadth challenges, of an Army Captain who made public statements opposing the Vietnam War and urged others not to go to Vietnam; the Court categorized the military as a "specialized society separate from civilian society"); Korematsu v. United States, 323 U.S. 214 (1944) (condoning internment of Americans of Japanese descent based on military needs).

As the above extract from *Everson v. Board of Education of Ewing Township* shows, the Establishment Clause imposes several apparently absolute standards. But translating those standards into a legal test that draws clear lines separating permissible from impermissible government conduct has proven difficult.[11] The three-prong test that was set forth in 1971 in *Lemon v. Kurtzman*[12] is the Supreme Court's only enduring attempt[13] to develop a single standard to determine whether a government action impermissibly establishes religion. Under *Lemon*, a government statute or program "respecting" religion is constitutional if it has a secular legislative purpose, its principal effect neither advances nor inhibits religion, and it does not foster excessive governmental entanglement with religion.[14]

Two circuit court cases set the parameters for Establishment Clause jurisprudence as applied to the military. In *Katcoff v. Marsh*,[15] the Second Circuit held that the existence of the Army chaplaincy did not violate the Establishment Clause. Thus, even though the government funds and sponsors religion, the chaplaincy does not unconstitutionally establish religion in the military. On the other hand, soldiers cannot be forced to attend religious services. In *Anderson v. Laird*,[16] the Circuit Court for the District of Columbia decided that not even the military educational atmosphere of the military academies justified mandatory chapel attendance.

In light of the constitutional mandate that "Congress shall make no law respecting an establishment of religion,"[17] what justifies government-sponsored, taxpayer-financed religion in the Army? In *Katcoff v. Marsh*,[18] two Harvard law students challenged the Army chaplaincy's existence.[19] The plaintiffs alleged that government financing of the chaplaincy program violated the Establishment Clause of the Constitution.[20] The Second Circuit readily admitted that when "viewed in isolation" the chaplaincy program would violate the *Lemon* test.[21] The Establishment Clause, however, must be "interpreted to accommodate other equally valid provisions of the Constitution, including the Free Exercise Clause [and Congress' War Power Clauses] when they are implicated."[22]

The best defense of the chaplaincy, and of any religious program in the military, is that it preserves a soldier's right to freely exercise his religion. In the absence of government funded chaplains, soldiers would be stymied from practicing religion in situations made necessary by military service. The Free Exercise Clause "obligates Congress, upon creating an Army, to

10. Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 15-16 (1946).

11. *See supra* note 5.

12. 403 U.S. 602 (1971).

13. Although scholars and Justices frequently criticize the *Lemon* test, it has not been overruled. In several cases, the Supreme Court has simply ignored *Lemon*. *See*, *e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983).

As recently as 1997, however, the Supreme Court of Washington applied the *Lemon* test. Defending its decision to use *Lemon*, the court wrote:

> The Supreme Court has indeed declined to apply the *Lemon* test in recent cases; however, it has not overruled *Lemon*. . . . We hold that until the Supreme Court abandons the *Lemon* test, it shall apply to Establishment Clause issues under the First Amendment. Our continued adherence to the *Lemon* test conforms to every circuit court and every state supreme court case directly involving the Establishment Clause during the last two years.

Malyon v. Pierce County, 935 P.2d 1272, 1286 (Wash. 1997).

The *Malyon* court cited numerous recent cases that applied *Lemon*. *Id.* at n.46.

14. *Lemon*, 403 U.S. at 612.

15. 755 F.2d 223 (2d Cir. 1985).

16. 466 F.2d 283 (D.C. Cir. 1972).

17. U.S. Const. amend. I.

18. 755 F.2d 223 (2d Cir. 1985).

19. *Id.* at 229. The plaintiffs sought an "alternative chaplaincy program which [was] privately funded and controlled." *Id.*

20. *Id.* at 223.

21. *Id.* at 231-32.

22. *Id.* at 233. In addition, the "historical background" of the chaplaincy must be considered if it "sheds light on the purpose of the Framers of the Constitution." *Id.* at 232.

make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them."[23] Further, the Army needs chaplains to accompany soldiers to places where civilian clergy do not go—field training exercises and actual combat.[24] Conceivably, if the Army did not have chaplains it would be violating both the Establishment Clause and the Free Exercise Clause by *inhibiting* religion. Thus, the Free Exercise Clause carves out a limited exception to the Establishment Clause prohibition. In *dicta*, two Supreme Court Justices have endorsed this rationale for a military chaplaincy.[25]

Katcoff also gave great weight to Congress' authority under Article I, Section 8 of the Constitution to "raise and support Armies" and "make Rules for the Government and Regulation of the land and naval forces."[26] The court stopped short of holding that military regulations are "immune from judicial review," but repeated the oft-quoted Supreme Court language that defers to the military: "Judges are not given the task of running the Army . . . the military constitutes a specialized community governed by a separate discipline from that of the civilian."[27] The Second Circuit deferred to Congress' and the Army's judgment that if chaplains were not made available to troops, "the motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened accordingly."[28]

Katcoff justified the military chaplaincy as an institution.[29] A separate analysis, however, applies to individual religious activities in the military. First, military religious activities must be voluntarily attended. In *Anderson v. Laird*,[30] cadets and midshipmen from the three major service academies brought a class action suit challenging regulations requiring attendance at Prot-

23. *Id.* at 233.

This argument dates at least back to 1850. *See* Kurt T. Lash, *The Second Adoption of The Establishment Clause: The Rise of The Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1096-97 n.45 (1995).

24. *Katcoff*, 755 F.2d at 228. "The problem of meeting the religious needs of Army personnel is compounded by the mobile, deployable nature of our armed forces, who must be ready on extremely short notice to be transported from bases . . . to distant parts of the world for combat duty." *Id.*

25. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). In a concurring opinion, Justice Brennan wrote:

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provision for churches and chaplains at military establishments for those in the armed services may afford one such example. . . . It is argued such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces . . . those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires.

Id. at 296-98 (Brennan, J., concurring). Similar views were expressed by Justice Stewart in the dissenting opinion.

> Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.

Id. at 308-09 (Stewart, J., dissenting).

26. U.S. CONST. art. I, § 8, cls. 12, 14.

27. Katcoff v. Marsh, 755 F.2d 223, 233-34 (2d Cir. 1985). The Second Circuit stated that the:

> [R]esponsibility for determining how best our Armed Forces shall attend to [the] business [of fighting or being ready to fight wars should the occasion arise] rests with Congress . . . and with the President. . . . while 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.

Id.

28. *Id.* at 227. In addition, the historical legacy of the chaplaincy supported the *Katcoff* decision. Military chaplains pre-date the Constitution. "Upon adoption of the Constitution . . . Congress authorized the appointment of a commissioned Army chaplain." *Id.* at 225. The chaplaincy has grown with the military. Thus, it appears that the Framers did not believe that a military chaplaincy violated the Bill of Rights. *Id.*

29. A majority of the court in *Katcoff*, however, had reservations about certain activities of the chaplaincy. Two of the three judges questioned whether the unique nature of military service justified providing a military chaplaincy in "large urban centers, such as the Pentagon in Washington, D.C." or to "retired military personnel and their families." The court remanded the case to the District Court for the Army to make a "showing that [such programs] are relevant to and reasonably necessary for the conduct of our national defense." *Katcoff*, 755 F.2d at 238.

Since the plaintiffs did not pursue the remand, questions about the chaplaincy's "fringe activities" remain unanswered. Fearing that another judicial loss would obligate the plaintiffs to pay the government's legal costs, the plaintiffs opted not to pursue the suit. *See* ISRAEL DRAZIN & CECIL B. CURREY, FOR GOD AND COUNTRY 203-05 (1995).

estant, Catholic, or Jewish chapel services on Sundays.[31] In separate opinions, two of the three judges held that mandatory chapel attendance violated the Establishment Clause.[32]

Chief Judge Bazelon wrote: the Establishment Clause "was written to abolish certain forms of governmental regulation of religion in order to protect absolutely the core values of religious liberty. Attendance at religious exercises is an activity which under the Establishment Clause a government may *never* compel."[33] Judge Bazelon paid little heed to "military necessity" or "deference to the military." Since the prohibition against compulsory church attendance was absolute, he did not "balance" the constitutional infringement against the perceived needs of the military.[34]

Judge Leventhal, concurring in the judgment, considered military exigency, but found that "the government simply has not made the required showing that its interference with religious freedom is compelled by, and goes no further than what is compelled by, the effective training of military officers needed for survival."[35] One judge dissented.[36]

Judge Bazelon's opinion suggests that military members can never be compelled to attend a religious service. His opinion would have a significant impact if "service" encompassed any "religious prayer," since mandatory non-religious ceremonies frequently begin or end with a prayer. Judge Leventhal's opinion, however, suggests a case-by-case balancing of military exigency against Establishment Clause concerns. The Supreme Court has never ruled on this issue.

30. 466 F.2d 283 (D.C. Cir. 1972).

31. *Id.* at 284.

32. The decision included a three sentence *per curiam* opinion, followed by lengthy separate opinions by each of the three judges.

33. *Anderson*, 466 F.2d at 285 (emphasis added).

34. Judge Bazelon wrote that, "secular interests may never justify governmental imposition of church attendance." *Id.* at 294. "[a]lthough free exercise rights may have to bend to military exigencies, I would again emphasize that this is not authority for the military to impose religious exercise on its members." *Id.* at 294 n.70.

In addition, Judge Bazelon found that mandatory chapel attendance violated the Free Exercise Clause: "In this case, rather than conflicting, the two Clauses complement each other and dictate the same result. Abolition of the attendance requirements enhances rather than violates the free exercise rights of cadets and midshipmen." *Id.* at 290.

35. *Id.* at 303 (Leventhal, J., concurring).

36. Judge MacKinnon's dissent rested primarily on "the constitutionally recognized power of the armed services to train the necessary personnel to adequately defend the nation." *Id.* at 307 (MacKinnon, J., dissenting).

Statutory and Regulatory Establishment of Religion

Today's Army chaplaincy has statutory[37] and regulatory[38] bases. Federal law, however, prescribes only a few of a chaplain's duties.[39] Army Regulation (AR) 165-1 defines and supplements the chaplain's statutory duties.[40] The regulation reflects the constitutional justification for establishing religious programs—to vindicate soldiers' rights to freely exercise religion[41]—but explicitly recognizes the constitutional tension between the religion clauses as applied to the military:

> In striking a balance between the "establishment" and "free exercise" clauses, the Army chaplaincy, in providing religious services and ministries to the command, is an instrument of the U.S. government to ensure that soldier's religious "free exercise" rights are protected. At the same time, chaplains are trained to avoid even the appearance of any establishment of religion.[42]

Military religious leaders should respond to a soldier's desire to practice religion, but should not take coercive steps to initiate religious feeling in non-believers.

Anderson v. Laird's voluntariness requirement was not lost on the regulation's drafters: "Participation in religious services by Army personnel is strictly voluntary."[43] Religious activities, however, are a bona fide part of the military mission. Therefore, "personnel may be required to provide logistic support before, during or after worship services or religious programs."[44] *Army Regulation 165-1* balances the voluntariness requirement with the tradition of including a prayer at military ceremonies: "Military and patriotic ceremonies may require a chaplain to provide an invocation, reading, prayer, or benediction. Such occasions are not considered to be religious services."[45] In other words, including an invocation at a mandatory ceremony does not run afoul of the Establishment Clause.[46]

The regulation reflects the prohibition on "preferring one religion" over another[47] and charges commanders with support-

37. 10 U.S.C.A. § 3073 provides that:

> There are chaplains in the Army. The Chaplains include—
> (1) the Chief of Chaplains;
> (2) commissioned officers of the Regular Army appointed as chaplains; and,
> (3) other officers of the Army appointed as chaplains in the Army.

10 U.S.C.A. § 3073 (West 1998.).

By statute a "chaplain has rank without command." *Id.* § 3581. The significance of this provision is discussed briefly *infra* notes 126-127 and accompanying text.

38. *See infra* notes 40-51 and accompanying text.

39. "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." 10 U.S.C.A. § 3547(a).

Chaplains do not accomplish their religious mission alone. Federal statute mandates command support: "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.* § 3547(b).

Another provision establishes the chaplains as a "special branch" to which regular army officers may be appointed, but not assigned. *Id.* § 3064. *See id.* § 3036 (discussing the appointment and duties of the Chief of Chaplains).

40. U.S. Dep't of Army, Reg. 165-1, Chaplain Activities in the United States Army (27 Mar. 98) [hereinafter AR 165-1]. "The duties of chaplains beyond those specifically mandated by statute are derived duties assigned by the Army." *Id.* para. 1.4b.

41. Commanders will "[s]upport the free exercise of religion for all Army personnel." *Id.* para. 1-16c. "Each chaplain will minister to the personnel of the unit and facilitate the "free-exercise" rights of all personnel." *Id*. para. 4.4b.

42. *Id.* para. 1-4c.

43. *Id.* para. 3-2a.

44. *Id.*

45. *Id.* para. 4-4h.

46. *See infra* notes 134-135 and accompanying text.

47. "The Army recognizes that religion is constitutionally protected and does not favor one form of religious expression over another. Accordingly, all religious denominations are viewed as distinctive faith groups and all soldiers are entitled to chaplain services and support." AR 165-1, *supra* note 40, para. 3-3a.

ing the "free exercise of religion for *all* Army personnel."[48] At the same time, "scheduling priority will be given to worship services conducted by chaplains and services that minister to the largest number of soldiers and family members."[49] The inference is while all religions should receive support, numbers count. Heavily represented faith groups can expect greater access to facilities. The same approach should be taken when approaching the question of religious displays.[50]

Neither the "voluntariness" requirement nor the "no preference" mandate prevented the drafters from authorizing chaplains to conduct a wide range of religious activities. The regulation charges the Chief of Chaplains with providing "comprehensive religious support."[51] In essence, the regulation authorizes chaplains to provide religious programs akin to those provided at a civilian congregation.[52] Further, the chaplain is the "principal staff officer" for the Army's far-reaching Moral Leadership Training Program.[53]

Establishing Religion in the Army—Concluding Comments

Religion is firmly established in the Army. The chaplaincy and many of the religious programs that flow from the chaplaincy have deep historical roots. The military chaplaincy has been validated legally. The Second Circuit's reasoning in *Katcoff* is sound. The dual rationale undergirding the chaplaincy—

48. AR 165-1, *supra* note 40, para. 1-16c (emphasis added). The regulation also provides, "all religious denominations are viewed as distinctive faith groups and all soldiers are entitled to chaplain services and support." *Id*. para. 3.3a. Also, the regulation states: "[E]ach chaplain will minister to the personnel of the unit and facilitate the "free-exercise" rights of all personnel, regardless of religious affiliation of either the chaplain or the unit member." *Id*. para. 4.4b.

49. *Id.* para. 3-3b.

In addition, the rationales supporting government funding of religion only apply to programs directed at military members and their families. Providing chaplain support directly to members of the public would violate the core of the Establishment Clause. Hence, *AR 165-1* provides: Religious services conducted in military chapels and facilities are primarily for military personnel and authorized civilians. The Army is not required to provide religious support to non-DOD authorized personnel; however, military worship services are generally open to the public. *Id.* para. 3-3c.

50. *See infra* notes 130-131 and accompanying text.

51. AR 165-1, *supra* note 40, para. 1-5a.

52. The regulation broadly authorizes chaplains to "provide for religious support, pastoral care, and the moral and ethical well-being of the command." *Id*. para. 4.4a.

Specifically, the regulation requires chaplains to:

[C]ontribute to the spiritual well-being of soldiers and families of the command by:

(1) Developing a pastoral relationship with members of the command by:
(a) Taking part in command activities.
(b) Conducting programs for the moral, spiritual, and social development of soldiers and their families.
(c) Visiting soldiers during duty and off-duty hours.
(d) Calling on families in their homes, as appropriate.
(2) Being available to all individuals, families, and the command for pastoral activities and spiritual assistance.
(3) Contributing to the enrichment of marriage and family living by assisting in resolving family difficulties.
(4) Providing pastoral counseling in CFLC and through family life ministry.
(5) Participating in family advocacy, health promotion, and exceptional family member programs.
(6) Supporting sick and injured soldiers and their families through hospital and home visitations, pastoral counseling, religious ministrations, and other spiritual aid and assistance.
(7) Contributing to the rehabilitation of persons in confinement through worship services and pastoral activities, and by cooperating with other members of the staff and interested boards and committees.

Id. para. 4.4l.

In their roles as staff officers, chaplains "will advise the commander and staff on matters of religion, morals, and morale," to include—

(1) The religious needs of assigned personnel.

(2) The spiritual, ethical, and moral health of the command, to include the humanitarian aspects of command policies, leadership practices, and management systems.

(3) Plans and programs related to the moral and ethical quality of leadership, the care of people, religion, chaplain and chaplain assistant personnel matters and related funding issues within the command.

Id. para. 4-5a.

A chaplain's role differs from a congregational clergyperson in that a chaplain ministers to the needs of soldiers from various faith groups. "Each chaplain will minister to the personnel of the unit . . . regardless of religious affiliation of either the chaplain or the unit member." *Id*. para. 4.4a.

effectuating soldiers' free exercise rights and deference to Congress—is unassailable. The Supreme Court has blessed the chaplaincy in *dicta* and has continued to show deference to the military in various contexts. Nonetheless, the Establishment Clause has not been completely read out of the military. Soldiers must be free to exercise their right to practice religion, but should not come under pressure to do so. The line between making religion available (a protected activity) and "pushing" religion on an unsuspecting soldier (prohibited) is not always self-evident, and deserves further consideration in the analysis section.

Free Exercise Clause—Accommodating Religious Practice in the Military

The Army, as a cross-section of America, is composed of soldiers with diverse religious beliefs and practices. At times, religious practice interferes with the military mission. Conflicts typically arise in the context of time off for worship, wear of religious apparel and jewelry, and religious dietary restrictions. In the civilian world, courts have frequently been called upon to vindicate an individual's right to exercise religion in the face of government interference.[54] The judiciary, however, has provided little relief for military members who seek to exercise their religion against command opposition.[55] Instead, military members must look to statutes and regulations that protect religious practice.

Free Exercise of Religion Case Law

Goldman v. Weinberger is a landmark constitutional case concerning the free exercise of religion in the military. Captain Goldman, an orthodox Jew serving in the Air Force as a clinical psychologist, routinely wore a yarmulke while in uniform. Pursuant to an Air Force regulation, Captain Goldman's hospital commander ordered him to remove the yarmulke while indoors.[56] Goldman refused to obey this order. The next day he received a letter of reprimand and was warned that he could be court-martialed for further disobedience. Captain Goldman sued to enjoin the Secretary of Defense and others from enforcing the regulation.[57] He argued the regulation interfered with the free exercise of his First Amendment rights.[58] In a five to four decision, the Supreme Court rejected Captain Goldman's constitutional challenge.

The majority opinion first emphasized the deferential standard of review of military regulations:

> [W]e have repeatedly held that "the military is, by necessity, a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743 (1974). . . . Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.[59]

53. *Id*. para. 11-1a. *See id*. ch. 11 (describing the Moral Leadership Training Program). Chaplain proponency of this program suggests that a religious approach will be taken to "the full spectrum of moral concerns of the profession of arms and the conduct of war." *Id*. para 11.1a. The "Range of Topics" for the Program is staggering:

> a. The moral dimensions of decision making; b. Personal responsibility; c. Personal integrity; d. Family relationships and responsibilities; e. Drug/alcohol abuse and personal morality; f. Trust and morality in team development; g. Human relationships and moral responsibility; h. Moral dimensions of actions in combat and crisis; i. America's moral/religious heritage; j. Safety and its moral implications; k. Suicide prevention training; l. Sexual harassment prevention training; m. Consideration of others; n. Social, organizational, and individual values; o. Reaction to combat-fatigue, fear, fighting, and surviving; p. Loss, separation, disappointment, illness, and death; q. AIDS, as a medical, social, and moral problem.

Id. para. 11-5

54. *See supra* note 4 and the cases cited therein.

55. *See*, *e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986). *See infra* notes 56-64 and accompanying text (discussing *Goldman*).

56. *Id.* at 504. The order followed Captain Goldman's testimony as a defense witness at a court-martial. Justice Stevens' concurring opinion notes the retaliatory nature of the proceedings against Captain Goldman. *Id.* at 511 (Stevens, J., concurring).

57. *Id.* at 505-06.

58. *Id.* at 506. The district court agreed with Goldman. The Circuit Court of Appeals for the District of Columbia reversed. The Supreme Court granted review. *Id.*

59. *Id.* (most citations and original footnotes omitted).

The Court cited a familiar litany of cases that justified deference to Congress and the military in military matters. For example, "[Judicial] deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Id.* at 508 (citing Rostker v. Godlberg, 453 U.S. 57, 70 (1981)).

Thus, civilian religion jurisprudence had little precedential value on the military.

The Court endorsed the "professional judgment" of the Air Force that the uniform "encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank."[60] The Court did not question the merit of the Air Force's uniform regulation. Rather, the Court was satisfied that the Air Force rules "reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity."[61]

A three-Justice concurrence[62] emphasized the need for uniform treatment of different religious traditions. The three justices reasoned that a contrary result in this case, might open the door to permitting a Sikh to wear a turban or a Rastafarian to wear dreadlocks.[63] The Air Force's neutral and objective rule—"visibility"—passed constitutional muster.[64] Four judges dissented.[65]

Goldman is the only Supreme Court precedent that directly addresses the need for the military to accommodate religion. *Goldman* gives the military unfettered discretion to restrict religious practice, at least by a military member. The Court, in deference to Congress and the military, will accept any rational argument that the needs of morale, discipline, or uniformity trump a service member's desire to practice religion.

In *Hartmann v. Stone,*[66] the Second Circuit may have discovered a boundary beyond which the military cannot restrict free exercise rights. In *Hartmann*, the court found that a regulation that prohibited Army Family Child Care (FCC) providers from conducting any religious activities during FCC day care was unconstitutional.[67] In *Hartmann*, the plaintiffs were civilian child care providers who were family members of soldiers. The plaintiffs alleged that the restriction violated their First Amendment rights to freely exercise religion and to free speech.[68] The court found that the rule discriminated against religion. "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[69] The Army asserted that avoiding an Establishment Clause violation was a compelling interest.[70] In addition, the Army played its "final trump card"[71]—deference to the military. The military necessity argument did not work. Significantly, the day care providers who

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60. *Goldman*, 475 U.S. at 508.

61. *Id.* at 510.

62. *See id*. at 510-13 (Stevens J., White, J., and Powell J., concurring).

63. *Id.* at 512.

64. *Id.* at 513.

65. Justice Brennan, joined by Justice Marshall, wrote a spirited dissent. *Id.* at 513 (Brennan, J., dissenting). Justice Brennan accused the majority of "evading its responsibility" for "judicial review of military regulations." *Id.* According to Brennan, the majority adopted a "subrational" basis standard of review. Brennan asserted that the military offered no evidence or a "credible explanation of how the contested practice is likely to interfere" with the Air Force's interest in discipline and uniformity. *Id.* at 516 (Brennan, J., dissenting).

A dissent by Justice O'Connor, joined by Justice Marshall, sought to apply a two prong "test" to military free exercise issues. First, when the government denies a free exercise claim, it must show that an unusually important interest is at stake. *Id.* at 530 (O'Connor, J., dissenting). Justice O'Connor agreed with the majority that the need for "military discipline and esprit de corps" is an especially important governmental interest. *Id.* at 531 (O'Connor, J., dissenting). Second, the government must show that granting a requested exemption would do substantial harm to the government's interests. *Id.* at 530 (O'Connor, J., dissenting). Justice O'Connor, echoing Justice Brennan, found that the government presented "no sufficiently convincing proof in this case to support an assertion that granting an exemption of the type requested here would do substantial harm to military discipline and esprit de corps." *Id.* at 532 (O'Connor, J., dissenting).

66. 68 F.3d 973 (6th Cir. 1995).

67. The regulation at issue stated: "The dissemination of religious information (e.g., grace) or materials is prohibited as well as providing program activities that teach or promote religious doctrine. (Programs operated by chaplains are exempted from this restriction.)" U.S. Dep't of Army, Reg. 608-10, Personal Affairs: Child Development Services, para. 1-8 (12 Feb. 1990) [hereinafter AR 608-10] *cited in Hartmann*, 68 F.3d at 977.

Further, the regulation contains a "compliance item" which states: "Religious materials or activities specifically designed to teach or promote religious doctrine are not permitted . . . does not permit Bible stories, pictures, prayers including grace at meals." AR 608-10, *supra*, app. C-10, *cited in Hartmann*, 68 F.3d at 977.

68. *Hartmann*, 68 F.3d at 975. The plaintiffs also alleged that the regulation violated their "Fifth Amendment rights to Equal Protection and 'Parental Liberty.'" *Id.* at 978.

69. *Id.* at 979. In distinguishing the two cases, the court noted that *Goldman* dealt with a *neutral* law which incidentally burdened religion. The *Hartmann* regulation explicitly banned religious practice. *Id*. at 985.

70. *See infra* notes 107-113 and accompanying text (discussing the Establishment Clause aspect of this case in the section concerning "hybrid" issues).

were denied the exercise of religious practices *in their own homes* were civilians.[72] Therefore, the restrictions violated the First Amendment.

Hartmann is extraordinary because it vindicates the First Amendment in the face of the "military necessity" argument. Thus, the case may set a distant outer limit on the "deference to the military" argument in the area of religion. On the other hand, since the religious practitioners in *Hartmann* were not military members, *Hartmann* may have little impact on the lives of service members.[73] Since courts pay great deference to Congress and the military in matters of religious practice, soldiers should look to applicable statutes and regulations to determine their rights to religious freedom.

Statutory and Regulatory Right to Free Exercise of Religion

Federal Statute

Less than two years after *Goldman*, Congress directed that members of the armed forces be allowed to wear "neat and conservative" items of religious apparel while wearing their uniforms.[74] The statute left the details up to the "secretary concerned."[75] The conference report directed the DOD to issue implementing regulations that define "neat and conservative."[76]

The Department of Defense Directive

The DOD implementing directive[77] is not limited to the religious apparel question, but embraces the full range of religious accommodation issues. According to the DOD directive, "requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards or discipline."[78] Thus, the policy presumes accommodation, absent a mission-related reason to deny a request. The directive lays out "goals" and factors that determine whether accommodation is appropriate.[79] The Army adopted these goals in its implementing regulation, *AR 600-20*.[80]

In April 1997, the Department of Defense issued additional interim guidance on the sacramental use of peyote.[81] Native American service members may use, possess, or transport peyote for bona fide traditional religious ceremonial purposes. Peyote use is subject to reasonable limitations to promote military readiness, safety, or to comply with applicable law.[82]

Army Regulation

The Army regulates religious accommodation in two publications: *AR 600-20*,[83] and *Department of the Army Pamphlet (DA Pam) 600-75*.[84] *Army Regulation 600-20* provides:

> The Army places a high value on the rights of its soldiers to observe tenets of their respective religions. It is the Army's policy to approve requests for accommodation of reli-

71. *Hartmann*, 68 F.3d at 983.

72. *Id.* at 985. Specifically, the *Hartmann* court noted:

> [T]he Army has wandered far afield. It stands not in an area where the link to its combat mission is clear, it does not even stand in an area where the link is attenuated but nonetheless discernible (sic). Instead, the link here is far more ephemeral than those found in other cases. First, and most important, it does not necessarily involve the conduct of a member of the armed forces. Instead, in setting the terms of child care for its members, it controls the conduct of people not in the Armed Forces, including spouses and children.

Id.

The concurring opinion in *Hartmann* emphasized that the Supreme Court cases which gave special deference to military regulations, "apply to regulations that directly govern military personnel and their actions. The "regulations in controversy have not been demonstrated to have any direct relationship to . . . military requirements and concerns." *Id.* at 986-87 (Wellford, J., concurring).

73. With the exception of *Korematsu v. United States*, the Supreme Court has been more likely to protect the constitutional rights of civilians from military regulations than to protect the rights of military members. *See* Korematsu v. United States, 323 U.S. 214 (1944) (deferring to military expertise and permitting the internment of American civilians of Japanese descent). *See*, *e.g.*, Reid v. Covert, 354 U.S. 1 (1957) (holding that courts-martial cannot try civilians); Duncan v. Kahanonmoku, 327 U.S. 304 (1946) (dealing with two civilians improperly tried in military tribunals during the Second World War).

74. 10 U.S.C.A. § 774(a), (b) (West 1998). *See generally* Dwight Sullivan, *The Congressional Response To Goldman v. Weinberger*, 121 MIL. L. REV. 125 (1988).

75. 10 U.S.C.A. § 774(c).

76. H.R. CONF. REP. NO. 100-446, at 638 (1987) *cited in* Sullivan, *supra* note 74, at 146-47. The report made clear, however, that "the 'nonuniform' aspect of religious apparel should not be used as the sole basis for determining if an item of religious apparel interferes with military duties except in unique circumstances, such as those involving ceremonial units." *Id.*

77. U.S. DEP'T OF DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICE (3 Feb. 1988) [hereinafter DOD DIR. 1300.17].

78. *Id.* para. C.1.

> gious practices when they will not have an adverse impact on military readiness, unit cohesion, standards, health, safety, or discipline, or otherwise interfere with the performance of the soldier's military duties. However, accommodation of a soldier's religious practices cannot be guaranteed at all times but must depend on military necessity.[85]

The emphasis on operational concerns places the issue primarily in the hands of commanders, not lawyers or chaplains.

Army Regulation 600-20 charges unit commanders with the initial decision to approve or deny requests for accommodation of religious practices.[86] In addition, the regulation introduced the Committee for the Review of the Accommodation of Religious Practices within the U.S. Army (the Committee)[87] as the final arbiter of religious accommodation issues.[88]

Army Regulation 600-20 couples brief descriptions of common types of religious practices with "considerations" to apply when determining whether these practices can be accommodated.[89] Each individual provision reflects the need to balance mission accomplishment with the desire to accommodate. Certain religious practices are more favored than others. For example, worship services "will be accommodated except when precluded by military necessity,"[90] while dietary accommodations are discussed in less mandatory language.[91] A careful review of the regulatory language may provide guidance to a commander or legal adviser on the Army's view of the need to accommodate a specific practice.[92]

The regulation addresses religious dress and appearance. Subject to temporary mission requirements, "soldiers may wear . . . religious apparel, articles, and jewelry that are not visible"

79. *Id.* para. C.2. The pertinent portions of this section include:

> a. Worship services, holy days, and Sabbath observance should be accommodated, except when precluded by military necessity.
> b. The Military Departments should include religious belief as one factor for consideration when granting separate rations, and permit commanders to authorize individuals to provide their own supplemental food rations in a field or "at sea" environment to accommodate their religious beliefs.
> c. The Military Departments should consider religious beliefs as a factor for waiver of immunizations, subject to medical risks to the unit and military requirements, such as alert status and deployment potential.
>
> . . . .
>
> f. Religious items or articles not visible or otherwise apparent may be worn with the uniform, provided they shall not interfere with the performance of the member's military duties . . . or interfere with the proper wearing of any authorized article of the uniform.
> g. Under [10 U.S.C.A. 774], members of the Armed Forces may wear visible items of religious apparel while in uniform, except under circumstances in which an item is not neat and conservative or its wearing shall interfere with the performance of the member's military duties.

Id.

80. *See infra* notes 83-99 and accompanying text.

81. Memorandum, Assistant Secretary of Defense for Force Management Policy, subject: Sacramental Use of Peyote by Native American Service Members (25 Apr. 97). Final guidance will be included in the next revision of *DOD Directive 1300.17.*

82. *Id.*

83. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 5-6 (30 Mar. 88) [hereinafter AR 600-20].

84. U.S. DEP'T OF ARMY, PAM. 600-75, ACCOMMODATING RELIGIOUS PRACTICES (22 Sept. 1993) [hereinafter DA PAM 600-75].

85. AR 600-20, *supra* note 83, para. 5-6.

86. *Id.* para. 5-6f.

87. *Id.* para. 5-6a.

88. The Committee, established by the Deputy Chief of Staff for Personnel (DCSPER), requires each level of command, through the major command commander, to deny a request before the Committee will hear the case. Interview with Major Lindsey Arnold, DCSPER Human Resources Directorate Command Policy Officer, in Charlottesville, Va. (18 Feb. 98) [hereinafter Arnold Interview]. Major Arnold is the primary staff action officer for *AR 600-20*.

By regulation, the Committee provides a recommendation to the commander. AR 600-20, *supra* note 83, para. 5-6a.(2)(b). Committee decisions are final directives. A judge advocate from the Administrative Law Division of the Office of the Judge Advocate General sits on the Committee. Arnold Interview, *supra.*

Department of the Army Pamphlet 600-75 contains the procedural workings of the Committee. DA PAM 600-75, *supra* note 84, chs. 3, 4.

89. AR 600-20, *supra* note 83 , para. 5-6h.

90. *Id.* para. 5-6h(1).

or that would be "authorized for nonreligious reasons."[93] Further, "soldiers may wear an item of religious apparel while wearing the Army uniforms, except when the item would interfere with the performance . . . duties, or when the item is not neat and conservative."[94] The regulation defines "religious apparel"[95] and "neat and conservative" items[96] and also provides factors for determining whether an item "interferes with a soldier's military duties."[97] The regulation allows commanders to prohibit any visible religious items "under unique circumstances" such as "parades, honor or color guards."[98] If the unit commander denies a request for accommodation, any commander in the chain of command "may review and grant" the accommodation. Continued denials lead to a review by the Committee.[99]

Additionally, *DA Pam 600-75*[100] adds gloss to the accommodation analysis by requiring the commander to make a sincerity determination. While "[o]nly sincere religion-based practices will receive consideration,"[101] such "practices are not limited to the mandatory tenets of a religious group," but may be "required by individual conscience or personal piety."[102]

Department of the Army Pamphlet 600-75 provides factors that "promote a standard procedure for resolving difficult questions involving accommodation of religious practices."[103] The pamphlet directs commanders to consider a temporary accommodation or an interim measure, such as alternative duties or alternative duty hours that do not conflict with the soldier's religious practices.[104] The soldier must continue to perform all duties unless he is excused by the commander.[105] Finally, administrative or punitive action may be appropriate in cases of continued conflict.[106]

Accommodating Religious Practice in the Army—Concluding Comments

91. *Id.* para. 5-6h(2). A "soldier with a conflict between the diet provided by the Army and the diet required by the soldier's religious practice may request an exception to policy to ration separately and take personal supplemental rations when in a field/combat environment." *Id.* This language clearly places the burden on the soldier and does not display a strong intent to accommodate.

92. *Id.* para. 5-6h(3). The regulation also contains detailed guidance concerning accommodation of religious medical practices. *Id.*

93. *Id.* para. 5-6h(4)(a).

94. *Id.* para. 5-6h(4)(b).

95. *Id.* para. 5-6h(4)(b)1. "Religious apparel" is defined as articles of clothing worn as part of the observance of the religious faith practiced by the soldier. *Id.*

96. *Id.* para. 5-6h(4)(b)(3). Regarding the wear of religious apparel outside of worship services, the regulation states:

> [N]eat and conservative items of religious apparel are those that are discreet in style and color; do not replace or interfere with the proper wearing of any prescribed article of the uniform; and are not temporarily or permanently affixed or appended to any prescribed article of the uniform.

Id.

97. *Id.* para. 5-6h(4)(b)5. The regulation states:

> Factors in determining whether an item of religious apparel interferes with military duties include, but are not limited to, whether an item may impair the safe and effective operation of weapons, military equipment, or machinery; pose a health or safety hazard to the wearer or others; interfere with the wearing or proper functioning of special or protective clothing or equipment . . .; or otherwise impair the accomplishment of the military mission.

Id.

98. *Id.* para. 5-6h(4)(b)6.

99. *Id.* para. 5-6h(4)(b)7. Soldiers must comply with a commander's prohibition while review is pending. *Id.* para. 5-6h(4)(b)8.

100. DA Pam 600-75, *supra* note 84, para. 1-5 (providing additional guidance in implementing the Army accommodation policy).

101. *Id.* para. 4-1a.

102. *Id.* para. 4-1b. Conscientious objection regulations and case law can shed light on the meaning of a "sincere, religion-based" request. To qualify as a conscientious objector, beliefs need not conform to a traditional view of "religion." Welsh v. United States, 398 U.S. 333, 342-43 (1970). In *Welsh*, only persons whose objection to war "rest[ed] solely upon considerations of policy, pragmatism, or expediency" were not exempt. *Welsh*, 398 U.S. at 342-43.

By regulation, a conscientious objector is "a person who is sincerely opposed, because of religious or deeply held moral or ethical (not political, philosophical, or sociological) beliefs, to participating in war. . . ." U.S. Dep't of Army, Reg. 600-43, Conscientious Objection, app. D, para. 4-3 (7 Aug. 87) [hereinafter AR 600-43]. The regulation contains "relevant factors that should be considered in determining a person's claim of conscientious objection." AR 600-43, *supra*, para. 1-7a(5)(b). Further, "care must be exercised not to deny the existence of beliefs simply because those beliefs are incompatible with one's own." AR 600-43, *supra*, para. 1-7(5)(c).

For the most part, religious accommodation issues are leadership issues rather than legal ones. The regulations are settled and commanders weigh the facts of each case. Once a commander understands the basic legal premise—accommodate religious practice unless the mission requires otherwise—the commander has great latitude to make a decision. A commander should be able to cogently articulate the basis for his decision, especially a decision to deny an accommodation. A template for making and articulating this decision is contained in the analysis section.

The "Hybrid" Issue: Establishment, Free Exercise and Speech

Individual cases will often implicate both the Free Exercise Clause and the Establishment Clause. For example, an officer may believe that his religion requires him to "witness" to others. He exercises this religious obligation by placing religious quotations on his electronic mail (e-mail) correspondence. In addition, in his e-mails, he "suggests" that his subordinates should attend his church. If his subordinates feel pressure to attend, has the officer improperly "established" religion? Does his right to freely exercise his religion protect the officer? What is the role of freedom of speech in that situation? This expression of religion is a "hybrid" issue, since both religion clauses and free speech apply.

Hartmann v. Stone[107] aptly represents a "hybrid" religion issue, involving the Establishment Clause, the Free Exercise Clause, and freedom of speech concerns. *Hartmann* pitted the child care provider's free exercise and free speech rights against the Army's desire to avoid an Establishment Clause violation.[108] The Army argued that government regulatory oversight and bestowal of benefits would "involve both an advancement of religion and an entanglement with religion."[109] Although the court agreed that avoiding an Establishment Clause violation could be a compelling interest, it found that the providers were "private independent contractors" and not the "Army's alter egos."[110] The Army merely regulated their activities. Therefore, "the relationship between individual FCC providers and the program" did not create "legitimate Establishment Clause concerns."[111]

Hartmann is significant for several reasons. First, the Establishment Clause could, under the proper facts, defeat a free exercise or free speech claim.[112] Second, the free speech and free exercise rights of a civilian, even one linked to the military, are weightier than a military member's rights. Third, the government cannot make out a cogent Establishment Clause violation unless a reasonable observer would perceive that the speaker is acting on behalf of the government. The status of the speaker (in terms of rank and duty position) as well as the nature of the religious comments will be important factors in determining whether the speaker's religious expression violates the Establishment Clause.[113]

Analyzing a Religion Issue

103. DA PAM 600-75, *supra* note 84, para. 4-2. The factors are:

> (1) The importance of military requirements . . .
> (2) The religious importance of the accommodation to the requester.
> (3) The cumulative impact of repeated accommodations of a similar nature.
> (4) Alternative means available to meet the requested accommodation.
> (5) Previous treatment of . . . similar requests.

Id.

104. *Id.* para. 4-2e.

105. *Id.* para. 4-2f.

106. *Id.* para. 4-2g.

107. 68 F.3d 973 (6th Cir. 1995).

108. *Id.* at 979. The Army asserted that avoiding an Establishment Clause violation was an interest sufficiently compelling to overcome the provider's first amendment rights. *Id.*

109. *Id.* at 979-80.

110. *Id.* at 981.

111. *Id.* at 982.

112. *See also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995).

113. The care providers in *Hartmann* did not represent the government. Further, the care providers were not in a position to apply official pressure or coercion on military members to advance religion. Thus a reasonable observer would not have perceived that the providers actions constituted an official "endorsement" of religion. The appearance that the government is endorsing religion is pivotal to Justice O'Connor's view of the "effect" prong of the *Lemon* test. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

How should a judge advocate analyze a "religion" issue? First, determine which of the three types of religion issues is in question: accommodation/free exercise, establishment of religion, or a hybrid issue. In theory, completely separate analyses apply to either a "pure" free exercise or a "pure" establishment question. This section first discusses how to identify the issue, then provides suggested analyses for each of the three areas.

Identifying the Issue

If the gist of the problem is, "I have a soldier and she wants to do something or not do something because of her professed religious beliefs," this is probably a religious accommodation issue. The most common accommodation problems concern missing duty for a worship service or religious holiday, desiring special foods, or wearing certain items. If the soldier's complaint relates to expressing religious ideas (proselytizing) it may be a hybrid issue.

If a soldier complains that he is being forced to attend a religious event or participate in another person's religious practice, then the judge advocate should look to the Establishment Clause analysis. Extended prayers at ceremonial events and narrowly sectarian prayers may fall into this category. "Too much" of one particular faith group (for instance in a holiday display) should be analyzed under the establishment rubric.

A "hybrid" issue exists, for example, when a religious squad leader says, "you can't tell me to stop 'witnessing.' I have a free speech and free exercise right to discuss religion with my squad members." At the same time, one of the squad members says, "I'm tired of getting all this 'save your soul' stuff thrown at me in formation by my squad leader."

Approaching a Religious Accommodation Issue

The following is a systematic approach for resolving a religious accommodation problem:

> Resolve at the lowest possible level—presume accommodation.
>
> If immediate accommodation is not appropriate, consider interim measures.
>
> Apply the three preliminary criteria: sincerity, religion-based, impact on mission.
>
> Balancing test—"common sense plus." What type of accommodation is requested? Is there prior precedent (in the command? in the Army?). Apply the regulatory factors and other relevant factors. Analogize to non-religion scenarios.
>
> Be able to articulate your reasoning, and keep a record.

Resolve at the Lowest Possible Level—Presume Accommodation

From a leadership standpoint, the best place to resolve a free exercise of religion issue is at the unit level. A company commander, who is informed by senior noncommissioned officers, has the most insight about the soldier, the unit's mission, and the command climate. *Army Regulation 600-20* supports taking action at the lowest level, charging unit commanders with the initial decision.[114] At the initial stage, the commander should be generally aware of the considerations discussed in the succeeding subsections. Most importantly, unit commanders should be reminded that the policy is to accede to a soldier's religious practice desires unless the mission or good order and discipline would suffer. If the commander is inclined to deny the request, the commander should consult with the judge advocate, the unit chaplain, or the next higher commander. Finally, the commander should inform the soldier of the soldier's right under Army regulations to raise the issue to the next level (and all the way up to the Committee). The commander should not discourage the soldier from pursuing other lawful avenues such as the next level commander, chaplain, legal assistance, inspector general, or a congressional.

The requesting soldier should consult with a chaplain. Although the regulation does not require participation by a chaplain, the chaplain may be influential with the chain of command. Further, a soldier would be entitled to legal assistance support.[115] If a soldier considers disobeying a commander's order (despite the clear regulatory guidance that the soldier must comply), the soldier should seek legal guidance. If a soldier wishes to draft a formal request for accommodation, the soldier is also entitled to legal assistance support.

If Immediate Accommodation is not Appropriate, Consider Interim Measures

Unless accommodation would have an immediate and serious negative impact on the unit, the commander should offer an interim solution.[116] The temporary "fix" should accommodate

114. *See supra* note 86 and accompanying text.

115. *See* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6g (10 Sept. 1995). This would be a "military administrative" matter. *Id.*

116. *See supra* note 104 and accompanying text.

or partially accommodate the soldier's needs. The practical advantages of a quick fix include the appearance of (and being) fair, avoiding the discomfort of being "overruled" by one's superiors, and providing time for the commander to cool off.

For instance, a soldier requests kosher food for training exercises and deployments. At the time of the request, the unit is forty-eight hours away from a two-week field training exercise (FTX) at the local training area. Additionally, in three months the unit expects to deploy for a six-month rotation in Bosnia. The commander does not know anything about procuring special meals. An interim solution might allow the soldier to bring his own food to the FTX. If practicable, the commander could assist in the transportation and storage of the food in the field. The commander should inform the soldier that the solution is temporary and does not ensure that the request can be honored during the Bosnia deployment.

Apply the Three Preliminary Criteria: Sincerity, Religion-Based, Impact on the Mission

A soldier's request must be sincere and have a "religious" grounding. A soldier who is transparently trying to "get over" does not enjoy the protections of the religious accommodation policy. On the other hand, commanders must not doubt a soldier's credibility simply due to the unusualness of the request or of the soldier's beliefs. If the soldier held mainstream religious values, the system probably would have taken care of the problem; for example, absent exigent circumstances most soldiers do not have duty on Christmas Eve or Easter Sunday. The conscientious objection regulation may prove helpful in this area.[117]

If the soldier's request will have an impact on either the mission or on good order and discipline, then the commander can consider denying the request. The command can consider tangible effects (readiness, safety, and security) as well as command climate effects (resentment, cohesion). The need for uniformity is also a valid consideration.[118]

Balancing Test

The heart of the accommodation analysis involves balancing the needs of the mission with the desires of the soldier. *Army Regulation 600-20* provides differing "tests" for the different types of accommodation requests—clothing, food, missing duty, and medical.[119] In addition to consulting the specific subsection of *AR 600-20*,[120] the judge advocate and the commander should investigate whether prior precedent exists. The unit or installation chaplain is likely to be aware of other local cases. Similar cases should be treated similarly. In addition, although the Committee's decisions are not binding precedent on other cases, they should be considered persuasive (particularly if a Committee decision dovetails with the command's desired result). If the action reaches the division or corps level, a call to the Administrative Law Division of the Office of The Judge Advocate General may be appropriate.

If the question is one of first impression, then the commander must balance the competing interests.[121] Beyond operational considerations (safety, security, good order, and morale) that are dictated by regulation or policy, two other factors are worth considering. First, a commander should understand that a religion issue could become a public affairs nightmare.[122] Further, as with an Article 138 complaint,[123] a religious accommodation request that is denied gets high visibility. Every level of the chain of command through the major command must review a denied request before it goes to the Committee at the office of the Deputy Chief of Staff for Personnel.

In addition to weighing factors from the regulations, a commander should step back and weigh a soldier's request in the context of other sincere, but non-religious, motivations. Sports competitions provide a useful analogy. For example, Specialist *A* asks to miss two days of a field exercise for a religious holiday. Specialist *B*, a semi-professional weight lifter, asks to miss two days of the exercise to attend a once-a-year lifting competition for his weight/age class. Second Lieutenant *C*, a recent commissionee and college football star, is offered the chance to attend the Buffalo Bills' try-out camp. Whether *A*'s spiritual needs are more or less weighty than *B* and *C*'s desire for athletic glory is the commander's decision.

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117. *See supra* note 102 and accompanying text.

118. Although Congress overruled the Court's specific factual decision in *Goldman*, the Court's policy determination that "uniformity" enhances good order and discipline is still valid. The Committee puts great credence in the "uniformity" rationale. Arnold Interview, *supra* note 88.

119. *See supra* notes 90-92 and accompanying text.

120. AR 600-20, *supra* note 83, para. 5-6h.

121. AR 600-20, *supra* note 83; DA PAM 600-75, *supra* note 84.

122. *See, e.g.*, Bryant Jordan, *Going To The Chapel / Non-Christian Recruits Complain of Bias And Insensitivity*, AIR FORCE TIMES, Mar. 3, 1997, at 12 (discussing complaints of religious insensitivity on the front page of the *Air Force Times*); *Muslim Woman Fights U.S. Army over Scarf*, THE PLAIN DEALER (Cleveland, Ohio), July 23, 1996 at 2E; *Muslim Army Woman Is Charged Over Scarf*, NEWSDAY, June 7, 1996, at A36; *Muslim Soldier Charged Over Traditional Garb*, THE RECORD (Bergen County, N.J.), June 7, 1996, at A21; James Brooke, *The Military Ends Conflict of Career and Religion*, N.Y. TIMES, May 7, 1997, at A16.

123. 10 U.S.C.A. § 938 (West 1998); *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 20 (24 June 96).

Is a religious aversion to pork more or less weighty than a minor allergic reaction to pork? Which is an acceptable justification for wearing long sleeves in 100 degree heat—the religious need for modesty or the corps surgeon's warning of a one-percent chance of getting Lyme's Disease from a deer tick? That is also the commander's decision.

Be Able to Articulate Reasoning and Keep a Record

Whatever a commander decides, the commander should be able to articulate the relevant concerns. The commander should keep a record so future cases will be treated similarly. In addition, if the commander denies the request, the request will probably go up the commander's chain.

Analyzing an Establishment Clause Problem

Establishment Clause issues, however, present more of a legal challenge. No specific regulation identifies an "Establishment Clause" issue. Further, these issues do not fall into a single, discernible category. The Establishment Clause could turn on an individual incident (the commander ordered his senior noncommissioned officers to attend a prayer breakfast) or could be a policy decision (for example, every year a crèche is set up on the division headquarters lawn). These questions frequently spill over into hybrid issues (discussed in the next section). This section will address four common problem areas: Is participation in religious activities completely voluntary? Is the religious program pluralistic? Does the program support the right persons? What is the role of prayer at military ceremonies? One theme pervades each area: government funding of religion is justified by the need to vindicate soldiers' rights to exercise religion freely.

Voluntary

A soldier must not be coerced to profess a religious belief or to attend a religious event (aside from providing logistical support). Subtle coercion or indirect rewards are the problems that a judge advocate is most likely to encounter. For example, a first sergeant should not regularly give soldiers the "choice" of participating in Sunday morning clean-up details or attending church.[124] Non-belief or non-participation should not result in punishment.

Military leaders (including chaplains) should not take an overly *proactive* approach to garnering attendees for religious events. In essence, the command should be *reactive*—responding to the free exercise needs of soldiers, without pushing them into religious activities. While "mentoring" relationships are an important component of leadership, commanders must be cautious about encouraging their immediate subordinates to participate with the commander in religious events. For example, at a battalion staff meeting, the battalion commander encourages her subordinate commanders to attend her church. When two of the four company commanders attend, they talk "shop" over coffee at the gathering after services. The other commanders complain they are being left out because they do not attend the church. They consider attending to get "face time" with the commander. In this case, the improper "establishment" of religion compounds questions concerning appropriate senior-subordinate relationships.[125]

Military chaplains, in particular, must be cautious. Clearly, military chaplains should not attempt to proselytize soldiers.[126] One reason chaplains "hold rank without command" is to eliminate the formal authority of chaplains to coerce religious participation.[127]

Pluralistic

The chaplain program strives to support all religious groups while reaching as many soldiers as possible. Majority groups will have more resources dedicated to them,[128] but other groups should not be excluded.[129] Holiday displays should strive to be

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124. Apparently this choice was presented to airmen in basic training at Lackland Air Force Base. *See* Bryant Jordan, *Going To The Chapel/Non-Christian Recruits Complain of Bias and Insensitivity*, AIR FORCE TIMES, Mar. 3, 1997, at 12.

125. *See generally* AR 600-20, *supra* note 83, para. 4-14.

126. At least one civilian case reflected this idea. *See* Carter v. Broadlawns Medical Ctr., 857 F.2d 448 (8th Cir. 1988). The Eighth Circuit upheld the use of a Christian pastor as a state paid hospital chaplain-counselor. This practice did not have the primary effect of advancing religion because the chaplain "avoided proselytization" and was primarily a counselor with the versatility and training needed to help people of all religious backgrounds as well as those with no religious background at all. *Carter*, 857 F.2d at 455.

127. *See* Rigdon v. Perry, 962 F. Supp. 150 (D.D.C. 1997) (challenging military regulations that purportedly prohibited military chaplains from encouraging their congregants to contact Congress on pending legislation). Judge Stanley Sporkin, found that "when chaplains are conducting worship, . . . they are acting in their religious capacity, not as representatives of the military, or . . . under color of military authority." *Id.* at 160. More broadly, the *Rigdon* opinion suggested that "military chaplains cannot give orders and have no official authority." *Id*. at 157.

The current *AR 165-1* provides: "[I]n performing their duties, chaplains do not exercise command, but exercise staff supervision and functional direction of religious support personnel and activities." AR 165-1, *supra* note 40, para. 4.3a.

128. *See supra* notes 49-50 and accompanying text.

reasonably inclusive.[130] In addition, chaplains are charged with providing services to all soldiers, regardless of a soldier's denomination. If a particular chaplain cannot provide a needed service, the chaplain must find someone qualified to provide the service.[131]

Right Persons Supported

Religious programs must be directed to military members. The constitutional rationales that justify the chaplaincy do not allow religious support to local civilian communities.[132] Although civilians who are unaffiliated with the military may attend religious programs on-post, the majority of attendees will be active duty military members and their families.[133]

Military and Patriotic Ceremonies

Army Regulation 165-1 allows invocations, prayers, and benedictions at military and patriotic ceremonies. However, "military and patriotic ceremonies . . . will not be conducted . . . as religious services."[134] The Army chaplaincy apparently does not have written rules that govern prayer at non-religious ceremonies. Guidance is passed on through informal training and observation.[135] Prayers at ceremonies should be relatively short and non-denominational. These prayers should not reference divinity by any sectarian name (Jesus, Allah) but rather use "generic" terms (Father, Almighty, Source of Goodness).

Commanders should let chaplains give invocations and benedictions. Chaplains are the experts and are the most likely to use the appropriate language. In addition, a soldier is less likely to feel "pressured" by a chaplain than by a line officer who is giving a prayer. If an event is not large enough to merit attendance of a chaplain (for example, a staff meeting), then a prayer is probably not appropriate.

Analyzing a Religious Hybrid Issue—The Expression of Religion

The first step in analyzing a hybrid expression of religion question is to determine if the person who is expressing religion is superior in rank to those affected.

Military Superior

If a battalion commander recites a sectarian prayer at a staff meeting or a division commander orders a religious symbol to be placed on the lawn of the headquarters building, they are expressing religion in ways likely to affect their subordinates. In these cases, the expression of religion would be improper if it violated either of two standards. First, the reasonable listener should not feel coerced to participate in the religious activity. This issue is similar to the "voluntariness" analysis discussed earlier. Second, the reasonable observer should not perceive the "government" or the command as "endorsing" religion. Statements made and actions taken in an official capacity have the greatest likelihood of suggesting official endorsement of religion. Freedom of expression does not "save" speech that clearly endorses a distinctive faith group.

A more subtle issue is generic support for religion or for religious programming. For example, a division commander encourages attendance at the upcoming prayer breakfast. Is he

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129. *See* Kaplan, *supra* note 6, at 1230-32 (emphasizing the importance of even-handed treatment).

130. Civilian case law regarding holiday displays is also instructive. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a city-owned Christmas display which included a crèche as well as other non-religious objects because it did not have the primary purpose of advancing religion). *But see* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (finding a display unconstitutionally endorsed religion because it contained only a crèche, which displayed a religious passage).

131. Telephone Interview with Lieutenant Colonel Leinwand, Chief, Training Directorate, U.S. Army Chaplain's School (12 Feb. 98) [hereinafter Leinwand Interview].

132. *See supra* note .

133. The free exercise rationale does not seem to justify providing support to retirees. An expenditure of funds aimed at the civilian community (advertising in non-military papers, for instance) would appear to violate the Establishment Clause.

134. AR 165-1, *supra* note 40, para. 4-4h. *See supra* note 45 and accompanying text.

I think some prayers at non-religious ceremonies that require mandatory attendance is constitutionally suspect. The military would have a particularly challenging task defending prayers at Department of Defense elementary, middle and high school graduations. Neither the free exercise rationale nor Congress' War Powers would seem to rebut the Supreme Court's insistence that a faculty sanctioned prayer at a public school graduation is unconstitutional. Lee v. Weisman, 505 U.S. 577 (1992) (nonsectarian prayer at middle school graduation, where attendance was, for practical purposes, obligatory, found unconstitutional).

On the other hand, the Supreme Court has condoned prayers opening state legislative sessions. Marsh v. Chambers, 463 U.S. 783 (1983) (historical prevalence of legislative prayers validated the modern practice).

The question then arises, are military members more like middle school students or state legislators?

135. Arnold Interview, *supra* note 88, Leinwand Interview, *supra* note 131.

improperly "endorsing" or "establishing" religion or simply showing support for a mission-related appropriated fund program? A judge advocate might look to private organization regulations concerning voluntary membership,[136] inducements,[137] and endorsement[138] to get a flavor of an appropriate "hands-off" posture.

Peers or Civilians

If the person who is expressing a religious opinion is not superior to those affected, then the issue boils down to a question of free speech. For example, a specialist is proselytizing several of his peers, including his roommate. In this case, the "endorsement" concern is not present—the specialist does not speak for the government. The listeners will not perceive command pressure or command endorsement. The commander has the inherent authority to prohibit speech "he perceives to be a clear danger to the loyalty, discipline, or morale of troops . . . under his command."[139] The religious soldier cannot use the Free Exercise Clause as a sword to protect his comments if they have a disruptive effect on the unit.[140] Nor should the command use the Establishment Clause to restrict religious comments, aside from their effect on morale and cohesion. Comments by chaplains should be analyzed in this manner. Only in unusual circumstances would a chaplain's religious comments constitute a danger to loyalty or discipline. Civilian religious speech[141] on a military installation would also be subject to military free speech rules.[142]

Conclusion—Applying the Analysis

Returning to the scenarios in the introduction, the female soldier's request to wear a khimar in the finance office is a pure free exercise/accommodation question. The commander has discretion to grant or deny the request. The Deputy Chief of Staff for Personnel Committee has considered the khimar issue, supporting a command denial of the request.[143] Uniformity, and the impact of non-uniformity on morale and cohesion, are valid bases for denying the request, although arguing safety in the finance office would be a stretch. The Army, however, has no mandatory rule so a commander is free to grant the request.

The praying battalion commander is violating the Constitution. In this hybrid case, the commander violates one of the touchstones of establishment clause analysis—voluntary participation. The subordinate commanders do not attend the staff meeting voluntarily and should not be subjected to a religious experience. The staff meeting is not a military or patriotic ceremony in which regulation permits prayer. A reasonable observer may believe that the battalion commander is "endorsing" religion on behalf of the command. "Personal" comments cannot logically be separated from official comments at a staff meeting. At a minimum, subordinate commanders would feel pressure to join their boss in prayer.

Commands should strive to set up reasonably inclusive holiday displays.[144] While few bright line rules exist in this area, a display that celebrates the "holiday season," without an explicitly "religious" outlook is least likely to offend individuals or constitutional principles.

Finally, the commander should treat the preaching roommate just like any other potential morale problem that stems from a soldier's unpopular comments. The subject matter, religion, should neither insulate nor condemn the zealous soldier. In this scenario, as in many religion issues, leadership concerns are primary and legal requirements are secondary. If the commander believes that the religious diatribes have a negative impact on the unit, the commander can order the soldier to stop preaching.

Religion can be a controversial matter. This article has provided a legal framework for judge advocates to use to ensure that their commands neither improperly restrict the free exercise of religion, nor unconstitutionally establish religion.

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136. *See*, *e.g.*, U.S. Dep't of Army, Reg. 210-1, Private Organizations on Department of the Army Installations and Official Participation in Private Organizations, para. 2-5d (14 Sept. 1990).

137. *See*, *e.g.*, AR 600-20, *supra* note 83, para. 4-11a.

138. U.S. Dep't of Defense, Dir. 5500.7R, Joint Ethics Regulation para. 3-209 (C3, 12 Dec. 1997).

139. Brown v. Glines, 444 U.S. 348, 353 (1979). *See* Parker v. Levy, 417 U.S. 733 (1974).

140. Religious groups may try to use religion as a sword to trump other important values. In the past, some religious groups have requested to purchase, use, or display "religious" literature that was anti-Semitic, anti-Catholic or degrading to women. As a command/leadership matter, commanders should deny requests for this type of literature. Leinwand Interview, *supra* note 131. Neither free speech, nor free exercise rights override the commander's obligation to maintain good order and discipline and to effectuate army equal opportunity values.

141. Supervising Department of the Army civilians may be treated like military superiors.

142. *See*, *e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (limiting civilian political speech on a military reservation).

143. Arnold Interview, *supra* note 88. *See*, Karen Jowers, *Army: No Head Scarves with Uniform/Muslim Soldier's Appeal Denied*, Army Times, Sept. 16, 1996, at 7.

144. See *supra* notes 130-131 and accompanying text.