ENTANGLED CHOICES: SELECTING CHAPLAINS FOR THE UNITED STATES ARMED FORCES

INTRODUCTION

Driven by the climate of suspicion surrounding the Islamic community after September 11, 2001 and the recent arrest of Muslim chaplain James Yee, the Senate Judiciary Subcommittee on Terrorism, Technology, and Homeland Security and the Department of Defense ("DoD") have launched investigations into the Muslim chaplaincy selection process.[1] These investigations involve the organizations that provide ecclesiastical endorsements for Muslim chaplains, and the possibility that chaplains endorsed by these organizations will use their positions to spread terrorist ideology.[2] Some politicians and analysts are essentially encouraging the DoD to adopt policies disfavoring certain endorsing organizations because of their beliefs, which would result in the Department accepting only those Muslim Imams who are members of sects that subscribe to "American-friendly" beliefs.[3]

The desire to select chaplains with American-friendly beliefs seems reasonable when the United States is at war in the Middle East and in constant fear of a terrorist attack at home.[4] However, many of the government's efforts to curb the spread of terrorism also threaten the constitutional rights of Americans.[5] The fact that the government appears to be substantively examining the Muslim faith through its investigation of the Muslim endorsing organizations—and ultimately favoring more mainstream sects over less popular ones—raises important constitutional concerns. Considered in isola-

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1. *See Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base: Hearing Before the Senate Judiciary Subcomm. on Terrorism, Tech. and Homeland Sec.*, 108th Cong. (2003) [hereinafter *Terrorist Recruitment*], *available at* http://judiciary.senate.gov/hearing.cfm?id=960; Rowan Scarborough & Steve Miller, *Military Probes Hiring of Clerics*, WASH. TIMES, Sept. 26, 2003, *available at* http://www.amafandvac.org/article.php?story=20031227150500029. The Department of Justice is also investigating the selection process for Muslim chaplains who serve in federal prisons. OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, 118TH CONG., REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (Jan. 27, 2004) [hereinafter REPORT TO CONGRESS], *available at* http://www.usdoj.gov/oig/special/0401a/index.htm, at III.C.3.

2. *See Terrorist Recruitment*, *supra* note 1; Scarborough & Miller, *supra* note 1.

3. *See Terrorist Recruitment*, *supra* note 1.

4. *See, e.g.*, Douglas Jehl & Richard W. Stevenson, *New Qaeda Activity Is Said to Be Major Factor in Alert*, N.Y. TIMES, Aug. 4, 2004, at A1.

5. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (holding that an American citizen designated as an "enemy combatant" by the military retains his due process rights even in times of war); *America After 9/11: Freedom Preserved or Freedom Lost?: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2003) (testimony of Nadine Strossen, Pres., ACLU), http://judiciary.senate.gov/testimony.cfm?id=998&wit_id=2878.

tion, a policy allowing the military to handpick its endorsing organizations on the basis of those organizations' beliefs could not stand under the Establishment Clause. However, a number of other issues—particularly the Supreme Court's traditional deference to the military and its constitutional exception for longstanding historical practices—make it unclear whether the Court would tolerate such a policy. While the War Powers Clause and the long history of the military chaplaincy may provide the DoD with a certain level of immunity from the judiciary, the courts will probably be suspicious of the type of blatant entanglement between church and state that would arise if the DoD is given the power to unilaterally choose its endorsing organizations based on the organizations' beliefs. Although it is unclear which Establishment Clause standard a court would use to examine these potential DoD policy changes, several of the most commonly used Establishment Clause tests—including the *Larson* standard[6] and the *Lemon* test[7]—indicate that this type of policy would be unconstitutional.

This Comment examines the military chaplaincy, the legal issues implicated by the chaplaincy, and how the DoD's potential changes to the regulations regarding the Muslim chaplaincy[8] would likely violate the Establishment Clause,[9] despite the judiciary's deference to the military under the War Powers Clause and the historical practice exception articulated in *Marsh v. Chambers*.[10]

I. THE CHAPLAINCY

The Second Circuit recognized in *Katcoff v. Marsh*[11] that the chaplaincy is necessary in order to protect the free exercise rights of soldiers.[12] The military has attempted to maintain the delicate balance between the Free Exercise Clause and the Establishment Clause by providing chaplains from a variety of different religions—all trained to provide services and programs for every faith, regardless of their personal beliefs and affiliations.[13] Chaplains are strictly prohibited from proselytizing the communities they serve.[14] These policies help reduce the chance that the chaplains will establish a

6. *See* Larson v. Valente, 456 U.S. 228, 229 (1982) (holding that a statute that clearly embodies an intentional discrimination among religions must be closely fitted to a compelling state purpose in order to not violate the Establishment Clause).

7. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that for a statute to be constitutional it must have a secular legislative purpose, its primary effect must neither advance nor inhibit religion, and it must not foster "an excessive government entanglement with religion").

8. While the Federal Bureau of Prisons, a division of the Department of Justice, has also launched an investigation into the process it uses to select Muslim chaplains, this Comment is limited to the unique issues surrounding the military chaplaincy.

9. While there might also be Free Exercise Clause issues associated with the potential new policies concerning Muslim endorsing organizations, this Comment is limited to Establishment Clause issues.

10. 463 U.S. 783 (1983).

11. 755 F.2d 223 (2d Cir. 1985).

12. *Id.* at 228.

13. *See* Army Reg. 165-1, § 1-4(c) (May 26, 2000) [hereinafter AR 165-1], *available at* http://www.milpagan.org/RC/REGS/ar165-1.pdf.

14. *Katcoff*, 755 F.2d at 228.

single religion within their communities, while still making sure that soldiers and inmates have enough religious services and chaplains available to adequately protect their free exercise rights.

A. A Brief History of the American Military Chaplaincy

Chaplains have officially been a part of the American military for the last 229 years and have served in every major conflict since the Revolutionary War.[15] On July 29, 1775, during the Revolutionary War, the fledgling country officially recognized military chaplains and appropriated money to fund them as part of the military.[16] Congress again authorized chaplains in the military when it expanded the standing military in 1791.[17] After the Civil War, power to appoint chaplains was transferred to the Executive Branch.[18] At that time, in 1867, Congress first required chaplains to be recommended by an ecclesiastical body from their denomination.[19] In 1947, the DoD was created and assumed control of the chaplaincy.[20]

At first, all chaplains were Christians, although Catholics and several Protestant denominations were represented.[21] President Lincoln commissioned the first Jewish chaplain in 1862,[22] and the DoD registered the first Buddhist endorsing organization in 1987.[23] The first Muslim chaplains were appointed to the Army in 1993,[24] when the DoD certified its two current Muslim endorsing agencies.[25] Currently, there are twelve Muslim chaplains on active duty in the American armed forces, serving approximately four thousand[26] Muslim military personnel.[27]

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15. A BRIEF HISTORY OF THE UNITED STATES CHAPLAIN CORPS: PRO DEO ET PATRIA chs. 1-7 (William J. Hourihan ed., 2004), *available at* http://www.usachcs.army.mil/HISTORY/Brief/TitlePage.htm.

16. *Id.* at ch. 1.

17. *Id.* at ch. 2.

18. *Id.* at ch. 4.

19. *Id.*

20. *Id.* at ch. 7.

21. *Id.* at ch. 2.

22. *Id.* at ch. 3.

23. *Id.* at ch. 7.

24. Sandi Dolbee, *U.S. Marines' First Muslim Chaplain Happy to Make History*, SAN DIEGO UNION-TRIBUNE, Nov. 20, 1999, *available at* http://www.islamfortoday.com/america10.htm.

25. *Terrorist Recruitment*, *supra* note 1 (testimony of Dr. Michael Waller, Annenberg Professor of Int'l Communication at the Inst. of World Politics).

26. This number is representative of the military personnel who have expressed a religious preference. Cesar G. Soriano, *Navy's Muslim Chaplain Prays with Sailors*, USA TODAY, Oct. 16, 2001, *available at* http://www.usatoday.com/life/2001-10-17-chaplain.htm. Many Muslims may choose not to identify their religious preference, and some organizations estimate that there may be as many as 10,000 to 15,000 Muslims in the American armed forces. *See* Humayun Akhtar, *Islam in the U.S. Armed Forces* (Dec. 29, 1998), http://www.renaissance.com.pk/febnevi99.html; AM. MUSLIM ARMED FORCES AND VETERANS AFFAIRS COUNCIL, OUR HISTORY, http://www.amafandvac.org/staticpages/index.php?page=20031227091752287 (last updated Dec. 27, 2003).

27. Scarborough & Miller, *supra* note 1. Seven of the twelve chaplains are in the Army, two are in the Air Force, and three are in the Navy. Press Release, Senator Charles Schumer, New Revelation: Captain Yee Was Trained and Selected to Be a Muslim Chaplain by Group Being Investigated for Terrorism (Sept. 23, 2003), http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR02043.html [hereinafter Press Release]. The Muslim chaplains do not exclusively serve Muslim military

B. The Current Chaplaincy Selection Process

Under the current selection process, military chaplain candidates must meet certain academic requirements, undergo background checks, and obtain ecclesiastical endorsements from their respective religious organizations.[28] The DoD maintains a list of religious organizations from which it will accept ecclesiastical endorsements for chaplains.[29] Currently, the DoD allows the Graduate School of Islamic and Social Sciences ("GSISS") and the American Muslim Armed Forces and Veterans Affairs Council ("AMAFVAC") to endorse Muslim chaplains.[30]

The endorsing organizations for the DoD are initially chosen by the Armed Forces Chaplains Board after the organizations certify that they are authorized by their membership or congregations to act as "agenc[ies] certifying and endorsing clergy to serve as military chaplains."[31] After an agency is initially certified, the endorsing agency must submit a form to the board every three years so that the board can review the agency and determine whether it should remain an ecclesiastical endorsing agency for the DoD.[32]

Most endorsing agencies apply for endorsement instead of being recruited by the military.[33] The requirements for becoming an ecclesiastical endorsing organization include being "organized exclusively or substantially to provide religious ministries to a lay constituency," providing a qualified applicant for the chaplaincy, abiding by the DoD and Military Department regulations and policies concerning the endorsement of chap-

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personnel because chaplains are required to provide services to soldiers of all religions. *See* Katcoff v. Marsh, 755 F.2d 223, 228 (2d Cir. 1985).

28. Military chaplains must: (1) obtain an ecclesiastical endorsement from an ecclesiastical endorsing organization recognized by the DoD, (2) be a fully qualified religious ministry professional of a qualified religious organization, (3) possess a baccalaureate degree or its equivalent from an accredited college or university listed in the military's list of accredited institutions, (4) successfully complete three resident years of graduate study in theology or a related subject (typically validated by a Master of Divinity or equivalent degree) at an accredited graduate school, (5) meet the physical standards required by the armed forces, and (6) be willing to support the free exercise of religion by members of the military and their dependents. DEP'T OF DEFENSE DIRECTIVE, APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS, NO. 1304.19 (1993) [hereinafter DoD DIRECTIVE NO. 1304.19], *available at* http://www.dtic.mil/whs/directives/corres/pdf2/d130419p.pdf.

29. *See* DEP'T OF DEFENSE WASH. HEADQUARTERS SERV., DEP'T OF DEFENSE PROCEDURES FOR MANAGEMENT OF INFORMATION REQUIREMENTS, NO. 8910.1-M 77 (1998) [hereinafter DoD PROCEDURES FOR MANAGEMENT OF INFORMATION], *available at* http://www.dtic.mil/whs/directives/corres/pdf2/p89101m.pdf.

30. Press Release, *supra* note 27. The American Muslim Armed Forces and Veterans Affairs Council is under the umbrella of the American Muslim Foundation so that AMAFVAC can have 501(c) IRS status—a requirement for endorsing agencies. Statement of Understanding and Agreement Between the American Muslim Foundation and American Muslim Armed Forces and Veterans Affairs Council (Dec. 4, 1998), http://abcnews.go.com/sections/wnt/US/Ross_Statement1.html. Other than sharing a 501(c) tax identification number, the two organizations are not related, and their Statement of Understanding and Agreement explicitly states that AMAFVAC is an independent organization. *Id.*

31. DoD PROCEDURES FOR MANAGEMENT OF INFORMATION, *supra* note 29, at 77.

32. *Id.*

33. *See* DoD DIRECTIVE NO. 1304.19, *supra* note 28, at para. 5.2; Melissa Charbonneau, Statement, *Breeding Grounds of Terror* (pt. 2), CHRISTIAN BROADCASTING NETWORK (Oct. 23, 2003), at http://www.cbn.com/CBNNews/News/031023a.asp.

lains, and notifying the DoD when an existing ecclesiastical endorsement should be withdrawn.[34] An endorsing agency may only be removed when it no longer meets these requirements.[35] Before removing an agency, the Armed Forces Chaplains Board must give notice stating the reasons for removal, and the agency must be given a "reasonable opportunity to provide a written reply that will be carefully considered in making a final decision."[36]

Most major religions and large Christian denominations have at least one endorsing agency that is certified by the DoD.[37] Because the agencies apply to become endorsing organizations, most religions and denominations have several endorsing agencies that represent each of the smaller sects within a religion or denomination.[38] This application process helps to ensure that religions are well-represented in the chaplaincy because those that are not represented can actively seek to remedy the situation instead of waiting for the government to do so. If the endorsing agency meets the requirements set forth by the military for endorsing agencies and has the backing of its religious followers, the government accepts the organization without analyzing its doctrines or beliefs.[39]

C. Plans to Re-evaluate the Muslim Chaplaincy Selection Process

1. The Events Leading Up to the Re-evaluation

A Muslim chaplain, Army Captain James Yee, was arrested on September 10, 2003, in Jacksonville, Florida, as he was returning from the U.S. naval base at Guantanamo Bay, Cuba.[40] Federal agents said they found Yee carrying sketches of the military prison at Guantanamo Bay, where Yee had been counseling Muslim Al Qaeda and Taliban prisoners.[41] Yee, a Chinese American who converted to Islam after graduating from the U.S. Military Academy at West Point,[42] had been under suspicion for espionage and aiding the enemy during the months prior to his arrest.[43] On October 10, the

34. DoD DIRECTIVE No. 1304.19, *supra* note 28, at para. 5.2.
35. *Id.* at para. E3.1.9.
36. *Id.*
37. *See, e.g.*, Katcoff v. Marsh, 755 F.2d 223, 226 n.1 (2d Cir. 1985) (listing religions and denominations represented in the Army chaplaincy); Am. Ass'n of Pastoral Counselors, Contact Persons for Religious Body Endorsements, http://www.aapc.org/cprbf.htm [hereinafter AAPC] (listing several endorsing agencies affiliated with the AAPC).
38. *See, e.g.*, AAPC, *supra* note 37. For instance, there are at least four endorsing organizations representing different sects of the Baptist denomination, and there are at least two endorsing organizations representing different factions of the Lutheran church. *Id.*
39. *See* DoD Directive No. 1304.19, *supra* note 28.
40. Associated Press, *Muslims, Chinese-Americans Rally in Defense of Guantanamo Detainee*, BREMERTON SUN, Nov. 23, 2003 [hereinafter *Muslims, Chinese-Americans Rally*], *available at* http://www.thesunlink.com/redesign/2003-11-23/local/326505.shtml.
41. *Id.*
42. Barbara Starr, *Muslim Chaplain Charged with Disobeying Orders*, CNN.COM, Oct. 10, 2003, *at* http://www.cnn.com/2003/US/10/10/guantanamobay.probe/index.html.
43. *See id.*

Army formally charged Yee with "disobeying a general order by taking classified material home and transporting classified information without proper security containers,"[44] and with four minor violations involving adultery and keeping pornography on a military computer.[45] No charges involving espionage were made against Yee,[46] and the Army prosecutors did not introduce any evidence on the mishandling of classified information charge.[47] Yee was released from military custody on November 25, 2003, after spending seventy-six days in a Navy brig,[48] and was transferred to Fort Benning, Georgia, where he was allowed to resume his chaplaincy duties.[49] After delaying his preliminary hearing five times, the Army dropped the mishandling of classified information charges, citing national security concerns that would result from releasing the evidence.[50] Yee was found guilty of the pornography and adultery charges, for which he received a non-judicial punishment in the form of a reprimand.[51] However, even this reprimand was later set aside by an Army general.[52] After he was exonerated in April 2004, Yee was finally allowed to return to his home in Fort Lewis, Washington, and resume his chaplaincy duties there.[53] Yee subsequently resigned his position, stating in his resignation letter that the "unfounded allegations . . . irreparably injured my personal and professional reputation and destroyed my prospects for a career in the United States Army."[54]

Some Muslim American and Asian American groups, as well as the press, have criticized the military for its handling of the case, particularly the unusual fact that Yee spent seventy-six days in the brig when the only charges against him were for mishandling documents.[55] Yee's attorney explained the atypical situation as "Army officials . . . operating in a post-Sept. 11 panic" by "shooting first and asking questions later."[56] One activist

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44. *Muslims, Chinese-Americans Rally*, *supra* note 40.

45. *Muslim Chaplain's Defense Cries Foul*, CNN.COM, Dec. 10, 2003, *at* http://www.cnn.com/2003/LAW/12/09/yee.hearing/index.html.

46. *Id.*

47. *U.S. Drops All Charges Against Muslim Chaplain*, CNN.COM, Mar. 19, 2004, *at* http://www.cnn.com/2004/LAW/03/19/yee.charges.dropped/index.html.

48. *Muslim Chaplain's Defense Cries Foul*, *supra* note 45.

49. *Army Adds Charges Against Guantanamo Chaplain*, CNN.COM, Nov. 25, 2003, *at* http://www.cnn.com/2003/LAW/11/25/guantanamo.chaplain/index.html.

50. *U.S. Drops All Charges Against Muslim Chaplain*, *supra* note 47.

51. Associated Press, *Yee Thanks Supporters*, CNN.COM, June 26, 2004, *at* http://www.cnn.com/2004/US/06/26/yee.speech.ap/index.html [hereinafter *Yee Thanks Supporters*].

52. *Id.*

53. *Id.*

54. Associated Press, *Muslim Chaplain Cleared in Probe Resigns*, Aug. 2, 2004, *available at* http://www.kansascity.com/mld/kansascity/news/nation/9305133.htm?1c.

55. *See, e.g.*, *Yee Thanks Supporters*, *supra* note 51; Claudia Rowe, *Chaplain Yee: Yee Calls Being Swept Up in Spy Furor "A Harrowing Ordeal,"* SEATTLE POST-INTELLIGENCE REP., Dec. 20, 2003, *available at* http://www.amafandvac.org/article.php?story=20031227175822782; Editorial, *Chaplain Yee: The Prosecution of Capt. James Yee*, MIAMI HERALD, Dec. 16, 2003, *available at* http://www.amafandvac.org/article.php?story=20031228085907606.

56. Rowe, *supra* note 55.

asserted that Yee would not have been targeted at all "if it were not for [the] heightened hysteria against Muslims" that currently exists in America.[57]

It does seem as though the suspicion surrounding Yee and other Muslim chaplains in the American armed forces is indicative of the U.S. government's general post-September 11th attitude toward Islam and its followers. In the aftermath of September 11, the Department of Justice ("DOJ") detained at least 1,200 immigrants, primarily Muslims or those of Middle Eastern descent.[58] Six months after September 11th, Amnesty International estimated that the DOJ was still holding 300 of those detainees, although only about 100 of them were considered to be "material witnesses" or were facing possible criminal charges.[59] Between December 2002 and December 2003, post-September 11th detainees lodged fifty-one civil rights allegations against DOJ employees that the DOJ Office of the Inspector General has deemed "credible" enough to warrant an investigation.[60] In addition to this detainment program, Attorney General John Ashcroft has implemented several other invasive investigatory programs targeting Muslims and those of Arab descent—including American citizens—that increase suspicion towards the Islamic community and could lead to potential civil rights violations.[61]

2. *The Senate Subcommittee Hearing*

Alarmed by Yee's arrest and reports of possible terrorist ties to the organizations that currently endorse Muslim chaplains,[62] some politicians and analysts have begun to put pressure on the DoD to investigate its endorsing organizations and on the Muslim chaplaincy in general to determine whether Muslim chaplains in the armed forces might try to spread terrorist ideology through their positions.[63] As a result of this, the Senate Judiciary Subcommittee on Terrorism, Technology, and Homeland Security held a hearing to address the issue. At the hearing, Dr. Michael Waller, Annenberg Professor of International Communication at the Institute of World Politics, testified that "some of us have been alarmed that the small but important Muslim chaplain corps in the military has been harmed by those with an

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57. *Yee Thanks Supporters*, *supra* note 51.

58. *Amnesty Report: Detainees in U.S. Denied Basic Rights*, CNN.COM, Mar. 14, 2002, *at* http://www.cnn.com/2002/US/03/14/amnesty.intl.us.detainees/index.html.

59. *Id.*

60. *See* REPORT TO CONGRESS, *supra* note 1; OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (July 17, 2003), http://www.usdoj.gov/oig/special/0307/index.htm.

61. *See, e.g.*, *America After 9/11*, *supra* note 5 (testimony of Dr. James J. Zogby, Pres., Arab Am. Inst.).

62. *See Terrorist Recruitment*, *supra* note 1 (testimony of Dr. Michael Waller, Annenberg Professor of Int'l Communication, Inst. of World Politics); Press Release, *supra* note 27.

63. *See* Letter from Charles Schumer, U.S. Senator, to Joseph Schmitz, Inspector General, Dep't of Defense (Sept. 22, 2003) [hereinafter Letter], http://schumer.senate.gov/SchumerWebsite/pressroom/special_reports/Imam%20Inspector%20General%20DoD%209.22.03.pdf; Scarborough & Miller, *supra* note 1; *Terrorist Recruitment*, *supra* note 1.

agenda that is more political than spiritual. This raises legitimate—indeed pressing—national security concerns."[64] Most of these concerns seem to center around one small sect of Islam, Wahhabism, that is considered to have radical fundamentalist beliefs.[65]

The doctrine of Wahhabism, which is considered a form of Islamic fundamentalism, states that everything added to Islam after the third century of the Muslim era is false.[66] Wahhabism emphasizes traditional Muslim beliefs, and adherents of Wahhabism reject newer interpretations of the Koran.[67] They also generally renounce the Islamic law reform movements that took place in the nineteenth and twentieth centuries, especially those involving gender relations, family law, and democracy.[68] Wahhabites believe that these reforms brought Islamic culture closer to Western ideals and away from the true path of Islam.[69] Wahhabi Muslims believe that they are the only true followers of the "path laid out by Allah," and members of all other religions—even other sects of Islam—are impure.[70]

In recent years, the United States has become concerned about potential terrorism from Wahhabi Muslim fundamentalist groups, and the suspicion surrounding the sect was heightened when Osama bin Laden, who many people seem to incorrectly believe is a Wahhabi Muslim,[71] was linked to the September 11 attacks on New York City and Washington, D.C. As the Bush administration expands the war on terror, suspicion surrounding Muslims, in particular adherents of the Wahhabi and other non-mainstream sects, has continued to grow because of Islam's alleged ties to terrorism.[72] Some gov-

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64. *Terrorist Recruitment*, *supra* note 1 (testimony of Dr. Michael Waller, Annenberg Professor of Int'l Communication at the Inst. of World Politics).

65. Press Release, *supra* note 27. Like many religions, there are several sects within the Muslim faith that have varying beliefs. The Sunnis are the largest sect and represent the majority of the Muslim population, and the Shi'ites are the second largest sect. Islam FAQ, Index of Islamic Sects, *at* http://atheism.about.com/library/FAQs/islam/blfaq_islam_sects.htm. However, there are as many as ten other sects, although three of those are not widely recognized as forms of Islam by other Muslims. *Id.* The two most influential sects besides the Sunnis and the Shi'ites are the Sufis and the Wahhabis. *Id.*

66. Islam FAQ, Wahhabism and Wahhabi Muslims, *at* http://atheism.about.com/library/FAQs/islam/blfaq_islam_wahhab.htm. Wahhabism was inspired by the teachings of the eighteenth-century Muslim scholar, Muhammad b. 'Abd al-Wahhab. YOUSSEF M. CHOUEIRI, ISLAMIC FUNDAMENTALISM 8 (rev. ed. 1997). Al-Wahhab believed that additions to Islam made subsequent to the original teachings were personal innovations that were contrary to the true Muslim way. EMORY C. BOGLE, ISLAM: ORIGIN AND BELIEF 97-98 (1998).

67. *See* BOGLE, *supra* note 66, at 97-98.

68. Wahhabism and Wahhabi Muslims, *supra* note 66.

69. *Id.*

70. *Id.*

71. In fact, bin Laden is a member of another fundamentalist sect, Qutbism, although the media has portrayed him as a Wahhabite. HANEEF JAMES OLIVER, THE "WAHHABI" MYTH: DISPELLING PREVALENT FALLACIES AND THE FICTITIOUS LINK WITH BIN LADEN 7 (2002). Qutbism was inspired by a twentieth-century Egyptian writer and activist, Sayyad Qutb, and the sect has been described as a "modern revolutionary movement" that is "unrepresentative of the orthodoxy of true Islam." *Id.* at 10-11. Ironically, Wahhabism is the national religion of Saudi Arabia, a long-standing ally of the United States and an important source of oil in this country. *See* AMIR TAHERI, HOLY TERROR: ISLAMIC TERRORISM AND THE WEST 158 (1987).

72. *See, e.g.*, *Terrorism: Growing Wahhabi Influence in the United States: Hearing Before the Senate Subcomm. on Terrorism, Technology and Homeland Security*, 108th Cong. (2003) [hereinafter *Growing Wahhabi Influence*], *available at* http://judiciary.senate.gov/hearing.cfm?id=827.

ernment officials, such as the general counsel for the Department of the Treasury who testified before the Senate Judiciary Committee about the country's strategy to fight terrorist financing, claim that "[w]e are not at war with a religion, but rather with terrorists who sometimes masquerade as its champion."[73] On the other hand, some analysts and politicians appear to view Wahhabism as the primary enemy of the United States in the war on terror and equate the creation of more mosques and Islamic centers in the United States with terrorist attacks on American soil.[74] One of these analysts urged the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security to affirmatively take steps "to enable and support traditional, mainstream American Muslims" and use law enforcement to stop the growth of the less popular Wahhabi sect.[75] It is clear that many politicians and analysts are closely linking terrorism and Islam, and—in their overzealous attempts to eradicate terrorism—are pushing the DoD to adopt chaplaincy selection policies that would substantively analyze the Muslim faith and likely result in an Establishment Clause violation.

As a result of this political pressure and the climate of fear that currently surrounds the American Islamic community, the DoD is reconsidering its relationships with the two organizations that offer ecclesiastical endorsements for military chaplains—the Graduate School for Islamic Social Sciences and the American Muslim Armed Forces and Veterans Affairs Council—because of those organizations' alleged ties to Wahhabism.[76] The politicians and analysts behind this campaign to re-evaluate the Muslim chaplaincy are equating terrorism with this particular sect and with Islam in general, and they are encouraging the DoD to re-evaluate its policies regarding the Muslim chaplaincy and to find alternative endorsing organizations that adhere to more mainstream beliefs. The politicians want the DoD to adopt new policies despite the fact that no causal connection has been established between terrorism and the Muslim chaplaincy. There are no reported cases of Muslim military chaplains spreading terrorist ideology to those who receive their services, and there is no actual evidence that the current endorsing organizations have ties to terrorism.

The politicians and analysts who support reviewing the current chaplaincy policies claim that both of the DoD's endorsing organizations have ties to radical Islam, or Wahhabism.[77] Both the Graduate School of Islamic

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73. *See Growing Wahhabi Influence, supra* note 72 (written testimony of David D. Aufhauser, General Counsel, Dep't of the Treasury), *available at* http://judiciary.senate.gov/testimony.cfm?id=827&wit_id=235.

74. *See Growing Wahhabi Influence, supra* note 72 (testimonies of Alex Alexiev, Senior Fellow at the Ctr. for Sec. Policy, and Stephen Schwartz, Senior Fellow at the Found. for Def. of Democracies), *available at* http://judiciary.senate.gov/testimony.cfm?id=827&wit_id=2355.

75. *See Growing Wahhabi Influence, supra* note 72 (testimony of Stephen Schwartz, Senior Fellow at the Found. for Def. of Democracies), *available at* http://judiciary.senate.gov/testimony.cfm?id=827&wit_id=2356.

76. *See supra* note 1 and accompanying text.

77. Scarborough & Miller, *supra* note 1.

Social Sciences and the American Muslim Foundation ("AMF")[78] were raided by the U.S. government in 2002 because of suspected ties to Al Qaeda, but neither organization has been charged with any crime in the more than two years since that raid.[79] Qaseem Uqdah, executive director of the American Muslim Armed Forces and Veterans Affairs Council, which itself has not been investigated, claims that his organization's ties to AMF exist only on paper and that AMAFVAC is not involved in any of AMF's activities.[80] The government has not presented evidence that his claims are false, and it has not launched an independent investigation of AMAFVAC. Both endorsing groups deny advocating terrorism in any form.[81] In addition, despite the intense concern over the chaplaincy in the military, none of the chaplains endorsed by these organizations have been convicted for any terrorist-related activities, and the charges against Captain Yee—who was endorsed by the GSISS—have been dropped.[82]

In March 2003, Senator Charles Schumer, a Democrat from New York, requested that DoD Inspector General Joseph Schmitz investigate the military's endorsing agencies.[83] After Yee's arrest, Schumer vehemently attacked the DoD's failure to investigate the endorsing organizations for possible terrorist connections.[84] In his second letter to Schmitz, dated September 22 (shortly after Yee's arrest), Schumer expressed concerns about the beliefs these organizations promoted in addition to their possible terrorist ties.[85] He wrote, "It is disturbing that organizations with possible terrorist connections and religious teachings contrary to American pluralistic values hold the sole responsibility for Islamic instruction in our armed forces."[86] He also suggested using other Muslim organizations with more mainstream beliefs as alternative endorsing organizations.[87] He pointed out to the Inspector General that the current military endorsing organizations "hew closely to the religious tenets of the radical Wahhabi/Salafi sect of Islam"

78. The American Muslim Armed Forces and Veterans Affairs Council, the endorsing organization at issue, is under the umbrella of the AMF. *See supra* note 30.

79. Scarborough & Miller, *supra* note 1.

80. *Id.*

81. *See Pentagon Seeks New Input in Hiring Muslim Chaplains*, CNN.COM, Oct. 14, 2003, *at* http://www.cnn.com/2003/US/10/14/muslim.chaplains/index.html. It is interesting that the burden seems to be on the endorsing organizations to show that they have no links to terrorism in this case. Other religious endorsing organizations that may have ties to radical groups do not seem to share a similar burden (i.e., conservative Christian endorsing organizations do not have to prove that they are not tied to groups like Army of God, which advocates killing doctors who perform legal abortions). The DoD places the burden of showing cause to remove an endorsing agency on the government (the Armed Forces Chaplains Board) and requires that the organization have a reasonable opportunity to respond to the reasons given for removal. DOD DIRECTIVE NO. 1304.19, *supra* note 28, at para. 5.2.3.

82. *U.S. Drops All Charges*, *supra* note 47.

83. Press Release, *supra* note 27.

84. *Id.*

85. Letter, *supra* note 63.

86. *Id.*

87. *Id.*

and that "there are numerous American Muslim organizations with pristine reputations who are able to perform such [endorsing] activities."[88]

As a result of political pressure from Schumer and others, the Pentagon ordered a review of its recruitment of Muslim chaplains on September 25, 2003.[89] The review is slated to include requirements for individual applicants for the chaplaincy and for the organizations that offer ecclesiastical endorsements for chaplains.[90]

The Subcommittee on Technology, Terrorism and Homeland Security, part of the Senate Judiciary Committee, held a hearing entitled "Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base" on October 14, 2003, during which the committee interviewed experts on chaplaincy programs and on terrorism.[91] During his testimony, Dr. Michael Waller from the Institute of World Politics criticized the FBI for trying to avoid associating Islam with terrorism by "painstakingly avoid[ing] using the words 'Islam' and 'terrorist' in the same sentence."[92] Ironically, Waller claims that separating discussions about Islam and terrorism has created an "atmosphere of fear and intimidation surrounding . . . the discourse."[93] The majority of Waller's testimony involved the terrorist activities of the founder of the American Muslim Council ("AMC"), who (he testified) is affiliated with the American Muslim Foundation, the organization that shares a tax identification number with the endorsing group AMAFVAC.[94] This link between AMAFVAC, the endorsing organization at issue in the DoD's investigation, and AMC seems to be quite attenuated. The AMAFVAC's executive director claimed that its relationship with AMF was only on paper,[95] and none of the testimony presented at the hearing indicated otherwise.

3. *What Changes Will Be Made in the Selection Process?*

At this point, the testimony before the Senate Judiciary Subcommittee is the only public record of the efforts to reform the chaplaincy selection process. Although the DoD has launched an investigation into the military chap-

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88. *Id.*

89. Scarborough & Miller, *supra* note 1.

90. *Id.*

91. *Terrorist Recruitment*, *supra* note 1. From looking at the title of the hearing, it seems that the Senators have presupposed a link between the Muslim chaplaincy and the spread of terrorist ideology instead of merely hearing testimony about a potential link.

92. *Terrorist Recruitment*, *supra* note 1 (testimony of Dr. Michael Waller, Annenberg Professor of Int'l Communication, Inst. of World Politics), *available at* http://judiciary.senate.gov/testimony.cfm?id=960&wit_id=2719.

93. *Id.* It is quite possible that the atmosphere Waller is worried about pales in comparison to the atmosphere of fear and intimidation that surrounded the American Muslim community after September 11. The FBI reported that hate crimes against Muslims increased by 1600% in the aftermath of September 11. *America After 9/11*, *supra* note 5 (testimony Dr. James J. Zogby, Pres., Arab Am. Inst.).

94. *Terrorist Recruitment*, *supra* note 1 (testimony of Dr. Michael Waller, Annenberg Professor of Int'l Communication, Inst. of World Politics).

95. Scarborough & Miller, *supra* note 1.

laincy, the results of that investigation have not yet been made public. It is also not clear what sorts of changes will be implemented as a result of these investigations and the political pressure applied by some politicians and analysts. An obvious change—and the one that Senator Schumer suggested in his letters to the Inspector General of the DoD[96]—is the DoD's replacing the current endorsing organizations with endorsing organizations that adhere to more mainstream Muslim beliefs.

The DoD seems to be succumbing to the political pressure to replace the current organizations, despite the lack of evidence that these organizations are actually tied to terrorism and despite any indication that the organizations no longer meet the requirements for endorsing organizations. The DoD has authority to unilaterally change its policies regarding selection of chaplains and promulgate regulations and directives to reflect those changes,[97] which could result in a change of federal law. Although it has not publicly named any replacement organizations, the DoD has announced plans to seek out new Muslim endorsing agencies.[98] For the moment, though, it will continue to recognize the current agencies.[99] If, however, the DoD begins analyzing religious beliefs before they accept Muslim endorsing agencies, they will likely be violating the Establishment Clause of the First Amendment.

II. THE ESTABLISHMENT CLAUSE

A. The Religion Clauses of the First Amendment

The First Amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[100] The first of the religion clauses, the Establishment Clause, sets up the wall between church and state and prohibits the government from establishing or endorsing any sort of religion.[101] The Court has stated that the Establishment Clause means at least the following:

> 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

96. Letter, *supra* note 63.

97. The DoD has general authority to promulgate regulations regarding the military under Title 10 of the United States Code. 10 U.S.C. § 101 (2000). Title 10 covers requirements for enlisting in the military, being commissioned as an officer, and for positions in each branch of the armed forces. *Id.* § 101.

98. Charbonneau, *supra* note 33.

99. *Id.*

100. U.S. CONST. amend. I.

101. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947). The "wall" between church and state is not a universally accepted principle. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2330-31 (2004) (Thomas, J., concurring in the judgment) (arguing that the Establishment Clause was intended as a federalism provision to keep the federal government from interfering with state establishments of religion and that states can permissibly establish religions without violating the Establishment Clause).

> person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.[102]

The Court has recognized that while government cannot remain completely separate from religion,[103] the state and federal governments are required to "be neutral in matters of religious theory, doctrine, and practice. [They] may not be hostile to any religion or to the advocacy of no-religion; and [they] may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."[104]

The other religion clause contained in the First Amendment, the Free Exercise Clause, protects the individual's right to practice any religion or none at all, and it only allows the government to target religious conduct when there is a compelling interest in regulating that conduct.[105] Thus, the government is required to remain separate from religion while allowing the people to freely practice it, and because of this, the Establishment Clause and the Free Exercise Clause sometimes appear to conflict with each other. Despite the frequent tension between the two clauses, "there is room for play in the joints," meaning that there are certain "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[106] When there appears to be a conflict between the clauses, the courts weigh the competing interests of the clauses and consider other relevant constitutional provisions in determining whether there has been an Establishment Clause or a Free Exercise Clause violation.[107]

B. Establishment Clause Tests

Since 1971, both the United States Supreme Court and the lower federal courts have primarily used the three-prong test that the Supreme Court articulated in *Lemon v. Kurtzman*[108] to determine whether there has been an Establishment Clause violation.[109] However, in the years since *Lemon* was

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102. *Everson*, 330 U.S. at 15-16.

103. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 672 (1984).

104. Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

105. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963); Cantwell v. Conn., 310 U.S. 296, 303 (1940); Reynolds v. United States, 98 U.S. 145, 162 (1878); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993); Dep't. of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

106. Locke v. Davey, 124 S. Ct. 1307, 1311 (2004) (holding that a scholarship program prohibiting recipients from pursuing a theology degree is permissible under the Establishment Clause and does not violate the Free Exercise Clause).

107. *See, e.g.*, Katcoff v. Marsh, 755 F.2d 223, 233 (2d Cir. 1985).

108. 403 U.S. 602 (1971).

109. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) ("[A]s in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* . . . .") (internal citations and quotations omitted); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1994) (applying the *Lemon* test to a policy allowing a church to use school premises after hours); Bd. of Educ. v. Mergens, 496 U.S. 226, 235 (1990) (applying the *Lemon* test where students sought equal access for Chris-

decided, the Court has indeed proven that it is "unwilling[ ] to be confined to any single test or criterion in this sensitive area."[110] Since *Lemon*, the Court has used a variety of tests in Establishment Clause cases.[111] The most commonly mentioned of these tests are the endorsement test and the coercion test.[112] These two tests, along with the *Lemon* test, are primarily used to determine whether the government is favoring religion over non-religion.[113] The Court has articulated yet another standard for use in the rare case where it must determine whether the government is exhibiting bias against a particular sect.[114] Since the potential policies at issue here involve bias, the

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tian organizations); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 386 (1990) (applying the *Lemon* test to a religious organization's attempt to have the government refund certain taxes); Widmar v. Vincent, 454 U.S. 263, 271-72 (1981) (applying the *Lemon* test where students sought equal access for Christian organizations). *But see* Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002) (failing to mention the *Lemon* test in holding that a state voucher program does not violate the Establishment Clause); Bd. of Educ. v. Grumet, 512 U.S. 687, 695 (1994) (not directly applying *Lemon* but relying on cases that applied it); Lee v. Weisman, 505 U.S. 577, 577 (1992) (holding that the *Lemon* test is not necessary to determine the constitutionality of prayers at public school graduations). Several justices have called the continuing validity of the *Lemon* test into question because of its sometimes inconsistent results. *See, e.g.*, *Grumet*, 512 U.S. at 720 (O'Connor, J., concurring); *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 111 (1985) (Rehnquist, J., dissenting).

The United States Circuit Courts of Appeal have consistently continued to apply the *Lemon* test even though the Supreme Court has subsequently articulated other Establishment Clause tests. *See, e.g.*, ACLU v. Ashbrook, 2004 WL 1562908, at *3 (6th Cir. July 14, 2004) (applying the *Lemon* test); United States v. Corum, 362 F.3d 489, 495-96 (8th Cir. 2004) (same); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1240 (11th Cir. 2004) (same); Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003) ("During the past decade, we have emphasized that the *Lemon* test guides our analysis of Establishment Clause challenges."); Charles v. Verhagen, 348 F.3d 601, 610 (7th Cir. 2003) (applying the *Lemon* test); Mayweathers v. Newland, 314 F.3d 1062, 1068 (9th Cir. 2003) (same); Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 425 (2d Cir. 2002) (same); Boyajian v. Gatzunis, 212 F.3d 1, 4 (1st Cir. 2000) (same).

110. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

111. *See* Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 721 (2003).

112. *See, e.g., id.* at 722, 730-33 (analyzing the Parsonage Exemption under the *Lemon* test and the endorsement test); Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54 MERCER L. REV. 1669, 1675-91 (2004) (discussing the *Lemon* test, the endorsement test, and the coercion test in outlining the history of the Court's Establishment Clause jurisprudence); Simcha David Schonfeld, *A Failing Grade: The Court in Zelman and Its Missed Opportunity to Clarify the Confusing State of Establishment Clause Jurisprudence*, 20 T.M. COOLEY L. REV. 489, 491-96 (2003) (analyzing the *Lemon*, endorsement, and coercion tests); Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 10-52 (2002) (analyzing the *Lemon*, endorsement, and coercion tests); Christopher Pierre, *"With God All Things Are Possible," Including Finding Ohio's State Motto Constitutional Under the Establishment Clause of the First Amendment*, 49 CLEV. ST. L. REV. 749, 768-76 (2001) (analyzing the constitutionality of Ohio's state motto under the *Lemon* test, the endorsement test, and the coercion test).

The most recent Establishment Clause test was adopted by a plurality of the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000). That test dictates that governmental aid should be allowed as long as it is neutral, neither favoring nor disfavoring religion. *Id.* at 809-10 (Thomas, J., concurring). Because this test has never been adopted by a majority of the Court, it will not be used to analyze the potential policies at issue in this discussion.

113. *See, e.g.*, Adair v. England, 183 F. Supp. 2d 31, 47-48 (D.D.C. 2002) (mem.).

114. *Id.*

standard found in *Larson v. Valente*[115] and its progeny is particularly relevant to this discussion.[116]

1. The Lemon *Test*

Although the Court has continued to clarify the meanings of each of the three *Lemon* prongs,[117] the basic test has remained the same: (1) the law must have a secular purpose, (2) the primary or principal effect of the law must neither advance nor inhibit religion, and (3) the law must "not foster 'an excessive government entanglement with religion.'"[118] A violation of any of the three prongs of this test voids the law in question.[119]

a. The Secular Purpose Prong

This prong of the *Lemon* test requires that a law have at least one plausible purpose that is not religious.[120] The law may have a religious purpose in addition to a secular purpose as long as the religious purpose is "neither pre-eminent nor exclusive."[121] The Court has recognized that a law need only be struck down if it is "*entirely* motivated by a purpose to advance religion," and that "a statute that is motivated *in part* by a religious purpose may satisfy the first criterion [of the *Lemon* test]."[122]

Courts rarely seem to strike down laws for not having a secular purpose[123] and are typically deferential to the state's asserted secular pur-

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115. 456 U.S. 228 (1982).

116. *See* Allegheny v. ACLU, 492 U.S. 573, 608-09 (1989) ("[W]e have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference.'"); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) ("*Larson* indicates that laws discriminating among religions are subject to strict scrutiny and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*.") (internal citation omitted). *See also* Dept. of Human Res. v. Smith, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.") (internal citations omitted).

117. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 223 (1997) (noting that the general principles used to evaluate alleged Establishment Clause violations have not changed, but the Court's understanding of the criteria has evolved).

118. 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). Where the Court evaluates aid to schools, the test has been modified to only consider the first two prongs because the primary effect and excessive entanglement prongs overlap in many of those cases. Mitchell v. Helms, 530 U.S. 793, 807-08 (2000).

119. Edwards v. Aguillard, 482 U.S. 578, 583 (1987); *see also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

120. *See* Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984) (explaining that the government must have a secular purpose but that the purpose does not have to be "exclusively secular"); *see also* Idleman, *supra* note 112, at 11.

121. Idleman, *supra* note 112, at 11 (internal quotations omitted).

122. Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (emphasis added).

123. *See* Idleman, *supra* note 112, at 11 ("[T]he requirement has been described, and rightly so, as a fairly low hurdle that is often easily satisfied . . . .") (internal quotations omitted); M. Greg Crumpler, *Constitutional Law—Legislative Chaplaincy Program Held Not to Violate the Establishment of Religion Clause*—Marsh v. Chambers, 6 CAMPBELL L. REV. 143, 148 n.46 (1984) (listing cases in which "the Supreme Court has . . . upheld the stated legislative purpose as secular"). *See also* Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002) (holding that a school voucher program has a "valid secular purpose of

pose.[124] The state loses the presumptive validity of its purpose only when the party challenging the statute calls the state's purpose into question and the state cannot articulate a plausible secular purpose in response.[125] This most often occurs when the government's stated purpose is a "sham" or the law at issue is inherently religious in nature.[126] These situations are somewhat rare, however, and most legislatures can clearly articulate a permissible secular purpose even if the law in question has an underlying religious objective.[127] Even if the Court deems the law to have a secular purpose, however, it must also pass the primary effect and excessive entanglement prongs of the *Lemon* test.

b. The Primary Effect Prong

The primary effect prong, the second part of the test, looks beyond the law's chief result to determine whether the law's primary effect is to advance or inhibit religion.[128] The Court examines whether the law has the "direct and immediate effect of advancing [or inhibiting] religion,"[129] even if advancing or inhibiting religion is not the "primary effect" of the law.[130] Under this prong of the test, the Court looks at the pervasiveness of religion in the benefited institution.[131] In *Hunt v. McNair*,[132] the Court stated that government aid has "a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[133] However, when the government provides aid that "is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct [the money] to [a religious institution] wholly as a result of their own genuine and independent private choice," there is no Establishment Clause violation.[134] Although laws that inhibit religion do not seem to come before the Court as often as those that advance it, the primary effect prong is

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providing educational assistance to poor children in a . . . failing public school system); *In re* Young, 141 F.3d 854, 862 (8th Cir. 1998) (holding that the Religious Freedom Restoration Act has the secular purpose of protecting freedom of religion and not benefiting a particular sect). *But see Wallace*, 472 U.S. at 56 (holding that the legislative purpose behind a "moment of silence" law is religious, not secular); Stone v. Graham, 449 U.S. 39, 41 (1980) (holding that Kentucky's posting of the Ten Commandments violated the secular purpose prong even though the commonwealth asserted secular purposes such as instilling into its citizens the values behind the Ten Commandments and illustrating the Commandments' connection to the modern legal system).

124. Idleman, *supra* note 112, at 12.
125. *Id* at 13.
126. *Id.* at 13-14. *See also* Edwards v. Aguillard, 482 U.S. 578, 587 (1987).
127. Idleman, *supra* note 112, at 13-14.
128. *Id.* at 612.
129. Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973).
130. *Id.*
131. *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 743-46 (1973).
132. *Id.* at 734.
133. *Id.* at 743.
134. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

also violated when the state has "an official purpose to disapprove of a particular religion or of religion in general."[135]

c. *The Excessive Entanglement Prong*

The majority of the Court's discussions in the area of Establishment Clause jurisprudence seem to focus on the third prong of the *Lemon* test—the excessive entanglement prong. Mere "[i]nteraction between church and state is inevitable, and [the Court has] always tolerated some level of involvement between the two."[136] However, once the two become excessively entangled in one another's affairs, there is an Establishment Clause violation.[137] Because some level of involvement between church and state is inescapable, "[e]ntanglement is a question of kind and degree,"[138] meaning that some entanglements are undoubtedly more egregious than others.

The entanglement prong of the *Lemon* test is certainly the most difficult to apply. In determining whether there is an entanglement, the Court examines all of the circumstances of a particular case.[139] There are four factors, however, that the Court views as instructive in determining whether there is excessive entanglement: (1) the character and purposes of the institution benefited by the government aid, (2) the nature of the aid that the government is providing, (3) the relationship that results between the government and the religious authority after the aid is provided, and (4) the risk of political division along religious lines.[140] While these factors are helpful, they are not determinative, and they do not receive the same weight in every case.[141] Some become more important than others—depending on the practice at issue—and the presence of one does not necessarily constitute excessive entanglement on its own.[142]

The first factor is the character and purposes of the institution or institutions that benefit from the government aid.[143] In *Lemon*, the Court held that the parochial schools benefiting from state aid had a primarily religious, not secular, purpose.[144] The Court pointed out that even though direct religious instruction constituted a small part of the students' day, they were surrounded by religious symbols and taught primarily by nuns.[145] The Court

135. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").
136. Agostini v. Felton, 521 U.S. 203, 233 (1997) (citations omitted).
137. *Id.*
138. Lynch v. Donnelly, 465 U.S. 668, 684 (1984).
139. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (recognizing that the line separating church and state is sometimes difficult to draw and depends upon the "circumstances of a particular relationship").
140. Crumpler, *supra* note 123, at 149-51.
141. *See, e.g.*, *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring) (mentioning how the risk of political division along religious lines is more important in some cases than in others).
142. *See Agostini*, 521 U.S. at 233-34.
143. *Lemon*, 403 U.S. at 615.
144. *Id.* at 616-17.
145. *Id.* at 616.

determined that because of the religious atmosphere and the impressionable age of the children, the parochial schools at issue in *Lemon* were "'powerful vehicle[s] for transmitting the Catholic faith to the next generation'"[146] and thus "involve[d] substantial religious activity and purpose."[147]

The second factor in determining entanglement is the nature of the aid that the government is providing.[148] It appears that government aid in the form of materials or services is more readily accepted by the Court than outright grants of money because materials can be checked to ensure that they do not contain impermissible religious content.[149] For instance, the Court pointed out in *Lemon* that aid to parochial schools in the form of "[b]us transportation, school lunches, public health services, and secular textbooks . . . were not thought to offend the Establishment Clause."[150]

The third factor that the Court takes into account is the resulting relationship between the government and the religious authority once aid is provided.[151] The primary concern under this factor is whether the state is required to maintain continuing surveillance in order to prevent an Establishment Clause violation.[152] Not all government monitoring of benefited institutions runs afoul of the Establishment Clause. For instance, in *Bowen v. Kendrick*,[153] the Court held that there was no excessive entanglement even though the government would be required to monitor federal grantees by examining their educational materials and making occasional field visits, because there was not a great deal of surveillance and the organizations were not necessarily pervasively sectarian.[154] However, when a significant amount of state surveillance is required to monitor a pervasively sectarian institution, "excessive and enduring entanglement"[155] between government and religion seems to be the inevitable result—a result which is not acceptable under the Establishment Clause.

The fourth factor is the "risk of political division along religious lines."[156] The Court recognized that allowing the government and religion to become entangled would interfere with the normal political process because people would cast their votes according to their faith instead of basing their decision on political issues.[157] The Court has stated that "political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political divi-

146. *Id.* (quoting DiCenso v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970)).
147. *Id.*
148. *Id.*
149. Crumpler, *supra* note 123, at 150.
150. *Lemon*, 403 U.S. at 616-17.
151. *Id.* at 616.
152. Crumpler, *supra* note 123, at 149-50.
153. 487 U.S. 589 (1988).
154. *Id.* at 616-17.
155. *Lemon*, 403 U.S. at 620.
156. Crumpler, *supra* note 123, at 150.
157. *Lemon*, 403 U.S. at 623.

sion along religious lines was one of the principal evils against which the First Amendment was intended to protect."[158]

2. *The Endorsement Test*

Justice O'Connor first introduced the endorsement test in her concurrence in *Lynch v. Donnelly*,[159] calling the test "a clarification of our Establishment Clause doctrine."[160] Endorsement is dangerous, according to Justice O'Connor, because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[161] The endorsement test prohibits government "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[162] Whether the government is conveying a message that endorses religion is determined by both the government's intentions and the "'objective' meaning of the statement in the community."[163] Although the Court has applied a form of the endorsement test in several cases,[164] Justice O'Connor has refused to completely abandon the *Lemon* test and has instead urged that the endorsement test be used to clarify the *Lemon* test.[165]

3. *The Coercion Test*

Another test that the Supreme Court has applied in Establishment Clause cases is the coercion test, first articulated by Justice Kennedy in his concurrence in *County of Allegheny v. American Civil Liberties Union*[166] and first applied by a majority of the Court in *Lee v. Weisman*.[167] Under this test, the central inquiry is whether the government is establishing religion through coercion.[168] This coercion can take a number of forms, including

158. *Id.*
159. 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).
160. *Id.* at 687.
161. *Id.* at 688.
162. Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment).
163. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).
164. Allegheny v. ACLU, 492 U.S. 573, 598-601 (1989) (applying the endorsement test to invalidate a crèche display); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (holding that a tax exemption limited to religious periodicals "effectively endorses religious belief"); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (invalidating Louisiana's "Creationism Act" because it had the purpose of "endorsing religion"); School Dist. v. Ball, 473 U.S. 373, 389-92 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997), (holding that a school program violated the Establishment Clause because of its "endorsement" effect); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (holding that Alabama's moment-of-silence statute was invalid because it was enacted to express the state's "endorsement of prayer activities").
165. *Wallace*, 472 U.S. at 69-70 (1985) (O'Connor, J., concurring in the judgment).
166. 492 U.S. 573, 660-62 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).
167. 505 U.S. 577, 587-96 (1992).
168. *Allegheny*, 492 U.S. at 659-60 (Kennedy, J., concurring in the judgment in part and dissenting in part).

"taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing."[169] Absent some type of coercion, Justice Kennedy wrote, "the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[170]

In *Lee v. Weisman*,[171] a majority of the Court held that the delivery of a nonsectarian prayer at a public school graduation was unconstitutional.[172] The Court pointed out that this type of coerced religious activity is particularly dangerous in public schools because school children are impressionable and extremely vulnerable to peer-pressure.[173] Justice Kennedy explained that "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[174] More recently, the Court applied similar reasoning—in *Santa Fe Independent School District v. Doe*[175]—to a school's endorsement of prayer before certain athletic events.[176] While the coercion test has only been applied by the majority in cases involving school prayer, it could be relevant in other situations as well.[177]

4. *The* Larson *Test*

In *Larson v. Valente*,[178] the Court distinguished cases in which the government favors one type of religion over another from those in which it favors religion over non-religion.[179] The Court explained in *Larson* that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another" and that the Establishment Clause was originally enacted to prevent that sort of preferential treatment.[180] Thus, the Court in *Larson* held that state laws showing any sort

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169. *Id.*
170. *Id.* at 662.
171. *Lee*, 505 U.S. at 577.
172. *Id.* at 586-87.
173. *Id.* at 593-94 (Kennedy, J., concurring in the judgment in part and dissenting in part).
174. *Id.* at 592 (Kennedy, J., concurring in the judgment in part and dissenting in part).
175. 530 U.S. 290 (2000).
176. *Id.* at 310-13.
177. *See Lee*, 505 U.S. at 592 ("The concern [about coercion] may not be limited to the context of schools, but it is most pronounced there.").
178. 456 U.S. 228 (1982).
179. *Id.* at 244-46, 252-53. The Court has recognized the continuing validity of the *Larson* strict scrutiny standard in subsequent cases. *See, e.g.*, Allegheny v. ACLU, 492 U.S. 573, 608-09 (1989) ("[W]e have expressly required 'strict scrutiny' of practices suggesting a 'denominational preference.'"); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) ("*Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*.") (internal citation omitted). *See also* Dep't of Human Res. v. Smith, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.") (internal citations omitted).
180. *Larson*, 456 U.S. at 244. The Court explained that before the Revolutionary War, religious

of denominational preference are treated as suspect and are subject to the rigorous requirements of the strict scrutiny test.[181] Under the strict scrutiny test, the government's actions must be: (1) justified by a compelling governmental interest, and (2) narrowly tailored to serve that interest.[182]

The Court determines what constitutes a compelling governmental interest on a case-by-case basis.[183] In general, national security and serious health, safety, or welfare concerns constitute compelling governmental interests, but reducing the cost to a state, avoiding litigation, and promoting administrative convenience do not.[184] For the policy to be narrowly tailored, the government generally must show that no less restrictive alternatives exist that would achieve the compelling governmental interest.[185]

III. THE WAR POWERS CLAUSE

A. The Court's Traditional Deference to the Military

Despite what seems to be a violation of the Establishment Clause, the Court may choose not to hold that a new military policy has violated the First Amendment because of the tremendous amount of deference the Court typically grants military decisions.[186] The War Powers Clause gives Congress the power to "provide for the common Defence," to "raise and support Armies," and to "make Rules for the Government and Regulation of the land and naval Forces,"[187] and the courts have broadly interpreted the military's power under this provision.[188]

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establishment of differing denominations was common in the colonies. *Id.* However, the Revolutionary generation disagreed with this practice, reasoning that "[i]f Parliament had lacked the authority to tax unrepresented colonists, then by the same token the newly independent States should be powerless to tax their citizens for the support of a denomination to which they did not belong." *Id.* This reasoning eventually led to the inclusion of the Establishment Clause in the First Amendment to the Bill of Rights in 1791. *Id.* at 245.

181. *Id.* at 246.

182. *Id.* at 246-47. In *Larson*, the Court held that a Minnesota law imposing certain registration and reporting requirements on religious organizations that solicited more than fifty percent of their funds from nonmembers was not narrowly tailored to serve the compelling governmental interest in protecting citizens from abusive practices in the solicitation of funds for charity. *Id.* at 248.

183. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391-92, 398 (2000) (holding that preventing political corruption or the appearance of such corruption is a compelling governmental interest); Zablocki v. Redhail, 434 U.S. 374, 388-90 (1978) (holding that protecting children is a compelling governmental interest); Korematsu v. United States, 323 U.S. 214, 216, 219 (1944) (holding that wartime necessity is a compelling governmental interest).

184. *See generally supra* note 183; JAMES A. KUSHNER, *Tier III: Strict Scrutiny: The Compelling State Interest Test, in* GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 4.30 (2003).

185. *See* Donald T. Kramer, 16A AM. JUR. 2D *Constitutional Law* § 387 (2004).

186. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2677 (2004) (Thomas, J., dissenting); Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988); Goldman v. Weinberger, 475 U.S. 503, 507 (1986); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952); Korematsu v. United States, 323 U.S. 214, 218-20, 223 (1944).

187. U.S. CONST. art. I, § 8.

188. *See Goldman*, 475 U.S. at 507.

In *Goldman v. Weinberger*,[189] the Court upheld an Air Force regulation requiring uniform dress for Air Force personnel against a Free Exercise Clause challenge.[190] In that case, an Air Force captain, who was also an ordained rabbi, brought a constitutional challenge on the grounds that the Air Force regulation prohibiting him from wearing his yarmulke while in uniform violated his free exercise rights.[191] The Court noted that when "evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[192] In this case, the Air Force's judgment that standardized uniforms "encourage[] the subordination of personal preferences and identities in favor of the overall group mission"[193] outweighed the captain's right to freely exercise his religion by wearing a traditional headpiece.[194] The *Goldman* case is an excellent example of the Court's extreme deference to the military. Although Goldman's claim would have been subject to strict scrutiny if it had arisen in a civilian context, the Court essentially did not review the claim on the merits[195] and instead automatically deferred to the military's judgment.[196]

The Court grants even more deference to the military when the United States is at war.[197] Although the soldiers in Iraq are supposedly now conducting peace-keeping and rebuilding operations, the United States is still at war with terror in general, and thousands of U.S. troops are still deployed in the Middle East.[198] Therefore, any policies that the DoD enacts during this time of war would probably be granted even more deference than normal, even if those policies might be considered a violation of civil rights during peacetime.[199] The most obvious example of this wartime deference is found in *Korematsu v. United States*.[200] In that case, the Court upheld one of several exclusion and detention provisions applied to people of Japanese ancestry in America during World War II.[201] These provisions, which were authorized by Executive Order 9066, required people to either leave or remain

189. 475 U.S. at 503.
190. *Id.* at 509-10.
191. *Id.* at 504.
192. *Id.* at 507.
193. *Id.* at 508.
194. *Id.* at 508-09.
195. The Court dismissed Goldman's argument that there should be religious exceptions to the Air Force dress code as "quite beside the point." *Id.* at 509.
196. Mary Jo Donahue, *First Amendment Rights in the Military Context: What Deference is Due?*—Goldman v. Weinberger, 20 CREIGHTON L. REV. 85, 109 (1986).
197. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Korematsu v. United States, 323 U.S. 214 (1944).
198. *See* Robert Burns, *U.S. Troops May Stay in Iraq Through '06*, ARIZ. DAILY STAR, Jan. 29, 2004, *available at* http://www.azstarnet.com/dailystar/relatedarticles/7662.php.
199. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).
200. 323 U.S. at 214.
201. *Id.* at 223-24. President Roosevelt signed Executive Order 9066 into law on Feb. 19, 1942. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) [hereinafter Document Info], http://www.ourdocuments.gov/doc.php?flash=false&doc=74.

in certain areas, and essentially culminated in the internment of over 120,000 Japanese men, women, and children, about 70,000 of whom were American citizens.[202] The Court held that these restrictions, which were based purely on race, were justified by their wartime necessity.[203] The Court explained this result by reasoning that "[t]here was evidence of disloyalty on the part of some [people of Japanese ancestry], the military authorities considered that the need for action was great, and time was short."[204] Based on these factors, the Court declined to second-guess the military's judgment.[205]

Forty years after the Supreme Court affirmed his conviction, Korematsu brought an action to have his conviction vacated based on documents that the government knowingly withheld from the Court when it considered the question of military necessity in his case.[206] The documents are internal government memoranda and letters indicating that no military necessity existed to enact laws detaining and interning people of Japanese ancestry.[207] The district court vacated Korematsu's conviction on a writ of *coram nobis* after considering those documents and a report from the Commission on Wartime Relocation and Internment of Civilians determining that military necessity did not warrant the detention of people of Japanese ancestry.[208]

1. The Court's Reaction to the War on Terror

As the military's actions during the war on terror begin to be challenged in the courts, the Supreme Court will once again be called upon to examine the limits of its traditional deference to the military during wartime. On June 28, 2004, the Court handed down one of its first opinions addressing this issue.[209] In *Hamdi v. Rumsfeld*,[210] the Court examined what process is due an American citizen held by the military as an enemy combatant.[211] The Court held that, while the military has authority to detain a citizen as an

202. Document Info, *supra* note 201.
203. *Korematsu*, 323 U.S. at 223-24.
204. *Id.*
205. *Id.*
206. Korematsu v. United States, 584 F. Supp. 1406, 1410 (N.D. Cal. 1984).
207. *Id.* at 1417-18.
208. *Id.* at 1416-17. The Commission found that "'broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership.' As a result, 'a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.'" *Id.* (quoting COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 236-39 (1982) [hereinafter PERSONAL JUSTICE DENIED]).

The commission also noted in its report that while *Korematsu* is technically still good law, it has been "overruled in the court of history" and that while "we have not been so unfortunate that a repetition of the facts has occurred to give the Court [the] opportunity [to overrule *Korematsu*] . . . each part of the decision, questions of both factual review and legal principles, has been discredited or abandoned." PERSONAL JUSTICE DENIED 238-39 (1982).
209. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).
210. 124 S. Ct. at 2633.
211. *Id.* at 2634.

enemy combatant, due process requires that the detainee "seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification[] and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[212] Declining to grant the military the tremendous deference sought, the Court pointed out that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[213] Although the circumstances of the *Hamdi* case are not analogous to an Establishment Clause case, the decision indicates that the Court is willing to review military policies regarding the war on terror and will not necessarily grant complete deference to all military decisions.

IV. How the Courts Have Treated Chaplaincy Programs

On its face, government establishment and funding of chaplaincy programs seems to be a violation of the Establishment Clause. However, at least one court has held that the free exercise rights of soldiers outweigh any Establishment Clause violation.[214] Courts have reasoned that the military must provide chaplains because the government is prohibiting soldiers from freely practicing their religion since they are frequently deployed or stationed away from home.[215]

The Second Circuit addressed the constitutionality of the Army chaplaincy in *Katcoff v. Marsh*.[216] Two Harvard law students, in their capacities as federal taxpayers, challenged the constitutionality of the Army's chaplaincy on the grounds that it violated the Establishment Clause because it

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212. *Id.* at 2648.

213. *Id.* at 2650.

214. *See* Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985) (reviewing the constitutionality of the military chaplaincy). This is also true in the context of the prison chaplaincy. *See, e.g.*, Remmers v. Brewer, 494 F.2d 1277, 1278 (8th Cir. 1974) (reviewing the prison chaplaincy); Theriault v. Carlson, 495 F.2d 390, 393 (5th Cir. 1974) (same); Horn v. California, 321 F. Supp. 961, 964 (E.D. Cal. 1968) (same); Rudd v. Ray, 248 N.W.2d 125, 127 (Iowa 1976) (same); Sch. Dist. v. Schempp, 374 U.S. 203, 296-99 (1963) (Brennan, J., concurring).

> 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. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that 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 and prisoners 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 such persons to be. . . . The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. . . . [H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.

Id. (footnotes omitted).

215. *See Katcoff*, 755 F.2d at 234.

216. 755 F.2d at 223.

was funded by government, instead of private, sources.[217] The court held that "[i]f the current Army chaplaincy were viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions."[218] However, the court pointed out, the Establishment Clause must be interpreted in light of other constitutional provisions, namely the Free Exercise Clause of the First Amendment and the War Powers Clause found in Article I.[219] The court ultimately decided to defer to Congress' war power on the question of the chaplaincy, stating that Congress' decisions on such matters are "presumptively valid" and that "any doubt as to [their] constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion."[220] The court also found that not providing a chaplaincy program to soldiers stationed in areas where they cannot freely practice their religion results in a violation of the soldiers' free exercise rights.[221] The court rejected the *Lemon* standard in this case and instead stated that in light of the court's deference to the military, the standard should be "whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense."[222] The court held that the chaplaincy program as a whole meets this standard because there are no practical alternatives to a government-funded chaplaincy, and the plaintiffs failed to show that a privately funded chaplaincy or a civilian chaplaincy were feasible options.[223] Deciding that the Free Exercise Clause and the War Powers Clause ultimately outweigh the Establishment Clause under these circumstances, the Second Circuit held that the Army's chaplaincy program, as a whole, is constitutional.[224]

More recently, the United States District Court for the District of Columbia began addressing a case in which current and former Navy chaplains and an ecclesiastical endorsing agency filed suit against the Navy, alleging that some hiring and retention practices violated the Establishment and Free Exercise Clauses.[225] The chaplains and the agency, all of whom were associated with non-liturgical Christian denominations, alleged that some of the Navy's hiring, promotion, and retention policies discriminated against them

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217. *Id.* at 224-25.

218. *Id.* at 232.

219. *Id.* at 233. The War Powers Clause gives Congress the power to "provide for the common Defence," to "raise and support Armies," and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8.

220. *Katcoff*, 755 F.2d at 234 (citing Rostker v. Goldberg, 453 U.S. 57, 64-68 (1981)).

221. *Id.* at 234.

222. *Id.* at 235. The Second Circuit did not indicate that it was basing this standard on any sort of existing Establishment Clause precedent.

223. *Id.* at 236-37. The court did remand a few areas of the chaplaincy to the district court to determine whether they were constitutional. *Id.* at 237-38. These issues included whether there was a reasonable necessity to provide chaplains to military personnel in large population centers (i.e., the Pentagon in Washington, D.C.) or to provide chaplains to retired military personnel who were no longer stationed away from home. *Id.*

224. *Id.* at 235.

225. Adair v. England, 183 F. Supp. 2d 31 (D.D.C. 2002) (mem.).

in favor of liturgical Christian denominations.[226] The court has not yet reached the merits of these claims, but its discussion of the standard of review that should be applied in this case is instructive for purposes of this Comment. The court held that because the plaintiffs allege denominational preferences by the government, the *Larson* standard applies, not the *Lemon* test.[227]

The *Adair* court also refused to defer to the military by applying a more relaxed standard of scrutiny.[228] The Navy relied heavily on *Goldman* for the proposition that the courts should afford the military great deference in reviewing its policies.[229] The district court, however, rejected this argument for two reasons: (1) unlike the hiring and retention policies at issue in *Adair*, "*Goldman* dealt with a regulation that involved inherently operational, strategic, or tactical matters";[230] and (2) *Goldman* only addressed Free Exercise Clause issues, not Establishment Clause claims.[231] The court reasoned that unlike the uniform regulation in *Goldman* that could have affected the soldier's performance, the Navy's chaplaincy hiring and retention policies only "relate to quality-of-life issues for military personnel and have no specific operational, strategic, or tactical objective."[232] In addition, it refused to read the *Goldman* decision as applying to all First Amendment claims and adopted the narrow interpretation that *Goldman* only applies in the Free Exercise arena.[233] The standard applied by the *Adair* court in this case could turn out to be important precedent in determining whether the potential DoD policies at issue in this discussion violate the Establishment Clause.

Although these lower federal courts have discussed various aspects of the military chaplaincy, there is no United States Supreme Court precedent directly addressing any issue involving the military chaplaincy. However, the Court has held that a state legislative chaplaincy program does not violate the Establishment Clause.[234] In *Marsh v. Chambers*, the only case in which the Supreme Court has directly addressed the constitutionality of a chaplaincy program, the Court did not apply the *Lemon* test.[235] Instead, the Court based its decision exclusively on historical grounds.[236] It pointed out

226. *Id.* at 40. The Navy divides its Christian personnel into three categories: Catholic, liturgical Protestant, and non-liturgical Christian. *Id.* at 36. The term "liturgical Protestant" refers to "Christian Protestant denominations whose services include a set liturgy or order of worship." *Id.* Examples include the Lutheran, Reformed, Episcopal, Presbyterian, and Methodist denominations. *Id.* "Non-liturgical" denominations do not follow a set order of worship. *Id.* Examples include the Baptist, Evangelical, Pentecostal, and Charismatic denominations. *Id.* The plaintiffs in this case maintain that the Navy favors liturgical denominations—both Catholic and liturgical Protestants—in its hiring and retention policies. *Id.* at 40.

227. *Id.* at 50.

228. *Id.* at 52.

229. *Id.* at 50.

230. *Id.*

231. *Id.* at 51.

232. *Id.* at 50.

233. *Id.* at 51-52.

234. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

235. *See id.* at 784-95.

236. *See id.*

that the First Congress authorized the appointment of paid chaplains and that the practice of hiring paid legislative chaplains in the state and federal legislatures has continued uninterrupted for more than 200 years.[237] The Court held that the First Congress, which is typically afforded great weight in interpreting the Constitution, demonstrated by their hiring of legislative chaplains that such a practice does not violate the Establishment Clause.[238] Since the Court made no effort to reconcile *Marsh* with existing Establishment Clause cases applying the *Lemon* test, it appears—as Justice Brennan pointed out in his dissent—that the majority was "carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine."[239]

Based on existing precedent, the military chaplaincy appears to be constitutional under the First Amendment. However, no court has ever addressed whether the policies underlying the chaplain selection process and the regulations that stem from them might constitute an Establishment Clause violation.

V. ANALYSIS

Given the paucity of precedent concerning the chaplaincy and the Establishment Clause, it is unclear which Establishment Clause test would apply to a constitutional challenge regarding DoD policies underlying the chaplain selection process.[240] *Adair v. England* suggests that the Court would apply the *Larson* strict scrutiny standard because the government policies favor one type of religion over another instead of favoring religion over non-religion.[241] *Adair*, however, is a district court opinion, and the circumstances of that case differ from this case. The only Supreme Court precedent regarding a chaplaincy program carves out an Establishment Clause exception based on the history of the legislative chaplaincy.[242] The military chaplaincy, in existence since the nation's founding,[243] has a history similar to that of the legislative chaplaincy at issue in *Marsh*. However, the chaplaincy selection process is not part of that history. It is unclear how much deference the Court would afford the military under these circum-

237. *See id.* at 788.
238. *Id.* at 790.
239. *Id.* at 796 (Brennan, J., dissenting).
240. Taxpayers do not generally have standing to bring constitutional challenges. *See* Frothingham v. Mellon, 262 U.S. 447, 485 (1923). However, there is an exception to that general rule in Establishment Clause cases. *See* Flast v. Cohen, 392 U.S. 83, 85 (1968). A taxpayer would likely meet the two standing requirements articulated in *Flast* because: (1) the chaplaincy is funded by the military and the DOJ under Congress's Taxing and Spending Clause power, and (2) Congressional funding of the chaplaincy in light of these policies would violate the Establishment Clause, thus linking the challenged expenditure to a specific constitutional limitation. *See Flast*, 392 U.S. at 102-03.
241. *See* Adair v. England, 183 F. Supp. 2d 31, 47 (D.D.C. 2002) (mem.).
242. *See* Marsh v. Chambers, 463 U.S. 783, 784-95 (1983).
243. A BRIEF HISTORY OF THE UNITED STATES CHAPLAIN CORPS: PRO DEO ET PATRIA chs. 1-7 (William J. Hournihan, ed., 2004) [hereinafter BRIEF HISTORY], *available at* http://www.usachcs.army.mil/HISTORY/Brief/TitlePage.htm.

stances. The argument in *Adair* that there should be no deference because the hiring of chaplains does not involve "operational, strategic, or tactical"[244] matters is not as convincing in this context. The military will likely argue that the new policies are designed to prevent terrorists from infiltrating the military, something that clearly involves more than just the quality of life of military personnel. Several factors, including the *Marsh v. Chambers* historical argument and the traditional deference to the military under the War Powers Clause, weigh in favor of finding these potential DoD policies constitutional. However, these policies have broader implications than those challenged in *Adair* or *Marsh*. Allowing the military to handpick ecclesiastical endorsing agencies would give it complete control over the beliefs of chaplains, something that would cause unprecedented entanglement between religion and government and shake the very foundation of the wall between church and state. Because it is unclear which Establishment Clause test a court would apply in this case, this Comment analyzes the issue under each one.

A. Marsh v. Chambers *Historical Standard*

The Court upheld the legislative chaplaincy at issue in *Marsh v. Chambers* purely on historical grounds.[245] Essentially, the Court reasoned that because the practice had continued uninterrupted for more than 200 years, it did not need to be analyzed under any type of Establishment Clause test.[246] The reasoning that the Court applied to the legislative chaplaincy could also be applied in the context of the military chaplaincy. Like the legislative chaplaincy, the military chaplaincy was authorized by the First Congress when it established a standing army in 1791.[247]

Although *Marsh* might be applied to a challenge of the policies underlying the chaplaincy selection process, the circumstances in *Marsh* are fundamentally different from the circumstances in this case. The plaintiffs in *Marsh* were challenging the very existence of the legislative chaplaincy program.[248] The Court declined to strike the entire program based on its history.[249] In contrast, this case would not involve a challenge to the chaplaincy as a whole but would instead call into question the policies underlying the selection of ecclesiastical endorsing organizations. Ecclesiastical 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.

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244. Adair v. England, 183 F. Supp. 2d 31, 50 (D.D.C. 2002).
245. *See Marsh*, 463 U.S. at 784-95.
246. *Id.* at 788.
247. *See* BRIEF HISTORY, *supra* note 243, at ch. 1.
248. *Marsh*, 463 U.S. at 785.
249. *Id.* at 784-95.

In addition, the Court has recognized on several occasions that practices rooted in history are not necessarily consistent with a modern interpretation of the Constitution.[250] In *County of Allegheny v. American Civil Liberties Union*,[251] the Court recognized that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today"[252] and that it is a "bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith."[253] Allowing the military to choose endorsing organizations on the basis of their beliefs clearly indicates a preference for a particular faith and has no legitimate historical basis. Therefore, even though these policies concern the military chaplaincy, which has been in existence since the founding of the nation, they cannot withstand a constitutional challenge merely because of the chaplaincy's history, and they should be subject to review under the Establishment Clause.

B. The War Powers Clause and Deference to the Military

The level of deference that a court would give the military in this case is unclear. The discovery that the government knowingly withheld information in the *Korematsu* case[254] and the Supreme Court's willingness to second-guess the military's actions in *Hamdi*[255] suggest that a court would not grant the military the sort of blanket deference that the Court granted in *Goldman* and *Korematsu*. In fact, in *Adair*, the district court questioned whether the War Powers Clause would even be an issue in that kind of challenge to the chaplaincy selection process.[256] The court held that the hiring and retention policies at issue did not implicate "operational, strategic, or tactical matters"[257] but instead only concerned the lifestyles of the chaplains and those they served; because of this, the court held, the military was not entitled to the traditional deference it is afforded in matters concerning military strategy.[258] The potential policies at issue in the instant case also concern the selection and hiring of chaplains—meaning that a court might decide, as the *Adair* court did, not to defer to the military at all. This seems unlikely, however, given the circumstances surrounding these policy changes. The military could legitimately assert that these policies do concern "operational,

250. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (invalidating a sodomy statute that represented a common prohibition throughout history); Reed v. Reed, 404 U.S. 71, 76 (1971) (striking down a law based on historic gender discrimination); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (striking down the concept of separate but equal).
251. 492 U.S. 573 (1989).
252. *Id.* at 603.
253. *Id.* at 605.
254. *See supra* notes 206-08 and accompanying text.
255. *See supra* notes 210-13 and accompanying text.
256. 183 F. Supp. 2d 31, 50-51 (D.D.C. 2002) (mem.).
257. *Id.* at 50.
258. *Id.* at 50-51.

strategic, or tactical matters"[259] since they are supposedly designed to keep terrorists from infiltrating the American military via the chaplaincy. In light of this assertion, it is likely that a court would grant the military at least some of the traditional deference.

It does not appear, however, that a court would completely defer to the military on this matter. In *Korematsu*, the Court essentially gave the military free reign to implement its policies during wartime despite the fact that it was infringing on the rights of American citizens. This decision resulted in one of the greatest atrocities that the United States has ever committed against its own people, but the tragedy could have been prevented if the Court had demanded actual evidence from the military proving the necessity of the detention. In *Hamdi*, the Court was unwilling to grant the military total deference and instead applied the usual standard for determining the process due an individual alleging a violation of constitutional rights.[260] While the Court took note of the fact that it was considering a military policy during wartime, it merely used this as a factor in the due process analysis and did not reach an overarching conclusion based on it.[261] It appears that the *Hamdi* Court refused to repeat the mistake that the Court made in *Korematsu*. Thus, it is likely that the Court would not grant complete deference to the military but would instead subject the chaplaincy policy to one of the Establishment Clause standards.

The military's aversion to a certain religious group based on its beliefs could result in a serious violation of the Establishment Clause. Complete deference to the military by the Court would continue in the *Goldman* path of eroding the First Amendment rights of military personnel. Hopefully, in light of the discovery that the government intentionally withheld documents in *Korematsu* and the Court's attitude toward the military in *Hamdi*, the Court will require more proof from the government that its policies are based on national security concerns and not on broad prejudicial classifications.

C. *The* Lemon *Test*

1. Secular Purpose Prong

The Court typically accepts most asserted secular purposes behind laws, even if the law has an obvious underlying religious purpose.[262] In this case, the government can certainly state what the Court will likely consider a legitimate secular purpose underlying changing the Muslim chaplaincy selection process and analyzing the beliefs of potential endorsing organizations—the identification of potential terrorist organizations planning to use

259. *Id.* at 50.
260. *Hamdi*, 124 S. Ct. at 2648.
261. *Id.*
262. Crumpler, *supra* note 123, at 148 n.46.

the chaplaincy to spread terrorist ideology. The DoD would, of course, be basing this asserted purpose on speculation because it has no substantial evidence that terrorists are entering the American military via the chaplaincy.

However, since the Court has been extremely lenient in the past about accepting the government's asserted secular purpose, even when the real underlying purpose is clearly sectarian,[263] there is no reason to believe it would treat this case differently. In addition, the government has been given a tremendous amount of leeway to protect national security concerns since September 11, despite the fact that it might be abridging constitutional rights. Therefore, even if the government's asserted interest is based on pretext, the Court would likely decide this is an acceptable secular purpose under the first prong of the *Lemon* test.

2. *Primary Effect Prong*

Under the second prong of the *Lemon* test, the primary or principal effect of the law at issue must neither advance nor inhibit religion.[264] The policy at issue here—looking substantively at Islam and changing the Muslim endorsing organizations for purely political reasons—definitely has the primary effect of advancing some sects of a religion and inhibiting other sects of the same religion. In *Zorach v. Clauson*,[265] the Supreme Court noted that "[t]he government must be neutral when it comes to competition between sects" and that "[i]t may not thrust any sect on any person."[266] In this case, the military is thrusting certain sects upon its soldiers by favoring Islamic sects with American-friendly beliefs over those it perceives to have more "radical" beliefs. In examining the endorsing organizations' beliefs and deciding which agencies to use based on that examination—instead of on a religiously neutral set of requirements—the government is not maintaining neutrality with regard to Muslim sects, and it is forcing the sect of its choice on the soldiers receiving services from Muslim chaplains.

It is clear in this situation that replacing the current endorsing organizations would have the direct and immediate effect of advancing some sects of Islam (for instance, the more mainstream Sunni and Shi'ite sects) while inhibiting the less politically popular sects, such as Wahhabism and other fundamentalist sects. The government has repeatedly emphasized the alleged link between Wahhabi Muslims and terrorism in an effort to demonize the sect and Islam as a whole. At a Senate Judiciary Subcommittee on Terrorism, Technology, and Homeland Security hearing regarding terrorism and the growing Wahhabi influence in the United States, Alex Alexiev, a Distinguished Fellow at the Center for Security Policy, testified as to what

263. *See* Idleman, *supra* note 112, at 11.
264. Crumpler, *supra* note 123, at 148.
265. 343 U.S. 306 (1952).
266. *Id.* at 314.

he (and no doubt other politicians and analysts) perceives to be the real dangers of Wahhabism:

> [T]he Wahhabi ideology continues to be characterized by a set of doctrinal beliefs and behavior prescriptions that are often inimical to the values and interests of the vast majority of Muslims in the world to say nothing about those of non-Muslims. . . . The Wahhabis continue to believe and preach . . . rigid conformism of religious practice, institutionalized oppression of women, wholesale rejection of modernity, secularism and democracy . . . .[267]

Most Americans would probably agree with Alexiev that these are not positive attributes, and they would choose not to subscribe to this particular religious doctrine. The Constitution, however, does not allow the government to disfavor a religion merely because it is unpopular. Alexiev's testimony is clearly a substantive analysis of the sect, and if the DoD bases its decisions to change the Muslim chaplaincy on such analyses, it will probably violate the Establishment Clause.

During his testimony, Alexiev also criticized the building of new mosques and Islamic centers and other Muslim efforts to proselytize.[268] However, these activities do not show a causal link between Islam and terrorism and they are protected by the Free Exercise Clause, even if they happen to be funded by a foreign government source (in this case, that source is allegedly Saudi Arabia). Unless the government can prove that the money is actually funding terrorism (rather than building mosques and sponsoring religious programs), there is no reason to be concerned about the growing number of mosques in the United States, or about Muslim chaplains in the military.

3. Excessive Entanglement Prong

If the DoD's potential policies are not struck down under the primary or principal effect prong, they will likely be struck down under the entanglement prong of the *Lemon* test. This prong requires that the law must "not foster 'an excessive government entanglement with religion.'"[269]

Two types of institutions would benefit from the potential policies in this case: (1) Islamic organizations whose beliefs are favored by the U.S. government, and (2) every type of ecclesiastical endorsing organization that would not be forced to undergo this type of scrutiny. The purpose of these institutions is clearly to advance their own religious beliefs through traditional means of religious practice and doctrine. Of course, this is permissible in this context because ecclesiastical endorsing organizations must have

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267. *Growing Wahhabi Influence*, *supra* note 72.
268. *Id.*
269. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

a religious purpose in order to qualify to provide endorsements for chaplains.[270] However, if the DoD adopts policies that discriminate against certain endorsing organizations and favor others solely on the basis of their beliefs and not on the basis of objective, religiously neutral criteria, this will undermine the delicate balance that the DoD has sought to maintain between the Free Exercise and Establishment Clauses and will ultimately result in excessive entanglement with the benefited religious organizations.

The nature of the aid provided by the government in this case includes monetary compensation for rendering endorsement services,[271] but more importantly the government would be providing the benefited institutions with a position of power over Muslim chaplains in the military. Senator Schumer's letters and the testimony before the Senate Judiciary Subcommittee on Terrorism, Technology, and Homeland Security demonstrate that the federal government believes chaplains have a great deal of influence over the populations they serve.[272] Of course, because the government recognizes this, it is seeking to ensure that only chaplains with acceptable, American-friendly beliefs are appointed to those powerful positions. Establishing a religion in violation of the First Amendment is much easier with this type of power than with an outright grant of money. The monetary aid in this case is probably constitutionally permissible because it is a nominal amount of money used to offset the administrative costs of issuing endorsements. However, it is unclear whether the Court would consider the government's grant of exclusive authority to certain religious organizations to be a potential danger to the Establishment Clause. However, in light of the fact that "[e]very government practice must be judged in its unique circumstances,"[273] that exclusive authority could be and should be a consideration in the Court's analysis of this issue.

The resulting relationship between the government and the benefited endorsing institutions would be hopelessly entangled. The primary concern under this analysis is whether the government will have to maintain continuous surveillance of the institution in order to prevent an Establishment Clause violation. The government, particularly through the DoD investigations and Senate hearings, already seems to be heavily involved in monitoring the activities of the current endorsing organizations, and it appears that the government is seeking to replace these organizations because the government (or more accurately, some politicians and analysts) disapproves of the religious beliefs that the current organizations represent. If the government is allowed to unilaterally replace these endorsing agencies, it will be maintaining an unacceptable level of control over the endorsing organizations and ultimately over military chaplains. Allowing the government to switch these endorsing organizations based on a political whim sets a dan-

270. *See* DoD DIRECTIVE 1304.19, *supra* note 28.
271. *See* DoD PROCEDURES FOR MANAGEMENT OF INFORMATION, *supra* note 29, at 81.
272. *See* Letter, *supra* note 63; *Terrorist Recruitment*, *supra* note 1.
273. Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

gerous precedent that would give the government complete control over the chaplaincy program and allow it to become entrenched in the politics of religion. In addition, this type of monitoring will probably lead to excessive entanglement. Under the current policies, the DoD recertifies endorsing organizations every few years to ensure that they continue to meet minimum objective requirements.[274] This type of monitoring is probably permissible under the Establishment Clause. However, if the DoD constantly re-evaluates endorsing organizations' religious beliefs (as it appears to be doing now), it will likely be engaging in the type of extensive monitoring that violates the entanglement prong of the *Lemon* test.

The fourth factor used to determine whether entanglement exists is the risk of political division along religious lines.[275] Religion and morality in general are increasingly politicized in the United States and are becoming entangled with issues that should be purely political.[276] The war on terror and homeland security are hot-button political issues that have contributed to a culture of fear and suspicion towards Muslims in the United States, and investigations such as this one perpetuate that type of unfounded suspicion. Islam, and in particular Wahhabism, has been engulfed by the sweeping war that the Bush administration has waged on that vague and elusive enemy—terror. As a result, the line between terrorism and Islam has blurred, and Islam is becoming more of a political issue than a religion for many American politicians. It is doubtful that the Senate Judiciary Committee would hold a hearing to discuss extensive expansion of the Vatican-funded Catholic Church, a situation that is analogous to the one at issue here. Both situations involve expansion of a religious community in America financed by a foreign government. If the Catholic Church undertook such a project, there would be no response from the government because Catholicism is deeply engrained in the rich tapestry of American culture—nearly one quarter of the population, or roughly 62.4 million people, is Catholic.[277] In contrast, studies liberally estimate that there are just over 2.5 million Muslims living in the United States, comprising no more than one percent of the population.[278] However, the fact that Islam is a minority religion in the United States and happens to be the religion of some of the enemies in the "war on terror" does not give the government the right to substantively examine Muslim beliefs and choose which sects it wants represented in its chap-

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274. DOD PROCEDURES FOR MANAGEMENT OF INFORMATION, *supra* note 29, at 77.

275. Crumpler, *supra* note 123, at 150-51.

276. *See, e.g., Crying Murder When C-section Refused*, CNN.COM (Mar. 19, 2004), *at* http://www.cnn.com/2004/LAW/03/19/colb.csection/index.html. *Howard Stern Suspended for Indecency*, CNN.COM, *at* http://www.cnn.com/2004/US/02/26/wbr.stern.suspended/index.html (Feb. 26, 2004); *Gay Marriage a Hot-Button Issue for '04 Race*, CNN.COM (Nov. 19, 2003), *at* http://www.cnn.com/2003/ALLPOLITICS/11/19/judy.desk.gay.marriage/index.html.

277. *Number of Catholics in U.S. Up; Clergy Down*, CATHOLIC WORLD NEWS, *at* http://www.cwnews.com/news/viewstory.cfm?recnum=13119 (based on numbers from the 2000 Official Catholic Directory).

278. Gustav Niebuhr, *Studies Suggest Lower Count for Number of U.S. Muslims*, N.Y. TIMES, Oct. 25, 2001, at A16.

laincy programs. The First Amendment prohibits the government from disfavoring a religion simply because it comprises a minority or because it is unpopular.

Unfortunately, because of the public's perception that Osama bin Laden is tied to Wahhabi Islam, the entire American Islamic community has been pulled into the war on terror. Yee's high-profile arrest has led to further politicization of this issue, and a number of politicians are seeking to take what they perceive to be a politically advantageous stand against terrorism by including Islam and its followers in the war on terror. Allowing the government to handpick religious organizations to perform certain functions because it approves of their particular set of beliefs will cause the type of political division along religious lines prohibited by the Establishment Clause. Those who support the government's unbridled discretion to fight the war on terror—including trampling the civil rights of American citizens—will support ousting chaplaincy endorsing organizations that might have unpopular beliefs. On the other hand, the growing number of Americans concerned by the government's erosions of civil rights during the war against a vague, unidentified enemy will be concerned that the government is violating the Establishment Clause and chipping away at the wall between church and state. This division is of great import in the current political climate as evidenced by the fact that the war on terror, including its implications for the American Islamic community, was a decisive issue in the most recent presidential election.

D. The Endorsement Test

The military's selection of ecclesiastical endorsing organizations based upon their beliefs is likely a violation of the endorsement test. Handpicking certain organizations to endorse chaplains obviously indicates a preference for those organizations and for their beliefs. This sends a clear message to the soldiers and taxpayers that the military, an arm of the government, prefers certain religious beliefs over others. When the military will only allow certain sects of the Muslim faith to be represented in the chaplaincy, it is definitely favoring adherents of those sects over adherents of other sects. This is exactly the sort of religious endorsement prohibited under this Establishment Clause test.

E. The Coercion Test

Most likely, these potential policies are a violation of the coercion test. Although the coercion test has only been applied in cases involving school prayer,[279] the reasoning behind the test could also be applied to the military. In the cases applying the coercion test, the Court has emphasized that school

279. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992).

children are particularly vulnerable to coercive religious messages from the government because they are typically impressionable and often succumb to peer-pressure.[280] A similar argument could apply to the military. While members of the military are not as impressionable as school children (primarily because they are adults), the military culture promotes conformity and discourages any sort of dissention in the ranks even more so than a school environment does. The military is based upon a hierarchical structure, and its success depends upon its personnel obeying orders from their superiors. This structure and training make military personnel particularly susceptible to coercive religious messages from military administration. Additionally, because selecting endorsing organizations is the sort of active coercion the coercion test seeks to prevent, these potential policies probably violate the Establishment Clause under the coercion test.

F. The Larson *Test*

The *Larson* test applies when the government appears to favor one denomination over another, as it would be doing in this case.[281] The *Adair* decision suggests that this would be the appropriate standard to apply to hiring policies favoring one sect over another.[282] Under *Larson*, the government policy is presumed suspect and is subject to the strict scrutiny test.[283] Under that test, a government policy must: (1) serve a compelling governmental interest, and (2) be narrowly tailored to serve that compelling governmental interest.[284]

The military could most likely assert a compelling governmental interest in this case. The Court has accepted the protection of the national security as a compelling governmental interest in the past,[285] and it would likely do so in this case as well. The specific national security interest in this case would be guarding against terrorist infiltration of the military via the chaplaincy. There is little doubt that a court would accept this justification as compelling. However, the question would then become whether a policy allowing the military to handpick ecclesiastical endorsing organizations is narrowly tailored to serve this compelling governmental interest. Allowing the military to unilaterally replace endorsing organizations on the basis of subjective criteria is not a narrowly tailored policy. In order to narrowly tailor this type of policy, objective criteria for the exclusion of terrorist-appointing endorsing organizations would need to be implemented. Perhaps the military could conduct an investigation of each of its existing endorsing agencies (not just the Muslim endorsing organizations) to determine whether resources are being used to fund terrorism or whether working rela-

280. *Id.* at 593-94.
281. *See* Adair v. England, 183 F. Supp. 2d 31, 49-50 (D.D.C. 2002) (mem.).
282. *Id.* at 50.
283. *Id.* at 49.
284. *Id.* at 48.
285. *See generally supra* note 183; KUSHNER, *supra* note 184, § 4.30.

tionships with terrorist organizations exist. If any of the organizations do not qualify based on this type of objective criteria, the military could then accept applications from other organizations instead of seeking out particular organizations with American-friendly beliefs. An even more narrowly tailored alternative would be to simply screen the individual chaplains instead of the endorsing organizations. The presence of these less restrictive alternatives indicates that allowing the military to handpick endorsing organizations based on those organizations' beliefs is not narrowly tailored to serve its compelling governmental interest of protecting national security by preventing terrorist infiltration of the military. Because it is not narrowly tailored, this type of policy would probably fail the *Larson* test and violate the Establishment Clause.

CONCLUSION

If the DoD is allowed to pick chaplaincy endorsing organizations based on its substantive evaluations of the organizations' beliefs, it would likely violate the Establishment Clause under any test. Without some sort of proof that the Muslim endorsing organizations need to be replaced and without some sort of objective criteria with which to replace them, neither the government's fear and suspicion, nor the war on terror validates the DoD's potential practice of analyzing the beliefs of various Muslim sects and favoring some sects over others in violation of the Establishment Clause.

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