

USAWC STRATEGY RESEARCH PROJECT

**RELIGIOUS SUPPORT IN THE HOMELAND:
THE ESTABLISHMENT CLAUSE IN PERSPECTIVE**

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ABSTRACT

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As America prosecutes the Global War on Terror and struggles to mitigate the effects of natural disasters, mature guidance and policy for providing religious support to US citizens during disaster relief operations in the homeland have yet to emerge. As Joint doctrine and Service Component doctrine continue to evolve, the employment of military chaplains in this role remains contentious. Forthcoming objections from the legal community cite such use of military chaplains as being in violation of the US Constitution's First Amendment, with a particular appeal to the Establishment Clause. The paper will examine the First Amendment with a view toward resolving this impasse. It will consider the Establishment Clause within its socio-political and historical context, paying particular attention to its language. It will explore judicial trends, bringing to light any seminal cases informing religious support issues in the homeland. Finally, the paper will make recommendations affecting policy for the same.

RELIGIOUS SUPPORT IN THE HOMELAND: THE ESTABLISHMENT CLAUSE IN PERSPECTIVE

It is religion which has given birth to Anglo-American societies: one must never lose sight of that; in the United States religion is thus intimately linked to all national habits.

—Alexis de Tocqueville¹

A father and his young son had spent many glad hours exploring the vast web-like network of trails and footpaths that wound throughout the full expanse of their favorite state park in the Ohio River Valley. Through untold hours of outdoor activity in the park, the two acquired an awareness of its terrain that bordered on intimate familiarity. Hiking in the park following a particularly violent thunderstorm, they encountered a large tree that had fallen across the trail and was positioned such that it would require all but the most determined hikers to forego the plainly trodden path for an alternate one that would allow circumvention. As the months passed, more and more hikers, runners, and bicyclists who used the trail came to abandon the original path for the alternate one. Despite the deviations of others, the father and son had continued to negotiate the fallen tree on each outing, hoping to retain the integrity of the original trail and to avoid violating the surrounding natural environment. Over time, however, the first path faded such that it was only faintly visible to the eye, the once-new, but now well-established, and divergent path around the decayed tree having achieved prominence. To the young boy, the long-term impact was clear. “Dad,” he said, “Now it looks like no one will remember where the trail used to go.”²

In no topic of interest in the arena of public discourse and debate in America does this young man’s voice come to have a more prophetic tone than in discussions regarding religion and American public life or, more specifically, in church-state relations. While it seems safe to say that religion stands as one of the most pervasive but least understood forces in American life³, most Americans seem to be unclear about “where the trail used to go” with regard to the intent of the Founding Fathers and their generation and the social context and political times that produced both them and the documents that birthed the Nation. The national discussion seems to be always uncomfortable and, more often than not, hopelessly polarized. In Pavlovian fashion, secularists mechanically point to Thomas Jefferson’s wall of separation between church and state as though all conversation should, fully and finally, end there. Conversely, a large number of very conservative citizens choose to defend their perspectives by citing the Founders as though each and all were wonderful and devout, orthodox Christian men.⁴ Both of these opinions, it seems, find their origins in fear, and neither of them is true. Thus framed by the

heresies of the extremes, such conversations generally create much heat but very little light, illuminating neither the path that America has trod nor the way that lies ahead.

Terrorist attacks, hurricanes, floods, and wildfires have together prompted significant employment of military forces from all service components within the geographical boundaries of the American homeland. Arguably, such *in extremis* employment of military forces within the US borders in response to catastrophes may seem to constitute a trend for the foreseeable future. As the Department of Defense (DoD) increasingly employs military resources in response to both man-made and natural disasters within the US borders, the issue of religion in American public life, specifically church-state relations, takes a step toward center stage, and a clear and historically sound understanding of the way ahead increases in value and significance. To wit, American service members from all branches may currently be employed by the President to provide critical and often life-sustaining support, including food, water, medical supplies, and human comfort items, to their fellow Americans in the cities, neighborhoods, and streets of the homeland. However, the chaplains who accompany US service members wherever they go are, under current policy guidelines, prohibited from providing anything akin to ministry⁵ to US citizens at home. Those who oppose such interaction between DoD chaplains and US citizens cite as their authority the First Amendment to the US Constitution and, more specifically, the Establishment Clause.

It becomes the task of this paper to show that the employment of DoD religious support assets, that is, military chaplains, to provide spiritual comfort to US citizens suffering devastation from natural or man-made disasters occurring within the US borders is, in truth, no violation of the Establishment Clause at all and that such action may, in fact, be entirely consistent with the American national character. Following a brief overview of the more recent vignette that has produced prevailing policy, policy that represents the problem at hand, the paper will first examine the social and political context that set the historical stage upon which America was founded with a view toward reviewing anew the aim of those who framed the Constitution. Next, it will highlight examples of church-state cases in the judiciary since the 1940s, exploring the seminal case that continues to inform current policy and comparing this with subsequent judicial opinions and commentaries. Third, the paper will review and compare current Joint and Service Component doctrine regarding the utilization of military chaplains in operations in the homeland. Lastly, the paper will offer recommendations with a view toward amending current guidelines and shaping religious support policy for future homeland operations.⁶

This paper will limit the discussion of the Establishment Clause to matters related to the Federal, or National government. Apart from references in notations, discussion pertaining to

issues of establishment as they reside within the individual states lie beyond the scope of this effort. The paper will assume that the Establishment Clause protects equally those who believe and those who chose to not believe. The paper will seek neither to diminish nor defame the sincere intentions of those members of the legal profession who are responsible for working daily to interpret the law in the national interest. It will, however, seek to challenge in a vigorous fashion the *status quo*, favoring light over heat, and with a view toward change.⁷

The Vignette: An Episode from Hurricane Andrew Relief Operations

The first tropical storm of the 1992 season, Hurricane Andrew blasted ashore in southern Florida at roughly 5 o'clock in the morning on August 24, 1992. By the time the tempest made landfall, it had grown into a Category 5 storm boasting wind gusts in excess of 175 miles per hour. In the final analysis, Hurricane Andrew would become the most expensive natural disaster (to that date) with property damages exceeding \$20 billion. In total, more than 60 people were killed and approximately 2,000,000 people were evacuated from their homes.⁸

In Andrew's wake, within days then-President George H. W. Bush ordered US troops to Florida to assist the Florida Army National Guard with disaster relief operations in the storm-torn area.⁹ Accompanying his battalion of paratroopers from the 82nd Airborne Division into the disaster area was an Army chaplain, Chaplain (Captain) Jeff Houston. As the paratroopers made their way through the devastated neighborhoods in Miami, Florida, they came upon a woman in need of assistance. She was injured, and her home was filled with water. After the Soldiers had met her physical needs, she asked the chaplain, who was present on the scene, to pray with her. Chaplain Houston honored her request.¹⁰

In its Sunday edition of September 13, 1992, *The Miami Herald* published a human interest article describing Chaplain Houston's presence and work alongside his paratroopers as they assisted Floridians who were affected by the tragedy. The article was printed complete with an accompanying photograph of Chaplain Houston assisting the woman noted above.¹¹ The Army's formal response to Chaplain Houston's now fully-visible action in response to the woman's request would not be long in coming.

On November 23, 1992, Lieutenant-Colonel Ronald J. Buchholz, an Army attorney in the Administrative Law Division of the US Army's Office of the Judge Advocate General, rendered to the US Army Chief of Chaplains an opinion stating that the US Constitution prohibits the involvement of military chaplains with civilian disaster victims, citing it specifically as a violation of the Establishment Clause.¹² LTC Buchholz maintained:

[Military chaplains' ministering to disaster victims] fails to meet the Supreme Court's three-part test for determining whether a governmental action violates the Establishment Clause's prohibition on governmental sponsorship of religion.¹³

According to LTC Buchholz, "such activity fails the first two parts of the test," rendering it invalid and without authority.¹⁴

Also pivotal in LTC Buchholz' opinion is his concern that continued actions and interactions of the kind in questions might lead to future cases of litigation against the chaplaincy that could be of "unpredictable scope."¹⁵ He refers to litigation that was brought against the Service chaplaincies at-large in 1985 by two Harvard law students, who challenged whether the chaplaincies were permissible at all within the parameters of the Constitution.¹⁶ It seems apparent that, through an abundance of caution, he wishes to protect the chaplaincy from additional legal actions of this sort. With this in view, he concludes:

[It would be prudent to restrict] chaplains to ministering to the spiritual and secular needs of soldiers deployed on disaster relief operations and refraining from an official involvement with civilian disaster victims, even that of a secular nature.¹⁷

Of particular interest in LTC Buchholz' opinion is his assumption and apparent belief that abundant clergy will always, or almost always, be readily available to respond in the aftermath of disasters. He speculates that a shortage of civilian clergy in the wake of a disaster would constitute an "unlikely event."¹⁸ He must presume, of course, that the local clergy, the segment of the effected population who could avail themselves for the most timely response, will somehow find themselves spared from the ravages of the disaster that has fallen upon their neighbors. Given that Hurricane Andrew had forced some 2 million people from their homes, it is not unreasonable to assume that such a significant number of displaced persons included, in fact, local clergy who found themselves in the same pitiful state as their parishioners; that is, homeless, destitute, and traumatized. Given the widespread destruction and suffering that lay in the wake of the catastrophic 911 terrorist attacks and Hurricane Katrina, a shortage of local clergy in a disaster area does not seem unlikely at all. Rather, it seems more likely than not.¹⁹

Writing in 1993, Mr. Robert L. Gilliam, Deputy General Counsel for Personnel & Health Policy, in the Department of Defense Office of General Counsel published a concurring opinion, wherein he stated that "there is no authority under which military chaplains may provide the requested services to personnel not affiliated with the armed forces."²⁰ Additionally, he notes that to perform the services in question would comprise an inappropriate use of Congressionally appropriated fund monies and that "providing chaplain services to civilians as a routine practice under such circumstances"²¹ would be done in violation of the Establishment Clause.

Mr. Gilliam concludes his memo with something of an odd concession that recognizes the extreme nature of the context within which this very discussion lies; that is, *in extremis* circumstances. He concedes that Constitutional limitations do not preclude military chaplains from providing emergency ministry to civilians should there arise a severe need that cannot be met by civilian clergy. As an example that would be permissible, he cites the ministration of last rites to a disaster victim who, it must be assumed, is near death. In support of this point, he notes the precedent for similar emergency exception practices for those within the medical profession. This thinking seems to envision a state of affairs wherein civilian clergy are either unable or unavailable to provide such ministries themselves to disaster victims such that military chaplains alone are able to meet the needs of the populace. Mr. Gilliam underscores that for this to occur in other than very rare instances would raise “the specter of state sponsored religion.”²²

It is interesting that Mr. Gilliam has described exactly the type of scenario wherein military chaplains might be called upon to stand in the gap until relieved by civilians; that is, a bona fide emergency that precludes the action of civilian clergy. However, at this point, some questions seem to emerge. In the case of medical personnel acting under the protection of an emergency exception, is a life-threatening injury the only justification for acting? If not, how much suffering, then, must an injured citizen endure before a qualified person can administer care? Who decides? Drawing from Mr. Gilliam’s extension of a similar exception to military chaplains, can the chaplain offer no spiritual comfort or condolence to severely injured citizens who are not near death? Must they wait for a civilian clergy person who might not be available for days? How near death must they be? What about victims who may have witnessed death and who are traumatized by the experience? And what of the victims who are homeless and destitute? Must they also wait? To not act with the resources at hand in behalf of countrymen who are victims of disasters in the homeland seems to be itself a specter of a very awful sort.

LTC Buchholz’ opinion was included in the 2001 version of the Army’s *Domestic Operational Law (DOPLAW) Handbook for Judge Advocates*, thus becoming, for a time, normative counsel for commanders in this regard.²³ It is noteworthy that, while LTC Buchholz’ opinion primarily impacted only the Department of the Army, Mr. Gilliam’s memo enlarged the scope of the prohibition contained in the original opinion, growing to include all Service Departments in DoD. Thus, a now 13-year-old opinion, an opinion that grew from a single incident, has grown in scope to become policy and has remained in place since 1993, prohibiting military chaplains from making available emergency comfort to American citizens in the homeland. From a practical perspective, this has remained a problem and in the light of the

Global War on Terror (GWOT), its significance is compounded. One must wonder if this is where the Founders of the nation truly intended for the trail to go.

The Establishment Clause: A Grammatico-Historical Overview

The First Amendment to the Constitution of the United States of America simply states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²⁴ Perhaps since World War II has no piece of Constitutional writing been more hotly contested than these sixteen words that make up the Establishment Clause; sixteen words which continue to spark controversy regarding the nature of the relationship between establishments of religion and government in America. Part of the difficulty seems to exist at the very heart of what is at once the Constitution’s strength and its fragility; that is, in its language. Leonard Levy, a distinguished professor of history and humanities and noted author on civil liberties, has observed that “those who wrote our glorious Bill of Rights were vague if not careless draftsmen.”²⁵ While the Establishment Clause may not boast the most precise language contained in the Constitution, any view that paints the drafters of the Constitution as being “careless” in their duties is an unfortunate analysis in light of the historical record. Nonetheless, it may be said that the language of their choice is broad enough to generate interpretive processes that remain complex at best.²⁶ What did the drafters of the Constitution mean by the phrase “establishment of religion”? What may have informed and shaped their word choice?

In the modern era, an establishment of religion may be defined as:

A church that is recognized by law as the official church of a nation, that is supported by civil authority, and that receives in most cases financial support from the government through some system of taxation; also called ‘state church.’²⁷

Given the evolution of language through time, it might be reasonable to expect that the generation of the Framers had, perhaps, an understanding of “establishment of religion” that might stand in contrast to a more modern one. However, that does not appear to be the case at all. Rather, the understanding of these words seems to retain continuity between past and present. In 1789, an establishment of religion, or religious establishment, meant in Anglo-American society, an institution enabled by the endorsement and aid of the national government to promulgate a particular creed or dogma and to require the compliant assent of the populace in both belief and practice. This understanding reflected a state church that was empowered to prescribe and regulate belief, to collect revenue through state taxes for its support and to require attendance at worship.²⁸

Clearly, those living in America during the days of the Constitutional Convention were quite familiar with the state churches that had long existed in Europe, churches wherein the potentate was also the head of the church. They were well-acquainted with the painful intolerance and persecution that most often accompanied such institutions, intolerance and persecution which had colored to a lesser degree their own early colonial period. It seems prudent, then, to believe that the Framers employed this language to avoid importing into the Anglo-American society via the national government anything remotely comparable to the state churches of Europe.²⁹ By prohibiting laws respecting an establishment of religion, the First Amendment dictated, without question, that Congress would make no laws uniting the government with a recognized church of the sort that exemplified Lutheran Germany, Anglican England, Roman Catholic Spain and France, and Presbyterian Scotland.³⁰

Leonard Levy argues that one cannot know the intent of the Framers. He points out that if the Framers had felt the importance of preserving their intent for posterity, they would have taken formal action to have recorded the reasoning behind their proceedings. Had their intent been of genuine importance, he says, they would have had a stenographer present, and they would have published the record.³¹ Levy further contends that, if original intent had any import, James Madison, the primary author of the Constitution, would have made more mention of it in his later life, noting that Madison “rarely referred to the Convention for the meaning or intent of the Constitution.”³² Most arguments from silence are precarious at best, and Levy’s appears to be no less so. It seems reasonable to believe that as long as Madison lived, whenever he spoke about the Constitution, he was describing the original intent, for he himself represented the embodiment of it. Intent was contemporary to and within Madison. Surely, Madison’s speech about the Constitution was commensurate with Framer’s intent.

According to Levy, one can only know the text of the Constitution. Yet, he says that “the clauses of the First Amendment cannot be taken literally. They do not mean what they say or what the Framers meant.”³³ Levy questions the meaning of an “establishment of religion,” asking also what it might mean to make laws “respecting an establishment of religion.” “History,” he says, “suggests answers, but the constitutional text does not.”³⁴ For Levy, an “establishment” of religion seems to represent an act and not an entity. He understands an establishment of religion to mean, not a national church along European lines, but, rather, any action by Congress that would either impinge or, more importantly to Levy, aid religion as a construct in any fashion.³⁵

Any claim that the purpose and intent of the Framers with regard to the First Amendment cannot be known seems to constitute intellectual dishonesty. Such claims represent as

substantive a legless ideology that is free-floating and without grounding. It should be apparent that history plays a significant role in any interpretive undertaking. When text per se is removed from its historical context, from the *Sitz im Leben* (situation in life) that gave it birth, then the interpreter is free to do as he wills. History becomes the anchor point for the text, giving it a mooring in time. Somehow Levy seems to agree when he notes that Madison himself relied on the text of the Constitution, the ordinary rules of common law . . . , and the history of the time.”³⁶ One wonders why modern interpreters cannot do the same thing.

It would be imprudent to fail to discuss, if only briefly, Thomas Jefferson’s “wall of separation,” as so many seem to find that so much rests upon it. The wall metaphor was not original with Jefferson. Earlier used by Anglican rector Richard Hooker, the religious dissenter Roger Williams, and the intellectual James Burgh, the phrase seems to have gained its current import when Justice Hugo Black employed the terms in 1947.³⁷ In Jefferson’s case, he used the phrase in return correspondence to the Banbury Baptist Association of Connecticut, writing in his role as President of the United States in January, 1802, more than ten years following the ratification of the First Amendment. In his letter, Jefferson is very plain to say that the wall exists between “Church and State,” both of which are entities.³⁸ In his commentary on the wall metaphor, Levy adds words to Jefferson’s describing the wall as a “high wall of separation” and implicates Madison as being in complete agreement with it.³⁹ It is insightful that none of those who were active in framing the Bill of Rights, including Madison, used any language or metaphors approaching any idea of the sort.⁴⁰ It is possible to gain some insight into Madison’s view of the wall from his private notes composed in the winter of his life. Wrestling with the issue concerning whether the appointment of chaplains for Congress was a violation of the First Amendment, he had concluded that it was so. Writing in his retirement he concluded:

As the precedent is not likely to be rescinded, the best that can now be done may be to apply to the Constitution the maxim of the law, *de minimus non curat* – Latin for “the law does not concern itself with trifles.”⁴¹

In other words, Madison, a prudent and sensible man, believed that this was a battle not worth the effort. Apparently, for him, the wall was fairly low to the ground.

The Establishment Clause: A Matter of Interpretation

The matter of religion in American public life encompasses much more than the constitutional relationship between church and state. However, it is the framework of the Constitution that provides the legal parameters within which those relationships must occur. Within the system of American jurisprudence, the doctrine of *stare decisis* establishes judicial

policy and informs the judicial process with a view toward fairness, stability, and confidence in the rule of law.

Stare decisis (*stare decisis et non quieta movere*), that is, "stand by the thing decided and do not disturb the calm," was a part of the English common law system that the new American states imported into their own justice system during the colonial and post-Revolutionary periods.⁴² Inasmuch as the early American legal system drew life from its British heritage, it is only reasonable to assume that American courts would lean heavily on precedents. Justice Antonin Scalia has said that common law, guided by the principles of *stare decisis*, grew "rather like a Scrabble board. No rule of law previously announced could be erased, but qualifications could be added."⁴³ While the doctrine of *stare decisis* has not been viewed as an unqualified ban to overturning previous decisions, it seems that no discussion of the doctrine can ignore the tension between its literal meaning and the ability of the law to respond to social change.⁴⁴ *Stare decisis* would guide the judiciary's decisions concerning the Establishment Clause, allowing expansionist readings through the latter half of the twentieth century and into the present day.

Before World War II, the Supreme Court had seldom rendered opinions regarding cases involving church-state questions. That changed in 1940 beginning with the Court's decision in *Cantwell v. Connecticut*, a case which upheld the rights of a member of Jehovah's Witnesses to distribute literature in a predominantly Catholic neighborhood.⁴⁵

In 1947 in *Everson v. Board of Education*, the Supreme Court ruled that any laws that aid one religion, aid all religions, or that prefer one religion over another are in violation of the Establishment Clause.⁴⁶ Just one year later, in 1948, in *McCormack v. Board of Education*, the Supreme Court declared as unconstitutional the practice of allowing churches to provide religious instruction during periods of free time in public schools. In these decisions, the Court had begun to apply the Establishment Clause in an expanded manner that would truncate, or even eliminate altogether, a large number of the ways in which the Federal government had recognized or assisted churches and religious practice.⁴⁷

In the late 1960s and early 1970s, the issue of states providing financial aid to parochial schools had become an issue of hot debate. In *Board of Education v. Allen* the Court overturned a New York law that obligated state school districts to lend text books free of charge to students attending church-sponsored schools. Such practice, said the Court, was a violation of the First Amendment.⁴⁸ Similarly, the states of Rhode Island and Pennsylvania had enacted legislation that, respectively, obligated the state to pay a portion of the teachers' salaries in some non-public schools and authorized state subsidies to church-sponsored schools for

instruction in non-religious subjects. In *Lemon v. Kurtzman*, the Court ruled that both state laws were violations of the First Amendment's Establishment Clause.⁴⁹

In *Lemon v. Kurtzman*, the Court put in place a tripartite test to assess government actions for Constitutional permissibility under the Establishment Clause. Specifically, the *Lemon* test examines government interactions with religious institutions to determine adherence to the following criteria: (a) the statute must have a secular legislative purpose; (b) its principle or primary effect must be one that neither advances nor inhibits religion; (c) the statute must not foster an excessive entanglement with religion.⁵⁰ Despite the criticism that Chief Justice William Rehnquist and others have leveled at the *Lemon* test, the Supreme Court continues to apply it, albeit less consistently than in the 1970s and 1980s and often in a modified form.⁵¹

One such modification to the *Lemon* test emerged in *Lynch v. Donnelly*, a case involving the city of Pawtucket, Rhode Island, and its practice of including a Nativity scene, or crèche, in its annual Christmas display in a downtown shopping district.⁵² “The endorsement test” reformulates the first two requirements of the *Lemon* test to determine whether “the government’s actual purpose is to endorse or disapprove of religion” and whether “irrespective of purpose, the practice under review in fact conveys a message of endorsement or disapproval.”⁵³ By this means, the Court overturned a lower court’s ruling and determined that the presence of the crèche in the Christmas display constituted no violation of the First Amendment. In delivering the opinion of the Court in *Lynch v. Donnelly*, Chief Justice Burger, referring to *Lemon v. Kurtzman*, writes:

The Court has recognized that total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.⁵⁴

Chief Justice Burger continues:

No significant segment of our society, and no institution within it, can exist in a vacuum in total or absolute isolation from all the other parts, much less from the government Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not mere tolerance, of all religions, and forbids hostility toward any Anything less would require the ‘callous indifference’ we have said was never intended by the Establishment Clause Indeed, we have observed, such hostility would bring us into ‘war with our national tradition’⁵⁵

Citing the *Lemon* test, Chief Justice Burger added that the Court had “repeatedly emphasized [its] unwillingness to be confined to any single test or criterion” in the particularly sensitive area dealing with the Establishment Clause of the First Amendment.⁵⁶

In her concurring opinion, Justice Sandra Day O'Connor articulates "the endorsement test." With regard to the *Lemon* test, she writes:

Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman*, as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause.⁵⁷

That said, in accordance with *stare decisis*, the *Lemon* test continues to inform questions concerning interactions between church and state as those relations pertain to the First Amendment.

The Establishment Clause: An Overview of Joint and Service Doctrine

Generally speaking, there exists in the current operational context a dearth of clear guidance with regard to the proper employment of DoD chaplains during emergencies in the homeland; emergencies that could require DoD to engage in its Civil Support (CS) role. Both Joint doctrine and, with a single exception, Service Component doctrine are either silent, internally contradictory, or, at best, unclear. This seems surprising, given the directives that should inform doctrinal development and implementation.

Homeland Security Presidential Directive 5 (HSPD-5) acknowledges that State and local authorities retain the lead role in managing emergency domestic crises. However, HSPD-5 also states that "the Federal Government will assist State and local authorities when their resources are overwhelmed"⁵⁸ HSPD-5 further directs all Federal departments and agencies to "provide their full and prompt cooperation, resources, and support, as appropriate and consistent with their own responsibilities for protecting our national security."⁵⁹ Focusing these comments with a view toward a new National Response Plan (NRP), HSPD-5 directs Secretary of Homeland Defense to ensure the integration of all "Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan."⁶⁰ The import of these comments lies in the expectation that all Federal agencies will marshal all resources, inclusive of all disciplines, to address domestic emergencies in the cases where State and local authorities are overextended.

The language contained in the NRP carries forward the same expectation as HSPD-5, reflecting a plan intended to "align all Federal coordination structures, capabilities, and resources, into a unified, all-discipline, all-hazards approach"⁶¹ The NRP notes that this type of approach is both new and comprehensive such that it, "for the first time, eliminates critical seams and ties together a complex spectrum of incident management activities"⁶²

The NRP further notes that such an approach will necessitate extensive coordination “across jurisdictions, as well as between the government and the private sector at all levels.”⁶³

The NRP retains the same language and all-encompassing thrust in its Letter of Agreement, whose signatories include the major Federal agencies, such as the Department of Defense. The NRP points out that imminently serious conditions resulting from civil emergency may require immediate action to save lives, relief human suffering, or mitigate property damage.”⁶⁴ In such crises when time is of the essence, the NRP authorizes local military commanders and DoD leaders to “take necessary action to respond to the requests of civil authorities.”⁶⁵ Responses of this sort occurring under Immediate Response Authority and within certain qualifications might be expected to represent exceptions to normal procedure.

Both HSPD-5 and the NRP recognize that some extreme circumstances may require extra-ordinary measures to be undertaken in support of State and local authorities; measures that might not be undertaken in the normal scheme of things. In those cases, all Federal agencies will work together using their total resources in an *all-discipline* (italics added) effort to come to the aid of American citizens.

As previously mentioned, current Joint Doctrine offers little guidance regarding the roles and missions that military chaplains might fulfill in such circumstances, which HSPD-5 and the NRP seem to anticipate. Joint Publication (JP) 1-05 (*Religious Support in Joint Operations*) acknowledges that unique issues are present in CS efforts. With that in view, JP 1-05 reinforces the primacy of State and local authorities, including National Guard forces, regarding initial response to domestic emergencies. While JP 1-05 does acknowledge that it is possible to deploy chaplains in support CS missions, it offers no guidance regarding what roles they may and may not fill.⁶⁶

JP 3-26 (*Homeland Security*) affirms that military chaplains may deploy in support of CS missions. Given that the implementation of the proper request procedure, JP 3-36 states that “military chaplains may provide religious support to civilian disaster victims during emergency operations.”⁶⁷

JP 3-28 (*Civil Support*, Final Coordinating Draft) offers the brightest hope thus far with regard to employing military chaplains in support of domestic disasters. The publication affirms, as do most Joint and Service publications, that the military religious support personnel retain religious support to DoD as their “primary mission.”⁶⁸ However, it adds that in coordination with State and local authorities, the lead agency may request DoD chaplains to provide “care, counseling, or informational services to non-DoD civilians.”⁶⁹ JP 3-28 continues:

This ministry support will be limited to the designated disaster control area and will cease with the termination of emergency operations. Moreover, the primary focus of military chaplains will remain DoD personnel.⁷⁰

At least three points are of import here. First, emergencies may overload State and local authorities to the degree that they request DoD chaplains to support the effort. Second, the chaplains' work is limited to the disaster area. Third, the chaplains' work with the civil sector terminates with the termination of emergency operations. This seems to offer a prudent framework for an all-disciplines approach to relieving human suffering in the homeland. The publication notes that chaplains are qualified to offer grief and stress management counseling, both of which are "secular or non-religious and have the intended ultimate effect of providing comfort and stability to authorized non-DoD personnel."⁷¹

With a single exception, Service Department doctrine falls far short of offering guidance that is useful for commanders and chaplains alike. Army Field Manual (FM) 1-05 (*Religious Support*) affirms the deployment of chaplains to stricken domestic areas, but its language is vague and unhelpful. It avoids clear delineation of what roles chaplains might fill, once deployed.⁷² The U.S. Air Force has no doctrinal statement at all on the matter.

Standing in bold contrast to the Department of Defense and the two other Service Departments is the Department of the Navy. Written in the light of the 9-11 terrorist attacks, Naval Warfare Publication 1-05, *Religious Ministry in the U.S. Navy*, agrees that the chaplains' primary mission efforts routinely remain on authorized military personnel, but it acknowledges that, sometimes, that could change.

At times, [Religious Ministry Teams] are used to provide [Religious Ministry] on the site of catastrophic events. When this occurs, the primary ministry focus may be on civilians rather than on military personnel. Past domestic catastrophic events have demonstrated the coalescing of government and private agencies to provide assistance, aid, relief, and a host of other emergency-related services.⁷³

The Navy publication astutely recognizes the significant role of religion in the national character, and, therefore, the comforting power that religious symbols hold for many Americans.

The chaplain's insignia becomes a powerful restorative and comforting symbol for survivors, rescue workers, families of victims, and the community in general.⁷⁴

While the Navy manual does not describe exactly the kind of actions that might be appropriate for chaplains who might be supporting civil authorities *in extremis*, it does readily recognize that such irregular circumstances could occur; that in such irregular circumstances the chaplain would have, as a temporary departure from the norm, dual foci, specifically both military personnel and civilians; that the religion and its recognized symbols play an influential

role toward communal and national healing and restoration; and, perhaps implicitly, that, in the larger context, the chaplain, who is easily recognized by branch insignia, represents hope.

The Establishment Clause: Recommendations for Closing the Gaps

Several patterns emerge in an historical overview of chaplains' activities in response to natural and man-made disasters. Using Hurricane Andrew relief operations as a model, Chaplain (Colonel) Ray Woolridge cites an observable pattern composed of four points. First, the activities of military chaplains in support of civilians were incidental to the primary mission of ministry to military service personnel. Second, military chaplains were employed in the disaster area for only a brief time; in most cases, less than one month. Third, military chaplains offered ministry due to the want of civilian clergy. Fourth, religious support was conducted under emergency conditions at the direction of the President.⁷⁵

Following Woolridge's Hurricane Andrew model, these points beg more attention and some expansion. In the case of Chaplain Houston and the woman in Miami, the chaplain was already present with his troops. He had deployed with them to ensure their free exercise of religion, per DoD policy and Army regulations. However, to argue that his actions in the woman's behalf, in the presence of his paratroopers, did somehow grossly detract from his primary mission to his Soldiers seems strained. To argue that one has a primary mission seems to imply that one might also have a secondary mission. JP 3-26 affirms that "the US military organizes, trains, and equips forces *primarily* [italics added] to conduct combat operations."⁷⁶ Yet, it is very apparent that US combat forces may, from time to time, be assigned secondary missions, such as disaster relief operations. Apparently, having a primary mission does not preclude having additional ones.

As soon as they were no longer needed, the chaplains returned to their home stations. They returned to their home stations, in most cases, with their assigned units because the units were returning home. None of the chaplains who deployed to Florida in support of Hurricane Andrew disaster relief operations intended to remain there. One might speculate that they intended to deploy with their Soldiers, perform their assigned missions, and return home as expeditiously as possible. Once the civil agencies, including civil support agencies from other regions in the country, were in place and functional, the chaplains departed.

Additionally, the scope of Hurricane Andrew must be held in view. Its devastation was expansive with an estimated 2 million people driven from their homes. All local agencies, including National Guard detachments, were paralyzed. It would be foolish to assume that local

ministers were somehow immune from the damage and that they were able to function normally. The disaster area resembled a combat zone in the wide scope of its destruction.

Lastly, all DoD personnel, including chaplains, were present pursuant to a Presidential disaster declaration for precisely that reason: there had been a disaster. There had not been “business as usual.” Emergencies often require actions that are clear departures from normal operations. Had there been no overwhelming emergency, no DoD personnel, no one in a status governed by Title 10 USC, would have been present at all.

With an eye toward the development of integrated Joint doctrine, perhaps the points that Woolridge has drawn from Hurricane Andrew offer a good point for beginning to build such an operational framework. With the exception of the United States Navy, religious support doctrine within DoD falls far short of addressing this complex and sensitive issue. Given that the world today is a more dangerous one than the Nation has ever known, the supposed comfort of doctrinal ambiguity must be abandoned for decisive action that is integrated, well-reasoned, and positive. This paper advocates an effort spanning DoD to provide such doctrinal guidance. To be sure, doctrine must be flexible enough to respond to changes in the operational environment. However, in the complicated contemporary context, cloaking ambiguity in the robes of broad guidance only spawns unnecessary conflict and confusion for commanders, for chaplains, and for judge advocates alike.

Conclusion

Some twenty years after *Katcoff v. Marsh*, the chaplaincies are still reeling from the challenge to their Constitutional existence. It follows that uncertainty about one’s right to exist has the ability to impact in a powerful way one’s sense of identity and confidence. Military chaplains are not secular professionals. They are not social workers or mental health caregivers, although they may be skilled in the same disciplines and understandings. They are not political officers or commissars who carrying the state message to the masses, although they wear the uniform of the armed forces. In the current discussion, policy makers must avoid requiring chaplains to act as other than that which they are: clergy who are also commissioned officers of the Services.

To be sure, military chaplains live daily in the healthy tension created between the church and the state in the Establishment Clause. In fact, nowhere else in American society is that tension better demonstrated than in the chaplaincies. Conversely, neither is there a better venue for viewing the rich religious tapestry of the national character. In the chaplaincies, both the tension and the harmony are on display, embodied in the Pastor/Soldier.

Doubtless, the Establishment Clause plays a helpful role in defining religious support to the military services. It helps inform the roles and functions of the all Service chaplaincies. It exists, neither to protect the church from the state nor to protect the state from the church. Plainly, the Establishment Clause exists to protect the people from the abuses and coercions of state church or a church state. It is a matter of no small import to recognize the locus of the Establishment Clause. It lies within the Bill of Rights; those unalienable rights that are guaranteed to the citizens of America, no matter what.

For some, the matter of military chaplains providing *in extremis* religious support to American citizens in domestic emergencies is politically divisive and untenable. Therefore, they may conclude that it lies outside the parameters of the First Amendment and cannot be permissible. Justice Sandra Day O'Connor, with regard to *Lynch v. Donnelly* wrote:

In my view, political divisiveness along religious lines should not be an independent test of constitutionality . . . the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness and not on the divisiveness itself.⁷⁷

In the light of this thinking, the questions beg asking: What might be found to be the character of a government act that employed military chaplains with a view toward relieving the suffering of its citizens in the aftermath of a natural or man-made disaster? Would that action reveal the compassionate nature of a government that understood and cared for its citizens? Would the government's refusal to do so constitute a display of "callous indifference"? Would undertaking such an action advance religion per se, or would it advance the interests of the people?

The tenuous, but necessarily healthy, balance between what may be perceived as excessive religious sway and unreserved secularism appears to be often lost in current culture and political discord. Looking backward to determine the Framers' intentions as they worked out the knotty problems of birthing this Nation is "neither an exercise in nostalgia nor an attempt to deify the dead."⁷⁸ Rather, it is a necessary and vigorous undertaking that offers a stimulating example of how to cause a republic to flourish by simultaneously treasuring liberty and guarding faith. To that end, it remains the task of today's leaders and policymakers to strive toward understanding "where the trail used to go" and to answer tomorrow's challenges to the national character with confidence and hope.

Endnotes

¹ Alexis deTocqueville, *Democracy in America*, trans. Gerald E. Bevan with an introduction by Issac Kramnick (London: Penguin Books, Ltd., 2003), 496.

² Derived from the author's own experience with his son on the many wonderful trails in Otter Creek Park, Muldraugh, Kentucky.

³ Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (New York: Random House, 2006), 16.

⁴ Ibid, 6. The paper will later note that Mr. Jefferson was not the first to employ the wall metaphor and that he did so only once in written correspondence to a Baptist association in Connecticut, several years following the ratification of the First Amendment to the US Constitution.

⁵ Prudence requires a common understanding of what should and should not constitute "ministry" within the scope of this paper. With that in view, a subsequent section of the paper will undertake that task.

⁶ The author notes here that other Army War College students, some with personal experience in the matter, have previously addressed this topic. Chaplain (Colonel) Donald L. Rutherford and Chaplain (Colonel) Alvin M. Moore III were both present in Florida during the relief operations that followed in the wake of Hurricane Andrew, and each has written a paper chronicling his concerns in the light of personal experience. Additionally, Chaplain (Colonel) Eugene R. Woolridge III has authored an unpublished research paper in conjunction with the requirements for the Army war College Distance Education Program wherein he addresses current concerns for emerging policy and doctrine development. All three of these works will serve as source material for this paper.

⁷ The reader should note that the author, himself a member of the professional clergy and a military chaplain, is well aware of the academic tension, even peril, associated with the activity of speaking across professional lines. The author notes, however, several parallels between the legal profession and his own; parallels that may lend credence to an external review. First, both law and theology deal with historical source documents of significance, the original authors of which are long-since dead, implying a greater reliance on the historical text and its language and on the context in which the text was written. Second, given the aforementioned conditions, both professions must employ interpretive methods intended to yield cogent results that are both informed and, to some degree, consistent within themselves. Third, both professions seek to shed light on the interpretive process by means of the rulings, judgments, and interpretations of other trusted professionals, some historical and some contemporary. Fourth, given that these disciplines are interpretive in nature, professional opinions and understandings may often be spread across a liberal-conservative continuum, with the more conservative readings being rendered so as to be wooden and lifeless and the more liberal ones to be rendered in such shades of gray that only those rendering the interpretation can see the gray at all. Lastly, both professions may be subject to similar blind-spots; for example, an over-reliance on numerous preceding opinions of others. Thus, upon closer examination, it may be said that law and theology are more similar than they are different.

⁸ “Hurricane Andrew: A Case Study”, *Weather World 2010* [on-line database] (Urbana-Champaign, IL: The University of Illinois at Urbana-Champaign, 1997, accessed on 20 February 2007); available from [http://ww2010.atmos.uiuc.edu/\(Gh\)/arch/cases/920824/home.xml](http://ww2010.atmos.uiuc.edu/(Gh)/arch/cases/920824/home.xml).

⁹ Raymond E. Woolridge III, “Challenges and Considerations for Employing Military Chaplains in the Homeland in Support of US Northern Command, 2005,” electronic copy, p. 31. Student Research Paper, US Army War College, Carlisle Barracks, PA. Woolridge notes Chaplain (Colonel) Henry Haynes’ observation that the South Florida area resembled “a war zone,” a word picture attesting to the magnitude of the destruction and chaos.

¹⁰ Donald L. Rutherford, *Pastoral Care in Hurricane Andrew Relief*, Personal Experience Monograph (Carlisle Barracks: US Army War College, 2000), 8. A Roman Catholic priest, Chaplain Rutherford also notes that he himself, upon request from the same woman, later received her confession. See also Alvin M. Moore III, *Military Ministry to Civilians in Humanitarian Operations*, Strategy Research Project (Carlisle Barracks: US Army War College, 2001), 2 and Woolridge, 1-2. Along with Rutherford, Moore and Woolridge both include the Houston episode in their approaches to this topic.

¹¹ “Army Chaplain: ‘Good Can Come Out of Disaster,’” *Miami Herald*, 13 September 1992, sec 1B Local, p. 1.

¹² MEMORANDUM FOR CHIEF OF CHAPLAINS, ATTN: DACH-PPZ (COL Kuehne) November 23, 1992, *Utilization of Chaplains in Disaster Relief Operations*, DAJA-AL 1992/2922 (27-1a).

¹³ Ibid. The tripartite test to which LTC Buchholz refers is contained in the Supreme Court’s opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The paper will examine *Lemon v. Kurtzman* in more detail under a subsequent heading.

¹⁴ Ibid. He notes that the chaplains’ activities had not violated the third part of the *Lemon* test; that is, the creation of excessive entanglement of government with religion.

¹⁵ Ibid.

¹⁶ Ibid. See *Katcoff v. Marsh*, 755 F 2d 223 (2d Cir. 1985). After several years in litigation, the court ruled that no violation of the Constitution existed in the case of the chaplaincies as they related to members of the armed forces and their families. Given that military personnel and their family members are often deprived of their free exercise rights as a matter of course by virtue of assignment locations and related military duties, the court determined that the chaplaincies ensured for them the free exercise of religion.

¹⁷ Ibid. He concedes that military chaplains could conceivably provide secular counseling or secular services to disaster victims without committing any violation of the Establishment Clause. However, in the final analysis he recommends to the contrary, apparently believing this to be in the best interest of all concerned. He also observes that military chaplains would be free to assist disaster victims should they wish to do so in an off-duty status, which would seem to further imply that they be dressed in civilian attire.

¹⁸ Ibid.

¹⁹ The author does not intend to portray LTC Buchholz in a poor light. The author assumes that LTC Buchholz would wish to see a rapid provision of comfort of all types, including spiritual comfort and assistance, to hurting US citizens. In the light of the world today, however, his comment seems to be woefully out of touch. Additionally, the availability of civilian clergy constitutes no guarantee that they could be effectively employed in the interest of victims. For example, civilian clergy lack the practical skills required for ministry in areas contaminated by chemical, biological, or nuclear weapons. Military chaplains train for ministry in such environments as a matter of course.

²⁰ MEMORANDUM FOR LTC (P) Clifton A. Rippinger, OUSD (P), August 10, 1993, *Utilization of Chaplains in Disaster Relief Operations*, Department of Defense, Office of General Counsel. By “requested services,” he means “pastoral care to civilians in natural disaster situations.”

²¹ Ibid.

²² Ibid.

²³ Center for Law and Military Operations, *Domestic Operational Law Handbook for Judge Advocates* (Charlottesville, VA: U.S. Department of the Army, 2001), 108-109. The language has been deleted from the 2005 edition of the *DOPLAW Handbook*, perhaps in anticipation of more clarity in emerging doctrine.

²⁴ U. S. Constitution, amend. 1

²⁵ Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Company; London: Collier Macmillan Publisher, 1986), x.

²⁶ James A. Reichley, *Religion in American Public Life* (Washington, D.C.: The Brookings Institute, 1985), 109-113. See also M. E. Bradford, *Original Intentions: On the Making and Ratification of the United States Constitution* (Athens, GA: The University of Georgia Press, 1993), 93-94.

²⁷ *Webster's Third New International Dictionary of the English Language*, Unabridged. Ed-in-Chief, Philip Babcock Gove and the Merriam-Webster Ed. Staff (Springfield, MA: Merriam-Webster, Inc., 1981), 778. The word “church” within the context of this definition seems to indicate a larger recognized religious organization or denomination and not a local “church.” This paper will reflect that understanding and will use the terms “establishment of religion” and “state church” interchangeably.

²⁸ M. E. Bradford, *Original Intentions: On the Making and Ratification of the United States Constitution* (Athens, GA: The University of Georgia Press, 1993), 95. The word “establishment” also appears in Article VII of the Constitution where it is used within the context of the ratification process: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” In this usage, the word seems to continue to convey an understanding of bringing something into existence in a formal manner so as to assure a certain settled singularity and continuance.

²⁹ Leonard W. Levy, *Original Intent and the Framers's Constitution* (New York: Macmillan Publishing Company; London: Collier Macmillan Publisher, 1988), 183.

³⁰ Levy, *The Establishment Clause*, 184. See also Brookings Institute, 111. It is clear that the Establishment Clause had as its focus the national, or federal, government. Several states retained their own establishments early in the nation's development, but these ended over time. Massachusetts, the last state to retain a state establishment of religion, ended the practice in 1833.

³¹ Levy, *Original Intent*, 2.

³² *Ibid.*, 5.

³³ *Ibid.*, 179.

³⁴ Levy, *The Establishment Clause*, xiv.

³⁵ It seems that, more often than not, when Levy discusses governmental aid to religion, he has money in mind; that is, financial support to civilian churches from public funds.

³⁶ Levy, *Original Intent*, 5.

³⁷ Meacham, 19.

³⁸ *Ibid.*, 264.

³⁹ Levy, *Original Intent*, 180.

⁴⁰ Reichley, 112. Madison consistently took the most separatist position throughout the debates in Congress. See also Meacham, 19. Church and state are specific things, whereas religion and politics are not. Compare the terms "church and state" with terms "religion and politics." When used interchangeably with the former as often occurs in the current debate, the latter changes the shape and meaning of the discussion.

⁴¹ Meacham, 228.

⁴² James C. Rehnquist, "The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court," *Boston University Law Review* 66 B.U.L. Rev. 345 (March, 1986), 1.

⁴³ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 8.

⁴⁴ Rehnquist, 4.

⁴⁵ Reichley, 6.

⁴⁶ *The Rehnquist Legacy*, Ed. Craig Bradley (Cambridge: Cambridge University Press, 2006), 57.

⁴⁷ Reichley, 7.

⁴⁸ *Ibid.*, 154.

⁴⁹ Ibid., 155.

⁵⁰ *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See Riechley, 155. On the same day that the Rhode Island and Pennsylvania statues were overturned, the Supreme Court in *Tilton v. Richardson* approved Federal grants to four Catholic colleges and universities in Connecticut. In his dissent, Justice Douglas noted that the apparent difference between *Lemon* and *Tilton* was that “small violations of the First Amendment over a period of years are unconstitutional . . . while a huge violation occurring only once is *de minimus*.”

⁵¹ Bradley, 57.

⁵² *Lynch v. Donnelly*, 465 U.S. 668, 687-688 (1984).

⁵³ Ibid.

⁵⁴ *Lemon v. Kurtzman*.

⁵⁵ *Lynch v. Donnelly*.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ *National Security Presidential Directive/NSPD-5*, 28 February 2003; available from <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html>; Internet; accessed on 25 February 2007

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Tom Ridge, *National Response Plan* (Washington, D.C.: The White House, December 2004), i.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid., iii.

⁶⁵ Ibid.

⁶⁶ U.S. Department of Defense, *Religious Support in Joint Operations*, Joint Publication 1-05 (Washington, D.C.: U.S. Department of Defense, 9 June 2004), II-8.

⁶⁷ U.S. Department of Defense, *Homeland Security*, Joint Publication 3-26 (Washington, D.C.: U.S. Department of Defense, 2 August 2005), IV-15. Invoking the 1992 OTJAG desk opinion and the 1993 DoD opinion that followed it would require chaplains to lend only “secular,” support to victims.

⁶⁸ U.S. Department of Defense, *Civil Support*, Joint Publication 3-28 (Washington, D.C.: U.S. Department of Defense, 18 December 2006), IV-2.

⁶⁹ Ibid.

⁷⁰ Ibid., IV-2.

⁷¹ Ibid., IV-3.

⁷² U.S. Department of the Army, *Religious Support*, Army Field Manual 1-05 (Washington, D.C.: U.S. Department of the Army, April 2003), 6-19, G-1.

⁷³ U.S. Department of the Navy, *Religious Support in the U.S. Navy*, Naval Warfare Publication 1-05 (Washington, D.C.: U.S. Department of the Navy, August 2003), 7-1.

⁷⁴ Ibid. The manual does not mention *which* chaplain insignia would bring comfort, indicating, perhaps, an understanding of the role of public religion in American life; that is acknowledging the “God of our Fathers” apart from sectarianism. See also Woolridge, 12. He cites the report of Oklahoma City National Memorial Institute for the Prevention of Terrorism written in the aftermath of the bombing of the Murrah Federal Building: “As a general rule, National Guard and fire and rescue chaplains may be better prepared to serve at the scene while other clergy are better prepared to help at the Family Assistance Center.”

⁷⁵ Woolridge, 11.

⁷⁶ JP 3-26, *Homeland Security*, IV-2.

⁷⁷ Lynch v. Donnelly.

⁷⁸ Meacham, 5.