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Article

***1 SERVICE BEFORE SELF? EVANGELICALS FLYING HIGH AT THE U.S. AIR FORCE
ACADEMY**

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INTRODUCTION

On October 6, 2005, Michael "Mikey" Weinstein, a second generation graduate of the United States Air Force Academy and father of a current cadet, sued the United States Air Force alleging numerous instances of evangelical Christian proselytizing and other Establishment Clause violations. [FN1] While Weinstein alleges that the problem is systemic throughout the Air Force, most of the allegations underlying the lawsuit occurred at the Academy in Colorado Springs, Colorado. Not surprisingly, Colorado Springs is also home to a number of national evangelical Christian [FN2] *2 organizations including, National Association of Evangelicals, Focus on the Family, Compassion International, The Navigators, Youth with a Mission, Young Life and the International Bible Society, "earning the city the tongue-in-cheek nickname 'the Protestant Vatican'." [FN3]

In response, evangelical groups [FN4] have filed motions to intervene in the lawsuit in order to protect what they see as the Free Exercise rights of service members to "worship according to their conscience and lead others in authentic expressions of personal veneration to Almighty God." [FN5] According to them, the Weinstein lawsuit is nothing more than "an assault on religious speech within the United States Air Force" that will have a chilling effect on constitutionally protected rights of service members. [FN6]

Navigating the scope of the religion clauses [FN7] of the First Amendment presents a complex problem, especially in the area of military colleges. [FN8] First, students in colleges and universities fall outside the scope of the United States Supreme Court's Establishment Clause protections. Currently, the Court's jurisprudence only extends to violations occurring in primary and secondary schools. Additionally, the Court has refused to grant certiorari in a number of cases over the past ten years that would have provided an opportunity to clarify the state of the law with respect to the establishment and free exercise of religion in higher education. [FN9]

Under the First Amendment, the Establishment Clause prohibits the government from creating a state-sponsored religion. But the protections of the Establishment Clause are constantly running up against the boundaries of the Free Exercise Clause which prohibits the government from interfering with the right to practice the religion of one's choice. *3 For example, public schools cannot establish religion by allowing religious groups to enter the school for the sole purpose of giving religious instruction to students during mandatory school hours. [FN10] But in order to accommodate the free exercise rights of students, public schools are allowed to release students during the compulsory education period to attend religious classes outside of school. [FN11]

Striking the right balance between the two clauses in most cases is incredibly difficult. However, the Court has been very clear that in the military context, service members have more limited free exercise rights than ordinary civilians. [FN12] Therefore, when the two clauses come into conflict in a military setting the courts should err on the side of preventing Establishment Clause violations even if that means there will be an infringement on a service

member's free exercise rights.

The majority of allegations in the Weinstein lawsuit center on this very problem of where to draw the line between the Establishment Clause and the Free Exercise Clause in a military setting. If the courts acknowledge the considerably coercive nature of the military, which extends to military academies, then an extension of its primary and secondary school Establishment Clause jurisprudence to military colleges would eliminate most of the problems at the United States Air Force Academy that gave rise to the current lawsuit. In addition, based on the twenty-year-old precedent limiting the free exercise rights of service members, there is no question that the Establishment Clause concerns should win out and evangelical Christians should be prohibited from proselytizing to fellow service members and cadets.

This article will examine the situation at the Air Force Academy, demonstrating the existence of Establishment Clause violations and illustrating the need for the Supreme Court to reaffirm its First Amendment military jurisprudence and set specific parameters for the exercise of religion at military colleges. Part I will describe the alleged Establishment Clause violations at the Academy that provide the basis of the current Weinstein lawsuit. Part II will briefly address the Weinstein lawsuit and why it is too broad to bring any effective change to the Academy. Part III will highlight the special characteristics and coercive nature of military colleges that distinguish them from other public and private colleges and universities. Part IV will analyze the United States Supreme Court's public *4 primary and secondary school Establishment Clause cases, arguing that they should be applied to military colleges. Part V will discuss the restrictions that have been legally imposed on the First Amendment rights of military personnel, including the free exercise of religion. Part VI will illustrate how, based on these decisions, a more narrowly crafted Weinstein lawsuit would have been a more effective way to set a defining precedent for limiting religious activities at military colleges.

I. THE EVANGELICAL INVASION

The problem of religious intolerance has been known to Air Force Academy officials dating as far back as 1994, when the Academy issued its "Report on Respect and Dignity," noting a concern about "notoriously fundamentalist Christian speakers." [FN13] Ten years later, in July 2004, as the Academy was embroiled in another well-publicized controversy regarding reports of sexual assaults on campus, it allowed a team of observers from the Yale Divinity School to spend a week observing Basic Cadet Training. [FN14] The report that followed discussed gender issues, but also highlighted a number of inappropriate Evangelical statements made by Academy chaplains, including encouraging cadets to return to their tents and proselytize to their fellow cadets and reminding them that "those not born again will burn in the fires of hell." [FN15]

*5 As the Academy struggled to develop a plan for ensuring religious diversity and accommodation, Captain Melinda Morton, the chaplain who invited the Yale team to campus and defended its findings, was dismissed from her position as Executive Officer to the Chief Chaplain. [FN16] Despite her transfer, Morton continued to be an outspoken critic of the Academy leadership, stating, "the issue is the environment that we the adults are creating ... in which we set the tone that evangelicalism is the official religion of the Air Force Academy." [FN17] According to Morton, "The evangelicals want to subvert the system. They have a very clear social and political agenda. The evangelical tone is pervasive at the Academy, and it's aimed at converting these young people who are under intense pressure anyway." [FN18]

The makeup of the Academy's chaplain corps supports Captain Morton's assertions. While the Academy's Cadet Wing consists of approximately 30% Catholics, 30% non-evangelical Protestants, 30% evangelical Protestants, and 10% Jewish, Islamic, other non-Christians, and cadets who declare no religious affiliation, the Academy's chaplain corps is overwhelmingly comprised of evangelical Christians. [FN19]

Following Captain Morton's dismissal, the media continued reporting stories of Evangelical proselytizing at all

levels of the Academy, focusing on events described in a report prepared by Washington-based Americans United for the Separation of Church and State. [FN20] The report concluded, "the policies and practices [of the Academy] constitute egregious, *6 systemic, and legally actionable violations of the Establishment Clause of the First Amendment to the United States Constitution." [FN21]

Among the specific findings, the group found that cadets who did not attend chapel after dinner during Basic Cadet training were placed by upper-class cadets into a "Heathen Flight" and marched back to their dorms for all to see, [FN22] upper-class cadets routinely attack other cadets using religious epithets, [FN23] and every meeting of the mandatory cadet cadre during Basic Cadet Training as well as mandatory meals, awards ceremonies, and training dinners open with prayers. [FN24] More specifically, in conjunction with a campus showing of "The Passion of the Christ," flyers for a Christian-themed program were placed on every plate in the dining hall, where all cadets were required to be in attendance. The flyers stated, "This is an officially sponsored USAFA event--please do not take this flyer down." [FN25]

Many of the Academy's official policies regarding leave, mandatory events, and religious expression also favor Christians and discriminate against others. For example, Christian cadets are granted non-chargeable passes [FN26] to attend Christian religious services and study groups off-base on Sundays but non-Christians who celebrate the Sabbath on Saturday [FN27] must use chargeable passes. [FN28] Also, many mandatory events that cadets are not permitted to miss to attend religious services such as training exercises, parades, and football games, are scheduled on Saturdays. [FN29] Christians are encouraged to hang crosses or other religious items in their dorm rooms but Academy rules prevent cadets from displaying non-religious items in the same way. [FN30] Finally, the Academy permits several outside Christian groups to host Special Program in Religious Education (SPIRE) groups, giving them special access to the Academy facilities and cadets while initially denying other groups such as Freethinkers the opportunity to do so. [FN31]

*7 The report also found a strong evangelical presence among the Academy's Permanent Party, those permanently assigned to the Academy as faculty and staff. For example, certain faculty members introduced themselves to their classes as born-again Christians and encouraged their students to become born again during the course of the term. [FN32] One history professor ordered students to pray before they were permitted to begin their final exam for the course. [FN33] More than three hundred people, including sixteen heads or deputy heads of academic departments, nine permanent professors, the then-Dean of Faculty, the Current Dean of Faculty, the then-Vice-Dean of the Faculty, Director of Athletics, football coach and other members of the faculty and staff, signed on to a full-page Christmas ad in the student newspaper. The ad stated their "belief that Jesus Christ is the only real hope for the world ... that there is salvation in no one else," and directed cadets to contact them in order to "discuss Jesus." [FN34]

Further, Brigadier General Johnny Weida, in his official capacity as Commandant of Cadets, sent a mass email to the Cadet Wing officially endorsing "National Prayer Week." [FN35] In addition, in his official Commander's Guidance document he instructs cadets that they "are accountable first to your God." [FN36] Weida also established a system of code words that he reveals to evangelical Christian cadets to help them proselytize to others. [FN37] Even when he was ordered to read an apology during the mandatory noon meal for inappropriate Evangelical activities, he opened his remarks with the chant. As he was reading the official statement, *8 a quotation from the New Testament Book of Ephesians was projected onto several large screens behind him throughout the dining hall. [FN38]

In addition, two weeks after the Academy initiated a program of religious tolerance, football coach Fisher DeBerry hung a banner in the locker room declaring, "I am a Christian first and last, I am a member of Team Jesus Christ." [FN39] Despite an official reprimand from Academy officials, he continues to advise players to attend

church the day after games [FN40] and stated "religion is what we're all about at the Academy." [FN41] Further illustrating the pervasiveness of the problem at the Academy, in response to the criticism that Coach DeBerry received for the banner, another coach in the athletic department stated that the only reason it was a problem is because "football is too visible," and that if the banner had been hung in another locker room "it would have been completely appropriate and no one would have cared." [FN42]

Notwithstanding the good faith efforts of Lieutenant General John Rosa, the recently departed Air Force Academy Superintendent, [FN43] the Air Force and the Academy continue to experience a large gap between its policies and their implementation. For example, in response to the religious intolerance criticism, Brigadier General Cecil Richardson, the Air Force's Deputy Chief of Chaplains stated that "we will not proselytize, but we reserve the right to evangelize the unchurched." [FN44] Yet approximately two months before the filing of the current lawsuit, the Air Force *9 withdrew its Code of Ethics for Chaplains that included the comparable statement, "I will not proselytize from other religious bodies, but I retain the right to evangelize those who are not affiliated." [FN45] However, in practice, Evangelical groups are still operating in full force at the Academy, despite the latest policy initiatives. [FN46]

In October 2005 the Air Force released "Interim Guidelines Concerning Free Exercise of Religion in the Air Force," addressing religious accommodation, public prayer outside of voluntary worship settings, individual sharing of religious faith in the military context, the chaplain service, email and other communications, and good order and discipline. [FN47] However, by February 9, 2006, under heavy pressure from *10 evangelical groups and evangelical Christian lawmakers, [FN48] the Air Force revised the Interim Guidelines, removing critical language disfavoring the inclusion of public prayer in official settings. [FN49] In an effort to further solidify the evangelical Christian hold on the military, on May 11, 2006 the House of Representatives included a provision in the National Defense Authorization Act for Fiscal Year 2007 allowing military chaplains to pray in the name of Jesus at public military ceremonies. [FN50]

II. THE WEINSTEIN LAWSUIT

Increasingly discouraged by the Air Force's weak, and at times complete lack of response to his calls to address the constitutional violations occurring both at the Academy and throughout the Air Force as a whole, Michael "Mikey" Weinstein, a 1977 Air Force Academy graduate, [FN51] filed suit against the Air Force [FN52] in Federal District Court in Albuquerque, New Mexico, [FN53] alleging that "over the course of at least the last decade a pattern and practice has developed at the Academy where senior officers and cadets have attempted to impose evangelical Christianity into *11 arenas that are clearly United States Air Force venues in violation of the Establishment Clause" [FN54] The complaint further alleges that "it is the unwritten policy of many evangelical chaplains to continue proselytizing and evangelizing cadets and staff at the United States Air Force Academy and members of the United States Air Force at large." [FN55] While the policy may be unwritten, it is certainly not unspoken, as Brigadier General Cecil Richardson, the Air Force Deputy Chief of Chaplains told The New York Times on July 12, 2005, stating "We will not proselytize, but we reserve the right to evangelize the unchurched." [FN56]

Mr. Weinstein repeatedly asked senior Air Force officials to repudiate General Richardson's statements and claims that their failure to do so in effect ratifies the policy. [FN57] Therefore, pursuant to 42 U.S.C. § 1983, the plaintiffs are seeking permanent injunctive relief, requesting that the USAF and all its senior leadership adopt the following policy: "No member of the USAF, including a chaplain, is permitted to evangelize, proselytize, or in any related way attempt to involuntarily convert, pressure, exhort or persuade a fellow member of the USAF to accept their own religious beliefs while on duty." [FN58]

On November 8, 2005, Air Force chaplain Major James Glass and pilot Captain Karl Palmberg filed a Motion to Intervene alleging that the *12 policy would violate their Free Exercise Rights. [FN59] Major Glass is asserting

that if successful this lawsuit will "effectively silence all religious discussion, not only at the academy, but even on the battlefield." [FN60] His interpretation of the proposed policy is that any and all conversations he has with any other person at any time about religion could be viewed as a violation. [FN61] Captain Palmberg interprets the policy similarly. He believes that he has a "constitutional right to discuss [his] faith without censorship or fear of retribution [and that it is] as valuable to the military and the future of [the] nation as the aircraft, bombs, and bullets [he is] trained to employ." [FN62]

While Mr. Weinstein is alleging that the problem is systemic throughout the Air Force, [FN63] the majority of his claims center on the problems at the Academy. Yet rather than enlisting current cadets, suing the Academy itself, and formulating a case that included damages to stave off mootness as the plaintiffs at VMI did in *Mellen v. Bunting*, [FN64] Mr. Weinstein chose instead to sue the Air Force as a whole, which led to a much different result. On October 27, 2006, without reaching the merits of the case, Judge James A. Parker of the United States District Court for the District of New Mexico dismissed the case based on failure to state a legally cognizable claim and lack of standing. [FN65] In granting the Air Force's Motion to Dismiss, the Court stated that Mr. Weinstein's attempts to "extend [his] claims beyond events at the Academy are unsupported by any factual *13 allegations of specific occurrences in regard to which any of the Plaintiffs' constitutional rights have been violated The only fair reading of Plaintiffs' factual allegations limits them to practices and events at the Academy and policies as they affect persons, other than Plaintiffs, at the Academy." [FN66]

The Court did, however, leave Mr. Weinstein an opening by dismissing the case as to Michael Wynne, Acting Secretary of the Air Force, without prejudice. [FN67] Thus, if Mr. Weinstein's appeal to the Tenth Circuit Court of Appeals is unsuccessful, he could still redraft his pleadings and bring the suit against Wynne again. [FN68]

As discussed at greater length in Section VI, *infra*, if the suit had been confined to the Establishment Clause violations at the Academy, it would have been much easier for courts to adopt the rationale of the Fourth Circuit in *Mellen* [FN69] and find the proselytizing activities on campus unconstitutional.

III. THE UNIQUE NATURE OF MILITARY ACADEMIES

Courts have consistently viewed the Military as "a specialized society which demands a respect for duty and discipline without counterpart in civilian life." [FN70] It follows that military academies are similarly specialized *14 and regimented, making them distinguishable from other private and public colleges and universities. [FN71]

A. The United States Air Force Academy

Congress established the United States Air Force Academy in 1954. [FN72] The youngest of the four service academies, [FN73] its mission is "To educate, train and inspire men and women to become officers of character motivated to lead the United States Air Force in service to our nation." [FN74] Central to this mission is the concept of "Service Before Self," which requires that "professional duties take precedence over personal desires." [FN75] Those who put service before self understand that "a person's 'self' must take a back seat to Air Force service: rules must be acknowledged and followed faithfully; other personnel must be respected as persons of fundamental worth; discipline and self-control must be in effect always; and there must be faith in the system." [FN76]

Part of its core Military Development program is an emphasis on peer leadership, first learned as a concept and then put into practice at the "follower" level. [FN77] Unlike non-military colleges and universities where students are almost completely unsupervised, a cadet's life is completely structured by rules and regulations. [FN78] For example, breakfast, lunch, and athletic activities are mandatory. [FN79] Saturday mornings are spent *15 studying or attending parades and inspections. [FN80] Instead of a non-military college three-month summer break, cadets only have three weeks. [FN81] The limitations on first-year cadets are even more restrictive. During the first five weeks of school they cannot have visitors or receive any phone calls and after that they can receive phone calls and visitors

only on Saturday afternoon and evening and Sunday morning and afternoon. [FN82] First-year cadets are also not allowed to wear civilian clothing, even on leave or for weekend privileges until approved by the Commandant. [FN83]

Thus, while most college students are experiencing their first taste of freedom, living on their own and deciding when and if to attend classes, parties, and athletic events, cadets at military colleges like the United States Air Force Academy are experiencing a much more disciplined and coercive lifestyle. It is this particular atmosphere that makes these colleges seem more like basic military training than traditional institutions of higher education, and the educational experience much more akin to that of primary and secondary school students.

B. Coercion at Military Colleges

While the United States Supreme Court has never ruled on what qualifies as an Establishment Clause violation at an institution of higher education, the circuit courts of appeal seem to generally recognize that, like primary and secondary schools, the key issue is coercion. In public colleges and universities where students and guests are free to come and go at their pleasure the courts are reluctant to find a violation. [FN84] However, the special regulated and coercive characteristics of military colleges make them more analogous to primary and secondary schools and distinguish them from public institutions of higher education. [FN85]

*16 Coercion was the key factor in the most recent court of appeals case dealing with religion at military academies. In *Mellen v. Bunting*, the Fourth Circuit Court of Appeals held that Virginia Military Academy's (VMI) supper prayer was a violation of the Establishment Clause. [FN86] Central to its analysis was the coercive nature of the military college due to its strict codes of conduct. [FN87] The court also determined that while the prayer may have technically been voluntary, the context of the military college rendered it in effect obligatory. [FN88] Further, even if the prayer was truly voluntary and those who didn't want to participate could simply avoid the mess hall, "the First Amendment prohibits ... requiring religious objectors to alienate themselves from the VMI community in order to avoid a religious practice." [FN89]

Similarly, in *Anderson v. Laird*, the Court of Appeals for the District of Columbia Circuit struck down a regulation that required all cadets at military academies to attend Protestant, Catholic, or Jewish chapel services on Sundays. [FN90] The Court emphasized, "the fact that attendance at the military academies is voluntary does not eliminate the possibility of coercion." [FN91] The military made an argument similar to the one being made by the Air Force in the current *Weinstein* case, that attendance at religious services was required for the "secular purpose of providing an overall training program designed to create effective officers and leaders by preparing them to meet all the exigencies of command." [FN92] However, the Court soundly rejected that argument, finding that mandatory chapel requirements were not "the best or the only means to impart to officers some familiarity with religion and its effects on our soldiers." [FN93] The government also asserted a secular effect, that mandatory *17 attendance at religious services "enables those who will one day hold command positions to gain an awareness and respect for the force religion has on the lives of men so as to react for the benefit of all in combat crises including giving of spiritual counseling and guidance to those who turn to religion in such situations." [FN94]

By contrast, religious practices occurring at non-military public and private institutions of higher education have generally been found to be less coercive and less likely to run afoul of the First Amendment. In *Tanford v. Brand*, the Court of Appeals for the Seventh Circuit found that a non-denominational invocation and benediction given during a graduation ceremony at Indiana University [FN95] was not a violation of the Establishment Clause. [FN96] The Court found that no coercion existed, mainly because unlike the high school graduation in *Lee v. Weisman*, attendance was in no way mandatory and many students from the law school chose not to attend the ceremony. [FN97] In addition, the court found that the audience, comprising students and guests, was more mature than that of a high school graduation. [FN98] Finally, many of the students and guests freely entered and left the stadium

throughout the ceremony for various reasons. [FN99]

The Court of Appeals for the Sixth Circuit employed a similar analysis in *Chaudhuri v. Tennessee*, upholding non-sectarian prayer and moments of silence at public university functions. [FN100] In *Chaudhuri*, a tenured Hindu professor alleged that he was required to attend university functions where it was custom to hear prayers or in their place, observe a moment of silence. Dr. Chaudhuri claimed that his performance evaluations were based partly on attendance and participation at these functions and that as such, the prayers and the moment of silence were a violation of the First Amendment. The Sixth Circuit upheld the practices as constitutional. Referring to the United States Supreme Court's explicit refusal to decide whether the coercion test of *Lee v. Weisman* applies in higher education, [FN101] the Sixth Circuit determined that it did not control. [FN102] The Court then further distinguished this case from *Lee* by relying on the age of the audience, [FN103] the same reasoning used by the Seventh Circuit in *Tanford*. The Court held that "the obvious difference between plaintiffs such as Dr. Chaudhuri [a tenured professor of mechanical engineering] and children at an impressionable stage of life 'warrants a difference in constitutional results.'" [FN104]

While none of these circuit court decisions will be binding on Mr. Weinstein's case against the Air Force [FN105] in the Tenth Circuit, they do provide some guidance and insight into the way courts have treated the military and military academies. More important, though, these few decisions give an indication of how receptive the courts might be to an argument that military academies foster coercive atmospheres and, for Establishment Clause purposes, should be analyzed like primary and secondary schools.

***19 IV. PRIMARY AND SECONDARY SCHOOL ESTABLISHMENT CLAUSE JURISPRUDENCE**

While the United States Supreme Court has developed a number of tests for Establishment Clause challenges, it has never applied one consistently to primary and secondary school cases, preferring instead to evaluate the facts of each particular case separately. [FN106] Therefore, this section will discuss the cases most relevant to the current situation at the Air Force Academy.

In general, when evaluating Establishment Clause challenges, courts have employed three different, yet related tests. [FN107] The most widely used and most often criticized [FN108] is the three-prong *Lemon* Test that requires that the law or activity have "a secular purpose, the primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion." [FN109] The second test is the *Endorsement* Test, sometimes incorporated into the second prong of *Lemon*. Under this test, "the government may not engage in a practice that suggests to the reasonable, informed observer that it is endorsing religion." [FN110] The third test, also sometimes incorporated into *Lemon* and used primarily in the context of school prayer, is the *Coercion* Test, which states, "the government may not coerce anyone to support or participate in religion or its exercise." [FN111]

*20 Under the three-prong *Lemon* Test, many of the current programs and activities occurring at the Air Force Academy could be found to violate the First Amendment. For example, the Academy engages in a policy of granting Christian cadets non-chargeable passes [FN112] to attend Christian religious services and study groups off-base on Sundays while forcing non-Christians who celebrate the Sabbath on Saturday [FN113] to use chargeable passes. [FN114] While the first prong of *Lemon* "presents a fairly low hurdle for the state ... a state-sponsored practice violates this prong ... if it is entirely motivated by a purpose to advance religion." [FN115] The Academy provides a number of Christian services and SPIRE groups for religious study on campus. Therefore, there is no other reason to grant a non-chargeable pass to Christian cadets other than to advance and encourage the practice of Christianity.

However, even if the Court were to defer to the Academy's assertion that encouraging attendance at off-campus religious services and study groups serves the secular purpose of developing officers who "appreciate the significance of spiritual values and beliefs to their own character development and that of the community," [FN116] it

would still fail the second prong of Lemon, and similarly the Endorsement Test. According to the United States Supreme Court, "the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." [FN117] The Endorsement Test asks the same question but requires that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious speech takes place." [FN118] The primary effect of the Academy's policy is that Christian students get the benefit of a non-chargeable pass to worship, but non-Christians do not. This clearly conveys a message that Christianity is the preferred religion and endorsed by the Academy.

Finally, because the Academy sets, regulates, and administers the disparate religious leave and pass policy, it is excessively entangled and fails the final Lemon prong. Therefore, the Academy's policy of granting *21 Christian cadets non-chargeable passes and not offering non-Christians the same fails all three prongs of the Lemon Test, as well as the Endorsement Test and is a violation of the Establishment Clause.

If the United States Supreme Court decided to abandon the Lemon Test, it could also analyze current programs and practices at the Air Force Academy based on its pre-Lemon decisions. For example, were the Court to analyze the Academy's SPIRE program, which allows outside religious groups special access to Academy facilities and cadets, it could draw upon its decision in *McCullum v. Board of Education*. There, a school district allowed private religious groups to come into the school to teach religion for thirty minutes, once a week, during regular hours set aside for secular education. [FN119] While the district did not pay the religious teachers, the instructors were subject to district approval and supervision. [FN120] In addition, the State's compulsory education system required students to be in attendance. [FN121] The Court held that this program was "beyond all question a utilization of the tax-established and tax supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment." [FN122]

While the SPIRE groups are invited onto campus at the request of cadets and attendance at their meetings is voluntary, they are still subject to the approval and supervision of the Academy. [FN123] In addition, the groups meet with cadets on campus in a main classroom building or the library. [FN124] Therefore, irrespective of whether evangelical Christian groups are getting special preference within the SPIRE program, [FN125] based *22 on *McCullum*, the entire program is "a utilization of [a] tax-established and tax supported public school ... to aid religious groups to spread their faith," and thus should be found to be a violation of the Establishment Clause.

While the Air Force has begrudgingly begun to admit that it has a problem with religious intolerance, it has consistently downplayed the issue. For example, according to a June 2005 Air Force Academy report, the religious climate at the Academy "does not involve overt religious discrimination, but a failure to fully accommodate all members' needs and a lack of awareness over where the line is drawn between permissible and impermissible expression of beliefs." [FN126] However, under *Abington School District v. Schempp*, [FN127] even minor encroachments on the First Amendment will not be tolerated because "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" [FN128]

Further, no matter which specific issue raised by Mr. Weinstein in his lawsuit or by various other groups who have reported on the growing evangelical influence at the Academy is analyzed under the pre-Lemon cases, a violation of the First Amendment is likely to be found. In *Engle v. Vitale* [FN129] the Supreme Court stated that "when the power, prestige and financial support of government are placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." [FN130]

Finally, due to the highly structured and regulated environment created by the military and existing with even more force at military academies, the United States Supreme Court could adopt the reasoning of the Fourth Circuit

in *Mellen v. Bunting*, and apply the Coercion Test it enunciated in *Lee v. Weisman*. [FN131] There, the Supreme Court held that prayer as part of a public high school graduation ceremony violated the Establishment Clause. [FN132] According to the Court, "the potential for divisiveness is of particular relevance [t]here though, because it centers around an overt religious exercise in a secondary school environment where subtle coercive *23 pressures exist and when the student had no real alternative which would have allowed her to avoid the fact or appearance of participation." [FN133] The decision was based on an underlying policy concern that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce," [FN134] exactly what appears to be happening at the Air Force Academy.

More recently, in 2000, the Supreme Court used a combination of all three tests to find a school district's policy permitting student-led prayer before a public high school football game unconstitutional. [FN135] The Court first addressed the school district's assertion that the invocations were private speech because they were voted on by the students and delivered by students. [FN136] Quickly dismissing this argument, the court found that the activities were authorized by school board policy, and performed on school property during school-sponsored events, thus not private speech. [FN137] Turning to the as-applied challenge of whether the policy actively endorsed religion, the Court determined that the Coercion Test set out in *Lee* was the proper precedent to apply. [FN138] While the District argued that students attend the games voluntarily, the Court disagreed [FN139] and stated that even if many students were there voluntarily, "the delivery of a pre-game prayer has the improper effect of coercing those present to participate in an act of religious worship." [FN140] In addition, it found that based on the atmosphere in which the policy was executed [FN141] an objective observer would perceive the pre-game invocation as being endorsed by the school. [FN142]

With respect to the facial challenge to the policy, the Court employed the Lemon Test, with the Endorsement Test guiding the analysis of the *24 first public purpose prong. The District argued that the facial challenge should have failed because the suit was brought prematurely [FN143] and that it could not legally "be invalidated on the basis of some possibility or even likelihood of an unconstitutional application." [FN144] The Court reasoned that while this was true, it was only one of the many injuries that could have been caused by the policy, and thus, not the only injury capable of rendering the policy unconstitutional. [FN145] The Court focused on the purpose of the policy, including the context in which the policy arose, [FN146] and held that "the policy was invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."

If the Court were to look into the context in which many of the current Air Force policies arose, it would similarly discover that they were implemented with the purpose of endorsing evangelical Christianity. In fact, the Court would have to look no further than the front page of the July 12, 2005, issue of *The New York Times*, in which many Air Force chaplains, including the Deputy Chief of Chaplains, expressed their commitment to furthering evangelical Christianity in the military, and the Air Force specifically. [FN147] Therefore, no matter what test or precedent the Court decided to apply, many of the current Air Force practices and activities would likely be found to violate the First Amendment. [FN148]

***25 V. FREE EXERCISE RIGHTS IN THE MILITARY**

At the outer boundary of the Establishment Clause lies the Free Exercise Clause. "While in many contexts [they] fully compliment each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflicts with the Free Exercise Clause." [FN149] Thus, in general, efforts to prevent the government endorsement of religion must not go so far as to prohibit the private practice of religion. For example, the government should not hang a crucifix in a public building such as a courthouse or legislative building, but it should also not prevent a private citizen who works in that building from wearing one, if they so choose.

However, an exception to this general rule of balancing the clauses equally is the military, which the United States Supreme Court consistently refers to as a "specialized society." [FN150] Based on the recognition of the special needs of the military in maintaining order and discipline, the courts have consistently deferred to the military and upheld regulations and policies that limit service members' protection under all of the clauses of the First Amendment--speech, [FN151] press, [FN152] assembly, [FN153] petition, [FN154] and free exercise of religion [FN155]--except the Establishment Clause.

There has been one case in which the military attempted to balance the two religion clauses: *Katcoff v. Marsh*. There, the Second Circuit Court of Appeals held that funding military chaplains was not an Establishment Clause violation because not providing them to soldiers abroad would actually be a Free Exercise violation. [FN156] However, in *Goldman v. Weinberger*, a case dealing specifically with the Free Exercise rights of service members, the United States Supreme Court held that the military could restrict even the passive exercise of religion, by holding that an Air Force captain should not be allowed to wear a yarmulke while on duty. [FN157] Thus, for reasons stated in detail below, *Goldman* is actually the more appropriate precedent to apply to the issue of religious expression at military colleges, such as the Air Force Academy.

A. The First Amendment Clauses and the Military as "Specialized Society"

The Court has consistently held that "the military is by necessity a specialized society separate from civilian society ... [and] must insist upon a respect for duty and a discipline without counterpart in civilian life." [FN158] For example, in *Parker v. Levy*, an Army captain was court-martialed for encouraging enlisted service members to disobey orders and refuse to fight in the Vietnam War. The United States Supreme Court held that the First Amendment did not protect this speech and conduct. The Court stated, "while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. [FN159] The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." [FN160]

Two years later, in *Greer v. Spock*, the United States Supreme Court once again granted great deference to the military by upholding regulations that banned partisan political speeches and demonstrations on a military base. [FN161] The court stated that while members of the military were free to engage in such activities while off-duty and off base, the military itself "must be insulated from both the reality and appearance of acting as a handmaiden for partisan political causes or candidates." [FN162] In addition, Justice Burger's concurrence makes it clear that the Court's real fear was political coercion of service members by their commanders. Using language seen mainly in religious contexts he stated, "the real threat to the independence and neutrality of the military--and the need to maintain as nearly as possible a true 'wall' of separation" [FN163] comes ... from the risk that a military commander might attempt to 'deliver' his men's votes for a major-party candidate." [FN164]

In 1980, service members from both the Air Force and the Navy challenged regulations that prohibited the circulation of petitions on military bases without prior command approval. [FN165] The soldiers asserted that this violated their First Amendment rights to communicate directly to their representatives in Congress. Upholding the regulations in both cases, the Court once again reaffirmed the military as a special society that required service members to sacrifice some of the rights they might otherwise enjoy in civilian society to ensure the overriding goals of discipline and order. [FN166] The Court reasoned "[The] accuracy and effect of a superior's command depends critically upon the specific and customary reliability of [his] subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior ... the right to command and the duty to obey ordinarily must go unquestioned." [FN167]

B. Katcoff versus Goldman, Which Precedent is Most Applicable?

The argument many use to advocate for religion in the military is based on *Katcoff v. Marsh*. [FN168] In that case, the Second Circuit Court of Appeals *28 held that government funding of military chaplains did not violate the Establishment Clause, and that the Free Exercise Clause "obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denomination is not available to them." [FN169]

However, the situation at military academies is clearly distinguishable. First, "Katcoff justified the military chaplaincy as an institution. A separate analysis however applies to individual activities in the military." [FN170] In the case of the Air Force Academy, the voluntary nature of such activities as a commanding officer using his official government email accounts to encourage cadets to attend evangelical Christian prayer weekends is certainly suspect. [FN171]

Second, military academies are located in the United States, where the religious denominations of the majority of cadets and officers are easily accessible in the local community. This is especially the case for evangelical Christians at the Air Force Academy, which is located in Colorado Springs, Co., the "home" of evangelical Christianity in the United States. The court in *Katcoff* stated that "[i]f the ability of such personnel to worship in their own communities is not inhibited by their military service and funds for these chaplains and facilities would not otherwise be expended, the justification for a governmental program of religious support for them is questionable and, notwithstanding our deference to Congress in military matters, requires a showing that they are relevant to and reasonably necessary for the conduct of our national defense by the Army." [FN172]

Finally, even military chaplains have experienced restrictions on their exercise of religion as recently as 1991, during the first Persian Gulf War. Among the restrictions the government imposed to avoid offending host countries like Saudi Arabia were: ordering military chaplains to remove insignia showing their religion, ordering chaplains to identify themselves as "morale officers" instead of chaplains, prohibiting chaplains from using the words "mass" or "holy communion" and posting listings of only certain religious services taking place on the base, but *29 not others, most notably the Jewish services. [FN173] Therefore, while there may be a long history of chaplains in the military, even they must operate within the court and government imposed-restrictions on military service members' Free Exercise Rights.

Thus, the most applicable United States Supreme Court precedent to the current situation at the Air Force Academy is *Goldman v. Weinberger*. In that case, analyzing a Free Exercise challenge, the Court upheld an Air Force regulation that prevented an orthodox Jew from wearing a yarmulke while on duty and in uniform. [FN174] While the Court recognized that Captain Goldman's wearing of a yarmulke was required by the tenets of his faith and was akin to silent prayer, and that prohibiting the practice would make "military life ... more objectionable for him and probably others," [FN175] it still deferred to the military and upheld the regulation. Writing for the majority, Justice Rehnquist stated, "the First Amendment does not require the military to accommodate such practices in the face of the view that they would detract from the uniformity sought by the dress regulations." [FN176]

He went on to further justify the restriction of Captain Goldman's Free Exercise rights by stating "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" [FN177] As noted, this emphasis on "service before self" is a concept *30 put forth by the Air Force itself. Thus, if Goldman stands for anything it means that even after graduation, upon entering the Air Force the restrictions on a service member's activities of daily living, including the ability to observe one's religion, remains. If the passive exercise of wearing a yarmulke, turban or dreadlocks was prohibited for the sake of unity and cohesiveness, certainly the active exercise of evangelical proselytizing should be as well.

Therefore, in light of the restrictions placed on service members' First Amendment rights under all of the clauses except the Establishment Clause, and the twenty-year precedent established by *Goldman*, which specifically

restricts service members' Free Exercise rights, it is unlikely that the Court would find a Free Exercise Clause violation if military academies prohibited evangelical proselytizing on campus.

VI. WHY A MORE LIMITED WEINSTEIN LAWSUIT WOULD HAVE BEEN MORE EFFECTIVE

As previously noted, the District Court dismissed the Weinstein lawsuit without reaching the merits of the factual allegations. However, based on the United States Supreme Court Establishment Clause and Free Exercise Clause jurisprudence, as well as the Fourth Circuit's decision in *Mellen*, it is clear the plaintiffs would have had a stronger case if they had sued the Academy itself, rather than the entire Air Force. [FN178]

If Mr. Weinstein had requested that the Academy alone adopt a policy prohibiting proselytizing on campus, as a military directive aimed at preventing Establishment Clause violations, and the Academy did so, the courts would likely give great deference to the Air Force and uphold the policy. With respect to the military, "there is a strong deference to the special needs of the military's separate society and an unwillingness to review the military's judgment on the importance of the interests served by the regulation and the need for the restriction to satisfy that interest." [FN179] Further, when analyzing whether any sort of prayer was appropriate for a middle school graduation, the Supreme Court in *Lee* stated *31 "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." [FN180] Therefore, if the Academy were to adopt such a policy it would take a stronger case to invalidate the policy on Free Exercise grounds than to sue under the current policy for Establishment Clause violations.

Second, even if the courts were to adopt a stricter standard of review, a challenge to a policy prohibiting proselytizing at military academies would pit the schools' desires to avoid Establishment Clause violations, a compelling state interest, [FN181] against the cadets' and officers' more limited Free Exercise rights. [FN182] This would seem to suggest that when "playing in the joints" [FN183] of the religion clauses, the military should err on the side of restricting free exercise rather than violating the Establishment Clause. It would also favor the adoption of Mr. Weinstein's narrowly tailored policy prohibiting "members of the Air Force, including chaplains from evangeliz[ing], proselytiz[ing], or in any related way attempt[ing] to involuntarily convert, pressure, exhort or persuade a fellow member of the Air Force to accept their own religious beliefs while on duty." [FN184] As previously stated, the hierarchical nature of the military and the coercive nature of evangelical Christianity makes the danger of allowing proselytizing similar to that which the Court sought to avoid in the political arena in *Greer*. The independence and neutrality of the military can be just as threatened by a commander using his position to deliver his men to Jesus as it can by his delivering them to a third-party political candidate.

Finally, the restrictions on cadets and officers should be extended to military academy campuses, as they are more akin to military bases than traditional college campuses. There are no fraternities or sororities at military academies and cadets cannot come and go as they please. Rather, like soldiers on active duty, cadets' conduct and activities while on campus are highly regulated. Since the United States Supreme Court held in *Brown and Huff* that soldiers have restricted First Amendment *32 rights on base, so too must cadets have restricted First Amendment rights on the Academy campus. This by no means would require the cadets or officers to give up religion altogether. As the Court reasoned in *Greer*, military cadets could still practice their religion, proselytizing or not, as much as they would like to off-base and off-duty.

VII. CONCLUSION

The United States Supreme Court has declined certiorari on every case involving Establishment Clause violations in higher education. However, the unique coercive characteristics of military colleges, as illustrated by the current situation at the United States Air Force Academy, require a different analysis from that applied to traditional public and private colleges and universities. The atmosphere on a military college campus is more similar to that of a military base, full of restrictions and regulations of rights regular college students take for granted. Therefore,

when it comes to drawing the line between preventing an Establishment Clause violation and accommodating the Free Exercise rights of cadets, based on the United States Supreme Court's military jurisprudence, the Establishment Clause concerns should take precedence.

[FN1]. Heather Cook is an Assistant District Attorney in the Bronx County District Attorney's Office. The views expressed in this article are hers alone and do not represent those of the District Attorney's Office or the District Attorney. She received her J.D. in May 2006 from the City University of New York School of Law, and wishes to thank Professors Andrea McArdle and Ruthann Robson for all of their support and guidance throughout this process.

[FN1]. *Weinstein v. United States Air Force*, No. CIV-05-1064 JP/LAM (D.N.M. filed October 6, 2005, amended October 31, 2005)[hereinafter Amended Complaint]. On October 27, 2006 Judge James A. Parker of the United States District Court for the District of New Mexico dismissed the lawsuit with prejudice to the Air Force, but dismissed the lawsuit without prejudice as to Michael Wynne, Acting Secretary of the Air Force. *Weinstein v. United States Air Force*, No. CIV-05-1064JP/LAM (D.N.M. filed October 27, 2006) [herein after District Court Decision]. *Weinstein* plans to appeal the decision to the 10th Circuit Court of Appeals. This decision will be discussed further in Section II of this article.

[FN2]. Evangelical is defined as "of those Protestant churches, as the Methodist and Baptist, that emphasize salvation by faith and reject the efficacy of the sacraments and good works alone." Webster's Third College Edition ... Evangelical Christians are a sect of Protestant Christians, distinguished by "six major distinctives of evangelical Christianity: 1) The supreme authority of Scripture, 2) Jesus Christ as incarnate God, 3) the Holy Spirit, 4) personal conversion, 5) evangelism, and 6) the importance of the Christian community." Worldwide Church of God Homepage, What is an Evangelical?, <http://www.wcg.org/lit/church/evangelic.htm> (last visited May 16, 2006). In the past many have used the terms "evangelical" and "fundamentalist" interchangeably, but they do in fact have different meanings. Fundamentalists are generally more reclusive, retreating to the safety of the church to protect them from the evils of the outside world. Evangelicals on the other hand, take a more missionary approach and tend to actively engage with the outside world believing that they are called by god to spread the gospel that eternal salvation can only be achieved through personal faith in Jesus Christ. *Id.*

[FN3]. The Evangelical Right Website, <http://www.evangelicalright.com/introduction.html> (last visited October 24, 2006).

[FN4]. Alliance Defense Fund and National Association of Evangelicals.

[FN5]. Motion to Intervene of The National Association of Evangelicals and it's Chaplains Commission. *Weinstein v. United States Air Force*, No. CIV-05- 1064 JP/LAM (D.N.M. filed February 8, 2006) [hereinafter Motion to Intervene].

[FN6]. *Id.*

[FN7]. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[FN8]. The Air Force acknowledged the unique nature of military colleges in a June 2005 study examining the religious climate at the Academy stating, "The task of providing for free exercise of religion, while not appearing to establish a religion, is complex enough in any government setting. Arguably, it is even more complex in a military environment and yet again more challenging in a university, military setting." *United States Air Force, U.S. Dep't of Defense, The Report of the Headquarters Review Group Concerning the Religious Climate at the US Air Force Academy iv. (2005)* [hereinafter Brady Report].

[FN9]. See *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); See also *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997); *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

[FN10]. *McCullum v. Board of Education*, 333 U.S. 203 (1948).

[FN11]. *Zorach v. Clauson*, 343 U.S. 306 (1952).

[FN12]. *Goldman v. Weinberger*, 475 US 503 (1986).

[FN13]. Brady Report, *supra* note 8, at 6. The report also noted that a faculty member who was interviewed for the report admitted to distributing a syllabus that included a bible verse and a statement telling cadets they would learn "awe and respect for the creator of the universe." *Id.*

[FN14]. Dr. Kristen Leslie led the team of six students from Yale Divinity School. Former USAFA Chaplain Melinda Morton invited them to the Academy. Basic Cadet Training (BCT), an orientation-type program for entering freshmen under the leadership of senior cadets. According to the Academy, "the faculty and staff refine skills applicable to a deployed field location, which means a busy period of counseling and pastoral care by chaplains." *Id.* at 10.

[FN15]. Leslie noted, "What we found was this very strong evangelical Christian voice just dominating. We thought that just didn't make sense in light of their mission, which was to protect and train cadets, not to win religious converts." T.R. Reid, *Air Force Removes Chaplain from Post*, WASH. POST, May 13, 2005, at A4. Cadets were also encouraged to "witness" to their fellow cadets, told that Jesus had called them to the Academy and military life and informed that God's plan for their life included attending the Academy. The observers expressed a concern that such consistent and forceful proselytizing "challenged the necessarily pluralistic environment of BCT." The report noted "the overwhelmingly Evangelical tone of general protestant worship encouraged religious divisions rather than fostering spiritual understanding among Basic Cadets." The observers suggested an approach that focused more on "ecumenical teamwork and developing an appreciation of spiritual diversity." United States Air Force, U.S. Dep't of Defense, *After Action Report: BCT II Chaplain Practicum Training: Special program in Pastoral Care*, with the resources, supervision and selected students of Yale Divinity School 2 (2004). [hereinafter *After Action Report*]

[FN16]. Patrick O'Driscoll, *Academy Critic Says She Was Fired*, USA TODAY, May 11, 2005, at A1. Morton had been scheduled to leave the Academy for an overseas position in the summer and officials stated that her duties were shifted in early May to another chaplain in an effort to ease the transition.

[FN17]. *Id.*

[FN18]. Reid, *supra* note 15.

[FN19]. Americans United for Separation of Church and State, *Report on Religious Coercion and Endorsement of Religion at the United States Air Force Academy 13* (2005) [hereinafter *Americans United Report*].

[FN20]. Americans United for the Separation of Church and State is a non-profit organization, founded in 1947 and comprised of religious, civic and educational leaders committed to educating federal, state and local legislators on the importance of the separation of church and state. Americans United for the Separation of Church and State Website, <http://www.au.org/site/PageServer?pagename=aboutau> (last visited May 16, 2006). Prompted by the allegations reported by the media following the release of the Yale Divinity report, the legal staff of Americans United conducted its own investigation. The "Report on Religious Coercion and Endorsement of Religion at the United States Air Force Academy" is based on those allegations along with interviews the organization conducted with cadets, their families, Academy staff and career Air Force Officials. Letter from Barry Lynn, Executive Director.

Americans United for Separation of Church and State, to Honorable Donald H. Rumsfeld, Secretary of Defense, United States Dep't of Defense (Apr. 28, 2005) (on file with author).

[FN21]. Americans United Report, *supra* note 19, at 1.

[FN22]. *Id.* at 2.

[FN23]. *Id.* at 5.

[FN24]. *Id.* at 2.

[FN25]. *Id.* at 4.

[FN26]. Passes that do not count as "leave."

[FN27]. Jews, Seventh Day Adventists, etc.

[FN28]. Americans United Report, *supra* note 19, at 9.

[FN29]. *Id.*

[FN30]. *Id.* at 9-10.

[FN31]. When the cadet was denied a SPIRE group and complained about this and other discriminatory acts he had experienced as a Freethinker, the Officer in charge of the Academy's equal opportunity office, Captain Joseph Bland, refused to recognize the complaint as one for religious discrimination because the cadet had identified himself as an atheist. Captain Bland then attempted to proselytize the cadet into Christianity. Captain Bland was the Military Equal Opportunity (MEO) Officer of the Year that year. *Id.* at 10. Eventually, the Freethinkers were allowed a SPIRE group.

[FN32]. *Id.* at 4.

[FN33]. *Id.*

[FN34]. *Id.*

[FN35]. The email instructed cadets to "ask the Lord to give us the wisdom to discover the right, the courage to choose it, and the strength to make it endure ... He has a plan for each and every one of us." *Id.* at 6.

[FN36]. *Id.*

[FN37]. At a Protestant service he instructed cadets that whenever he uses the phrase "Airpower!" they should respond with "Rock Sir!" a reference to the New Testament story of the house built on a rock, meant to symbolize building faith on the firm foundation of Jesus. He urged the cadets to use the opportunity to proselytize their faith to other students if they inquired about the chant. *Id.* The chant was also accompanied by a "J for Jesus" hand signal. Brady Report, *supra* note 8. at 7.

[FN38]. Americans United Report, *supra*, note 19, at 7.

[FN39]. *Id.* at 8.

[FN40]. *Id.*

[FN41]. Pam Zubeck, Academy to Get New Religion Guidelines, COLO. SPRINGS GAZETTE, June 23, 2005, at A1.

[FN42]. Brady Report, *supra* note 8 at 30. The coach went on to say that "the focus should be on individual assertiveness to be a good officer ... if someone is offended they need to learn to deal with it on their own." *Id.*

[FN43]. At a speech to the Anti-Defamation League, Academy Superintendent Lieutenant General John Rosa admitted that there was a problem of religious respect at the Academy. He stated that "it is an issue that has been at the Academy for awhile; it will take awhile to fix." According to General Rosa, there is a "climate and a culture at the United States Air Force Academy that is unlike ... the Air Force [he] grew up in. Young people don't respect themselves. They don't respect others." Lieutenant General John Rosa, Superintendent, United States Air Force Academy, Remarks at Meeting of Anti-Defamation League's Executive Committee (June 3, 2005), available at http://www.adl.org/misc/gen_speech.asp. General Rosa left the Air Force Academy on October 24, 2005 to become Superintendent of The Citadel in Charleston, South Carolina. Lt. Gen. John Regni, a 1973 graduate of the academy who promises zero tolerance for sexual assaults and religious intolerance, replaced him. Tom Roeder, Regni Promises Hard Line, COLO. SPRINGS GAZETTE, Oct. 25, 2005, at A1.

[FN44]. Laurie Goodstein, Evangelicals Are Growing Force in Military Chaplain Corps, N.Y. TIMES, July 12, 2005, at A1.

[FN45]. Alan Cooperman, Air Force Withdraws Proselytizing Paper for Chaplains, WASH. POST, Oct. 11, 2005, at A3.

[FN46]. The Academy continued to give access and preferences to off-campus evangelical groups such as The Navigators, a group whose motto is "To know Christ and to make Him known." In a confidential letter Navigator ministers told supporters that the Academy had given them a classroom on campus to meet with cadets at any time during the day. The ministers also specifically requested that members not share the letter publicly due to the current lawsuit, as they are "vitaly aware [they] are in the front lines of a spiritual battle." The Academy responded by claiming that the Navigators are one of 19 outside religious groups that hold voluntary meetings once a week from 6:30pm-8pm as part of the SPIRE program. An Academy spokesman said that if they were using the room for more than those 90 minutes a week it would be a violation of the agreement they signed with the Academy. Alan Cooperman, Group Trains Air Force Cadets To Proselytize, WASH. POST, Nov. 12, 2005, at A6.

[FN47]. For example, regarding accommodation: "It is Air Force policy that requests for accommodation should be approved except when precluded by military necessity. They should normally be approved unless approval would have an adverse impact on military readiness, unit cohesion, standards, or discipline. When requests are precluded by military necessity, commanders and supervisors should seek reasonable alternatives. Commanders and supervisors at all levels should ensure that requests for accommodation are dealt with as fairly as practicable throughout their organizations." United States Air Force, U.S. Dep't of Defense, Interim Guidelines Concerning Free Exercise of Religion in the Air Force, (2005) [hereinafter Interim Guidelines]. Regarding public prayer outside of voluntary worship settings: "Public prayer should not usually be included in official settings such as staff meetings, office meetings, classes, or officially sanctioned activities such as sports events or practice sessions." *Id.* However, "[c]onsistent with long-standing military tradition, a brief non-sectarian prayer may be included in non-routine military ceremonies or events of special importance ... where the purpose of the prayer is to add a heightened sense of seriousness or solemnity, not to advance specific religious beliefs" *Id.* "In addition, a moment of silence for personal reflection does not require the same considerations as public prayer and may be appropriate in official settings." *Id.* Regarding sharing of religious faith: "In official circumstances, particularly in situations where superior/subordinate relationships are involved, individuals need to be sensitive to the potential that personal expression may appear to be official expressions. This is especially true when subordinates are present as part of their official duties

and obligations. Nothing in this guidance should be understood to limit voluntary, peer to peer discussions." *Id.*

[FN48]. On October 11, 2005, 35 members of Congress signed a letter to Acting Secretary of the Air Force Pete Geren stating that the guidelines "clearly restrict the free exercise of religion and are misguided. The Air Force leadership has reacted to a small problem at the Air Force Academy by creating a different set of problems in these guidelines." Letter from Members of Congress, to Pete Geren, Acting Secretary, United States Air Force (Oct 11, 2005)(on file with recipient). In addition, 72 members of Congress sent a letter to President Bush expressing the same sentiments and requesting an executive order "guaranteeing the right of military chaplains to pray 'in Jesus' name' rather than being forced to offer non-sectarian prayers at public ceremonies." Alan Cooperman, Air Force Eases Rules on Religion; New Guidelines Reflect Evangelicals' Criticism, *General Says*, Washington Post, February 10, 2006, at A5.

[FN49]. See United States Air Force, U.S. Dep't of Defense, Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force, (2006) [hereinafter Revised Guidelines]. The revised guidelines were considerably shorter, down from 16 paragraphs and 4 pages to 7 paragraphs and one page. The revised guidelines are also broader in language and put much more emphasis on the rights of service members under the Free Exercise Clause than the Establishment Clause. *Id.*

[FN50]. H.R. 5112, 109th Cong. (2006).

[FN51]. Weinstein is also the father and father-in-law of two recent USAFA graduates, both of whom are currently on active duty with the USAF. Amended Complaint, *supra* note 1 at 2.

[FN52]. On October 31, 2005, the complaint was amended to add 2004 USAFA graduates and current US Air Force officers Casey M. Weinstein, Patrick T. Kucera, Ariel B. Kayne, and Jason A. Spindler as plaintiffs. In addition, on November 3, 2005, Michael W. Wynne was sworn in as Secretary of the Air Force and is automatically substituted as a defendant in place of former Acting Secretary Pete Geren.

[FN53]. Jurisdiction is based on the location of three US Air Force bases in New Mexico, including Kirtland Air Force Base, which is located in Bernalillo County, New Mexico. Mr. Weinstein is also a resident of Bernalillo County, New Mexico. *Id.*

[FN54]. *Id.* at 13. Other factual allegations include events previously reported by Americans United for Separation of Church and State, such as Chaplain Watties encouraging cadets during Basic Cadet Training to return to their tents and proselytize to cadets who had not attended the service, with the declared penalty for not accepting this proselytization being to "burn in the fires of hell." *Id.* at 14; cadets encouraged to "witness" to other cadets in an attempt to convert them to evangelical Christianity. *Id.* at 15; cadets coerced into non-secular prayers during mandatory or otherwise official events. *Id.* at 16; coerced attendance at religious services and prayers at official events, members of the Permanent Party and upperclass cadet staff encouraging and putting pressure on classmates and underclass cadets to engage in religious practices generally, and most especially in Christian religious practices. *Id.* at 17; "discrimination and harassment toward non-Christian and non-religious cadets have been manifested ... by numerous incidents of slurs directed at individual cadets who hold minority religion status or are Jewish or atheists." *Id.* at 19; "Christian cadets who wish to attend Christian religious services have been eligible for 'non-chargeable passes' that do not count as regular leave. However, cadets who celebrate the Sabbath on other days of the week have not been able to obtain such non-chargeable passes to attend Saturday services off the Academy grounds." *Id.* at 19.

[FN55]. *Id.* at 23.

[FN56]. Goodstein, *supra*, note 44. Richardson distinguished proselytizing as "trying to convert someone in an aggressive way" whereas evangelizing is "more gently sharing the gospel." However, according to Webster's dictionary, the terms are virtually synonymous. Evangelism is "any zealous effort in propagandizing for a cause." Evangelize is "to preach the gospel, to convert to Christianity." Webster's New World Dictionary, 470 (3rd ed. 1998). Similarly, Proselytize is "to try to convert to one's religion." *Id.* at 1080.

[FN57]. Amended Complaint, *supra* note 1 at 22.

[FN58]. *Id.* at 30(a).

[FN59]. Motion to Intervene, *supra* note 6.

[FN60]. *Id.* at 3.

[FN61]. *Id.* Major Glass is also concerned about being deployed to a location where combat operations are in progress and being able to share his faith with others and seek religious comfort when his life and the lives of others are at risk. *Id.* at 4.

[FN62]. *Id.* at 7.

[FN63]. Since the filing of the lawsuit, more allegations of misconduct within the Air Force have come to light including an Air Force recruiter who was told at a convention of Air Force Recruiters that he "needed to accept Jesus Christ in order to perform [his] duties" and that he should "use faith in Jesus Christ while recruiting." Patrick O'Driscoll, Plaintiffs Say Air Force Recruiters Told to Use Religion as Tool, USA Today, March 10, 2006. In addition, on May 4, 2006, an Air Force General stationed at Langley Air Force Base in Virginia, and in charge of purchasing weapons, used his official Air Force military email account to solicit support for a fellow Academy graduate running for Congress in Colorado. The email was sent not only to fellow Academy graduates, staff at the Central Command, the Office of the Secretary of Defense and the Joint Command, but also to employees at Boeing, a major military contractor. In the email. Major General Jack Catton encouraged recipients to contribute money to the campaign of fellow Academy graduate Bentley Rayburn, saying "We are certainly in need of Christian men with integrity and military experience in Congress." Stephanie Heinatz, Langley General's Email Probed, The Hampton Daily Press, May 11, 2006.

[FN64]. See *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

[FN65]. District Court Decision, *supra*, note 1 at 6, 9-10.

[FN66]. *Id.* at 5. The Court also found the causation element of Article III standing to be lacking as all of the Plaintiffs had graduated from the Academy prior to the filing of the lawsuit. *Id.*, at 9.

[FN67]. *Id.* at 15. The case against the Air Force was dismissed with prejudice, thereby precluding Weinstein from bringing another lawsuit against the institution.

[FN68]. *Id.* at 15. Judge Parker's decision cautions Mr. Weinstein that if he does decide to file another lawsuit against Wynne he should consider a different forum as "none of the actions of which Plaintiffs complain took place in New Mexico. None of the offending actors appear to have any connection, whatsoever, with New Mexico. None of the offending actors appear to have any connection, whatsoever, with New Mexico ... it would seem almost all of the witnesses would be from Colorado where the Academy is located ... the policies which the Plaintiffs find to be offensive ... were developed in ... Washington, DC, or at the Pentagon in Virginia [and] there is no indication that anyone in New Mexico had anything to do with the promulgation of these policies. None of the sources of proof of

the allegedly unconstitutional events or policies likely will be found in New Mexico." *Id.*, at 15 n.5

[FN69]. 327 F.3d 355 (4th Cir. 2003).

[FN70]. Thomas Dienes, Commentary, When the First Amendment is not Preferred: The Military and Other Special Contexts, 56 U. Cin. L. Rev. 779, 801-802 (1988) (quoting *Goldman v. Weinberger*, 475 US 503 (1986)).

[FN71]. See, *Mellen v. Bunting*, 327 F.3d 355, 371 (4th Cir. 2003) VMI cadets are not children, but they do not enjoy the same choices and freedoms as non-military college students. Instead they are subjected to a strict, detailed, and regimented code of conduct, emphasizing obedience and conformity. Addressing the factual circumstances of *Mellen v. Bunting*, commentator Alexander Minard states, "VMI is admittedly different from all but six other colleges in the United States," meaning the other military academies: the Air Force Academy, the Naval Academy, West Point, the Coast Guard Academy and The Citadel. Alexander Minard, Note, But Could They Pray at UVA? The Fourth Circuit's Application of the Supreme Court's School Prayer Jurisprudence to the Virginia Military Institute's Adult Cadets, 13 Wm. & Mary Bill Rts.J.971, 1003 (2005).

[FN72]. United States Air Force Academy, A Quick Look at the US Air Force Academy--Fact Sheet, available at <http://www.usafa.af.mil/superintendent/pa/factsheets/quick.htm>.

[FN73]. *Id.*

[FN74]. *Id.*

[FN75]. United States Air Force, United States Air Force, Core Values, Section I, available at <http://www.usafa.af.mil/core-value/cv-mastr.html>.

[FN76]. *Id.*

[FN77]. *Id.* Upper class cadets develop their leadership abilities by running the Cadet Wing, leading classroom discussions, and helping to teach Combat Survival Training and various airmanship courses.

[FN78]. United States Air Force, Air Force Academy--Daily Life-- Fact Sheet, available at http://www.academyadmissions.com/cadetlife/daily_life.php.

[FN79]. *Id.*

[FN80]. *Id.*

[FN81]. *Id.*

[FN82]. *Id.*

[FN83]. *Id.*

[FN84]. See *Tanford v. Brand*, 104 F.3d 982 (7th Cir.1997); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997).

[FN85]. Analyzing prayer in higher education, commentator Deanna Pihos discusses the differences between the Fourth Circuit's finding of coercion in *Mellen* and the Sixth and Seventh Circuits' failure to find any coercion in *Tanford v. Brand* and *Chaudhuri v. Tennessee*. She states, "The Fourth Circuit based its decision largely on the coercive factors and pressure towards conformity that set VMI--an institution with the goal of training military cadets--apart from nearly every other university setting." Deanna Pihos, Commentary, Assuming Maturity Matters: The

Limited Reach of the Establishment Clause at Public Universities, 90 Cornell L.Rev. 1349, 1368 (2005). Further, "to justify its focus on coercion, the court distinguished the VMI cadets from those in Tanford and Chaudhuri, openly comparing VMI cadets to children, rather than higher education students." Id.

[FN86]. 327 F.3d 355 (4th Cir. 2003).

[FN87]. "Although VMI's cadets are not children, in VMI's educational system they are uniquely susceptible to coercion. VMI's adversarial method of education emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code ... At VMI, even upperclassmen must submit to mandatory and ritualized activities, as obedience and conformity remain central tenets of the school's educational philosophy." Mellen, 327 F.3d 355, 371 (4th Cir. 2003).

[FN88]. "... the communal dining experience, like other official activities, is undoubtedly experienced as obligatory." Id. at 372.

[FN89]. Id. at n.9 (citing *Lee v. Weisman*, 505 US 577, 596 (1992)).

[FN90]. 466 F.2d 283 (D.C.Cir. 1972).

[FN91]. Id. at 296.

[FN92]. Id. at 285.

[FN93]. Id. at 296. The court found that deference to the military in this instance was not required as mandatory attendance at religious services was not vital to national security, military operations, military discipline or the academies' overall training programs.

[FN94]. Id.

[FN95]. 104 F.3d 982 (7th Cir.1997). The commencement ceremony included both undergraduate and graduate students, although the law school had another separate ceremony just for its graduates the following day. Id.

[FN96]. Id.

[FN97]. The suit was brought by a law school professor and two law school students, one third year and one first year. Later the suit was amended to include an undergraduate student. Id. at 984. However, only 15%-55% of the law school graduates even attended the university wide commencement ceremony. Id. at 983.

[FN98]. Id. at 985.

[FN99]. Id. at 984-985.

[FN100]. 130 F.3d 232 (6th Cir. 1997).

[FN101]. "We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not ... place primary and secondary school children in this position." Id. at 239 (quoting *Lee v. Weisman*, 505 U.S. 577, 593 (1992)).

[FN102]. Tanford, 130 F.3d at 238.

[FN103]. Pihos, *supra* note 85, at 1368. Courts generally presume that there is less coercion in higher education settings because of "reduced pressure to conform, a less captive and more mature audience, and a voluntary choice to

attend." Pihos criticizes this presumption on a number of levels. First, many students are still minors (under 18 years of age) when they enter college. However, even if they are 18, "many college students are only one summer removed from high school. To conclude without explanation that a student can distinguish an endorsement or advancement of religion in August, though they could not do so at their high school graduation in June, is a questionable distinction on which to create two different standards of Establishment Clause protection." *Id.* at 1373. Second, with respect to coercion and peer pressure, Pihos points out "susceptibility to peer pressure and coercion does not automatically evaporate at age eighteen. In fact, college may be the first time that many young adults are free from extensive parental supervision or the influence of the communities and institutions that previously shaped their lives ... and may be particularly susceptible to messages that favor or disfavor religion or particular religious views as college students generally tend to be conformists." *Id.* at 1373-1374. Third, because prayer in higher education occurs at a variety of events, it is misleading to assume that the entire audience is composed of mature adults. "The age diversity that is undoubtedly present at college sporting events and graduation ceremonies, then, begs the question whether a more exacting Establishment Clause analysis--such as that which courts apply in primary and secondary school prayer cases--would be more appropriate for higher education prayer cases if a portion of the audience resembles secondary and primary school students." *Id.* at 1374.

[FN104]. Chaudhuri, 130 F.3d at 239.

[FN105]. Weinstein is suing the Air Force, not the Academy itself, in the 10th Circuit.

[FN106]. See generally Pihos, *supra* note 85.

[FN107]. While most courts generally refer to three tests, when discussing the age of the audience, some circuit courts also refer to the analysis from *Marsh v. Chambers*, 463 U.S. 783 (1983)(upholding prayer at the opening of a legislative session because it was something "deeply embedded in the history and tradition of this country" and all members of the legislature were adults, less susceptible to undue influence than school children.). The United States Supreme Court has explicitly refused to extend *Marsh* to the public school realm. *Id.* at 1359.

[FN108]. "Although widely criticized and occasionally ignored, the Lemon test 'still appears to govern Establishment Clause cases.'" Chaudhuri, 130 F.3d at 236; see also *State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992)(en banc); *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Agostini v. Felton*, 520 U.S. 1141 (1997).

[FN109]. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[FN110]. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 US 573 (1989) (citing *Lynch v. Donnelly*, 465 US 668 (1984)(O'Connor, S., concurring) "[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious speech takes place." *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001). Government endorsement of religion "sends a message to non-adherents 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." *Lynch*, 465 U.S. at 688 (O'Connor, S., concurring) (citing *Abington School District v. Schempp*, 374 U.S.203 (1963)).

[FN111]. *Lee v. Weisman*, 505 US 577 (1992).

[FN112]. Passes that do not count as "leave."

[FN113]. Jews, Seventh Day Adventists, etc.

[FN114]. *Americans United Report*, *supra* note 19, at 9.

[FN115]. Mellen, 327 F.3d at 372.

[FN116]. US Air Force Academy Website, [http:// www.academyadmissions.com/character/index.php](http://www.academyadmissions.com/character/index.php) (last visited May 16, 2006).

[FN117]. Wallace v. Jaffree, 472 U.S. 38, 56 n. 42 (1985).

[FN118]. Good News Club v. Milford Central School, 533 U.S. 98, 119 (2001).

[FN119]. McCollum v. Board of Education, 333 U.S. 203 (1948).

[FN120]. Id. at 208-09.

[FN121]. Id. at 209. Compared with *Zorach v. Clauson* where students were released from public school upon written request of their parents to attend religious instruction at private religious centers. This program didn't involve religious instruction in the classrooms or expenditure of public funds. The court focused on the neutral and non-coercive nature of the program. It also made a distinction between being hostile to religion, which the Constitution forbids, versus ensuring that the government remain neutral towards all religions. To this end, the government "may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." 343 U.S. 306, 314 (1952).

[FN122]. McCollum, 33 U.S. at 210.

[FN123]. All outside religious groups have to sign a memorandum of agreement to participate in the SPIRE program and remain under the close supervision of the Academy chaplains. Cooperman, *supra*, note 45.

[FN124]. Id.

[FN125]. While most outside religious groups are only given a room on campus to meet with students for 90 minutes once a week, the Navigators, a Christian Evangelical group, alleges that they have been given a classroom to meet with cadets at the Academy any time during the day. Id.

[FN126]. Brady Report, *supra* note 8, at id.

[FN127]. Abington School District, *supra* note 110.

[FN128]. Id. at 225.

[FN129]. Engel v. Vitale, 370 U.S. 421 (1962).

[FN130]. Id. at 431.

[FN131]. 505 U.S. 577 (1992).

[FN132]. Id.

[FN133]. Id. at 588.

[FN134]. Id. at 591-592.

[FN135]. Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[FN136]. Id. at 302.

[FN137]. Id.

[FN138]. Id.

[FN139]. "There are some students, however, such as cheerleaders, members of the band, and of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience." Id. at 311.

[FN140]. Id. at 312.

[FN141]. Including the selection of the speaker, composition of the message, delivery to the audience assembled for a school-sponsored event on school property, broadcast over the school's PA system access to which is controlled by school officials, clothed in attire with school emblems and in school colors, the school's name displayed in the background on the field and on banners and flags all around the stadium. Id. at 307-308.

[FN142]. Id. at 308.

[FN143]. The District argued that until a student actually gave an address under the revised October policy, there was no evidence that it would have resulted in an unconstitutional religious message. Id. at 313.

[FN144]. Id. at 314.

[FN145]. Id.

[FN146]. The school district went through 3 previous versions of the policy before settling on the October version at issue in this case. The Court stated, "The District ... asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly--that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to 'solemnize' a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." Id. at 315.

[FN147]. See Goodstein, *supra*, note 44.

[FN148]. This assumes that the courts would recognize the coercive nature of military academies and extend its primary and secondary school jurisprudence to military academies. Justice Scalia and former Chief Justice Rehnquist in their dissenting opinion for denial of certiorari in *Mellen* indicated that they would be reluctant to do so. Justice Scalia wrote, "The weighty questions raised by petitioners--about the proper application of *Lee* where adults rather than children are the subjects, and about the constitutionality of traditional religious observance in military institutions--deserve this Court's attention, particularly since the decisions of the two other Circuits are in apparent contradiction as to whether *Lee* can extend so far." *Mellen v. Bunting*, 124 S. Ct. 1750, 1753 (2004). Justice Scalia seems to be rejecting the Fourth Circuit's findings that military academies are coercive by their nature and instead placing them on the same footing with other public and private institutions of higher education like those in *Tanford* and *Chaudhuri*. In addition, the language referring to "traditional religious observance in military institutions" indicates that he would likely analyze religion in the military as the Court did with respect to religion and prayer at the opening of a legislative session in *Marsh*. There the court also relied on history and tradition in upholding the practice stating, "In light of the unambiguous and unbroken history of more than 200 years, there can be no

doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." Marsh, 463 U.S. at 792.

[FN149]. Schempp, 374 U.S. at 308 (Steward, J., dissenting).

[FN150]. Brown v. Glines, 444 U.S. 348, 354 (1980); See also Goldman v. Weinberger, 475 U.S. 503 (1986); Greer v. Spock, 424 U.S. 828 (1976); Parker v. Levy, 417 U.S. 733 (1974).

[FN151]. Greer, 424 U.S. 828.

[FN152]. Flynt v. Rumsfeld, 245 F. Supp. 2d 94 (2003).

[FN153]. Greer, 424 U.S. 828.

[FN154]. Brown, 444 U.S. 348; Huff, 444 U.S. 453.

[FN155]. Goldman, 475 U.S. 503.

[FN156]. Katcoff v. Marsh, 755 F.2d 223 (2nd Cir. 1985).

[FN157]. Goldman, 475 U.S. 503.

[FN158]. Brown, 444 U.S. at 354; See also Parker, 417 U.S. 733; Greer, 424 U.S. 828; Goldman, 475 U.S. 503.

[FN159]. Even in civilian society, there are still restrictions that can be constitutionally imposed on religious practices, such as state laws prohibiting polygamous marriages and children of Jehovah's witnesses from selling religious literature. Kenneth Lasson, Commentary, Religious Liberty in the Military: The First Amendment Under "Friendly Fire," 9 J.L. & Religion 471, 476-477 (1992).

[FN160]. Parker, 417 U.S. at 758.

[FN161]. Greer, 424 U.S. 828.

[FN162]. Id. at 839. The Court went on to state that "The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" Id. at 836 (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)).

[FN163]. Emphasis added.

[FN164]. Greer, 424 U.S. at 842.

[FN165]. Brown, 444 U.S. 348; Huff, 444 U.S. 453.

[FN166]. Brown, 444 U.S. at 354.

[FN167]. Id. at 356-357.

[FN168]. 755 F.2d 223 (2nd Cir. 1985).

[FN169]. Id. at 234. (emphasis added).

[FN170]. Major Michael Benjamin, Chief of the Criminal Law Division of the United States Army, Army Paper, Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army, 1998-Nov ARMLAW 1, at 5.

[FN171]. Americans United Report, *supra* note 19 at 6.

[FN172]. Katcoff, 755 F.2d at 238.

[FN173]. Lasson, *supra* note 159.

[FN174]. Goldman v. Weinberger, 475 U.S. 503 (1986).

[FN175]. *Id.* at 509.

[FN176]. *Id.* In response to the Court's decision, Congress enacted a statute stating, in relevant part:[,] "a member of the armed forces may wear an item of religious apparel while wearing the uniform. [However], the Secretary concerned may prohibit the wearing of an item of religious apparel in circumstances [where] the wearing of the item would interfere with the performance [of] military duties; or ... the item of apparel is not neat and conservative. The Secretary concerned shall prescribe regulations concerning the wearing of religious apparel by members of the armed forces under the Secretary's jurisdiction while the members are wearing the uniform." 10 U.S.C. §§ 774 (a)-(c). While the statute effectively reverses the decision in Goldman by now permitting the wearing of a yarmulke while in uniform, its wording is still consistent with the legal analysis of the case. Both the decision and the statute rest on the concept that religious expression should be accommodated so long as it does not interfere with the performance of military operations, uniformity or cohesiveness. In addition, consistent with the Court's analysis, Congress also deferred the decision on what constitutes "interference with performance of military duties" and what is "neat and conservative," to the military. Thus, under the statute, although Captain Goldman could wear a yarmulke it is still highly unlikely that the Air Force would allow a Rastafarian to wear dreadlocks or a Sikh to wear a turban, and that decision would be upheld under both the Court's legal reasoning in Goldman and the [congressional] statute that followed.

[FN177]. *Id.* at 507 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)). "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment and esprit de corps." *Id.*

[FN178]. Mr. Weinstein would likely have encountered standing and mootness issues had he sued only the Academy but they could have been remedied by simply naming his son Curtis, currently a junior at the Academy as the plaintiff and suing for nominal damages, as the cadets in Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003) did, which allowed the case to proceed despite the graduation of the plaintiffs and the departure of General Bunting as Superintendent.

[FN179]. *Id.* at 808.

[FN180]. Lee, 505 U.S. at 587.

[FN181]. Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995); see also Widmar v. Vincent, 454 US 263 (1981).

[FN182]. Brown, 444 U.S. at 354; see also Parker, 417 US 733; Greer, 424 US 828; Goldman, 475 U.S. 503.

[FN183]. See, Locke v. Davey, 540 U.S. 712 (2004) (holding State's decision not to fund scholarships only for students pursuing devotional degrees not a violation of the Free Exercise Clause).

[FN184]. Amended Complaint, *supra* note 1 at paragraph 30(a).

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