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Constitutional Law - Compulsory Religious Training in Service Academies Held Unconstitutional

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CONSTITUTIONAL LAW—COMPULSORY RELIGIOUS TRAINING IN SERVICE ACADEMIES HELD UNCONSTITUTIONAL

Appellants, two cadets at the United Military Academy and nine midshipmen of the United States Naval Academy, brought suit as a class action for declaratory and injunctive relief on behalf of all cadets and midshipmen[1] at the United States Military Academy at West Point, the United States Naval Academy at Annapolis, and the United States Air Force Academy at Colorado Springs.[2] The defendants were the Secretary of Defense, and the Secretaries of the Army, Air Force, and Navy.

Appellants sought to have declared unconstitutional those regulations[3] of the various military academies which require cadets to attend church or chapel services each Sunday morning. Appellants contended that these regulations violated both the establishment clause and free exercise clause of the first amendment,[4] and constituted a "religious test" as a qualification for public office in violation of article VI of the Constitution.[5]

The regulations in question are quite unequivocal in nature,[6] and the mechanism for enforcement of these rules are the same as for any other

1. The designation "cadet" will include for the rest of this article not only the cadets at West Point and the Air Force Academy, but the midshipmen at Annapolis as well.

2. The litigants were not cadets at the Air Force Academy. However, the similarity of regulations at the three academies and the similarity of cadet positions at each academy brings the Air Force within the provisions of this suit. *See* FED. R. CIV. P. 23 as to class actions.

3. Part II, ch. 15, §1501(a) of the United States Naval Academy Regulations provides in part: "1) The basic requirements concerning religious matters at the Naval Academy are: a) All midshipmen will attend church or chapel services on Sunday mornings but are required to attend at no other times." Regulations for the United States Cadet Corps of the United States Military Academy, ch. 8, § IV, para. 11819, provide: "Attendance at Chapel is part of a cadet's training; no cadet is exempt. Each cadet must attend either the Cadet Chapel, Catholic Chapel or Jewish Chapel Service on each Sunday, according to announced schedules." Air Force Cadet Regulation 265-I provides in part: "Attendance at an established church service is mandatory for those Second, Third, and Fourth Classmen, present for duty in the Cadet area."

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

5. U.S. CONST. art. VI: "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

6. *Supra* note 3.

academy regulation. More specifically, a cadet who fails to attend obligatory Sunday chapel may be subject to reprimands, demerits, marching tours, confinement to quarters, and for repeated violations, expulsion.[7]

Cadets may choose to attend a Protestant, Catholic or Jewish service,[8] but once having made this initial decision, change to another denomination is quite difficult. At the Air Force Academy and Annapolis, a cadet desiring to change his place of attendance must first get the permission of the "sending chaplain," the "receiving chaplain" and his parents.[9] Furthermore, the cadet must be able to demonstrate to the satisfaction of the academy administrators that his desire to change affiliations is sincere, and not transitory.[10] Although chapel attendance is mandatory at all three academies, in principle a cadet may be excused from attendance if his sincere beliefs make compliance with the regulations impossible.[11] But in practice it would seem that few if any cadets are released from chapel participation.[12]

Throughout the litigation, the government staunchly maintained that the sole purpose for requiring cadets to attend church or chapel was to enable them to observe the religious beliefs and practices of others, and not to require religious training. The district court dismissed the plaintiffs' suit after a full hearing on the merits, and sustained the academy regulations.[13] The court of appeals reversed the lower court's ruling, and

7. Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).

8. At West Point, a cadet must attend one of the three on-campus chapel services. At the Naval Academy, midshipmen may elect to attend a denominational service in the town of Annapolis. At the Air Force Academy a cadet is permitted to attend services at an established and cooperating church in Colorado Springs.

9. U.S. Air Force Academy reg. 265-13(d)(1); U.S. Naval Academy reg. 1502(1)(d).

10. Pt. II, ch. 15, §1502(1)(a) of the U.S. Naval Academy Regulations: ". . . requests for changes . . . based on personal whims of the midshipman, rather than sincere desire to affiliate with the stated denomination, will not be approved."

11. THE ELEVENTH CONFERENCE OF SUPERINTENDENTS OF THE ACADEMIES OF THE ARMED FORCES, RECORD OF PROCEEDINGS, April 18, 1969 states at 32: "It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen."

12. Four cadets at West Point who sought unsuccessfully to be excused from mandatory chapel in 1969 were called "trouble makers" and were invited to resign from the academy. (TR. 367, April 29th, 1970 APP. 125-6). There is no evidence that any cadet at the Air Force Academy has ever been excused. Data on the Naval Academy was not available.

13. In criticizing the approach taken by the trial court, the appellate court observed, "The District Court failed to take into account that what is involved is necessarily a composite, and not a purely military judgment. . . . In essence all that is shown on the record are conclusory opinions of military officers."

granted appellants' request for declaratory relief, holding compulsory chapel attendance unconstitutional, and granted a permanent injunction, forbidding the service academies from enforcing their regulations compelling chapel attendance. *Anderson v. Laird,* 466 F.2d 283 (D.C. Cir. 1972).

In *Anderson* the court was faced with the difficult problem of balancing two of our nation's most lasting interests—our emphatic desire to retain our constitutional form of government and the necessity for preserving our national security. Determining the proper role to be assigned to a vast military structure in a democratic society is one of the continuing questions our republic must face in the years to come. While no one denies the importance of the military establishment, its tremendous size and economic influence extends into every corner of the land. The *Anderson* case is significant because it marks a reversal of the long standing policy of judicial non-interference in questions concerning military policy,[14] and a reassertion of the vital tenet that the military must at all times be subservient to the civil powers.[15] *Anderson* is apparently the first case challenging military action under the establishment and free exer-

14. As a general proposition it can be said that the amount of judicial interference with the military has been limited; more specifically, the amount of deference given the military in matters concerning discipline and training has been intentionally wide. As Justice Jackson commented: "[J]udges are not given the task of running the army . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian." Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953). The reason for this special treatment has been attributed to the unique role which the military performs. Mr. Justice Douglas in O'Callahan v. Parker, 395 U.S. 258, 262 (1969), quoting Toth v. Quarles, 350 U.S. 11, 17-18 (1955), conceded that "[U]nlike courts it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." Perhaps one of the most forceful statements in this regard was made by the Court in Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967): "Few decisions properly rest so exclusively within the discretion of the appropriate government officials than the selection, training, discipline and dismissal of the future officers of the military. . . . Instilling and maintaining discipline and morale in these young men who will be required to bear weighty responsibility in the face of adversity—at times extreme—is a matter of substantial national importance scarcely within the competence of the judiciary." For other cases illustrative of the courts' reluctance to interfere in the management of the military services, *see* Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970); Bryne v. Resor, 412 F.2d 774 (3d Cir. 1969); Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), *petition for cert. dismissed,* 396 U.S. 976 (1969); Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967), *cert. denied,* 389 U.S. 1022 (1967); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969).

15. President Kennedy in his special message to Congress on the defense budget delivered shortly after taking office declared, "Neither our strategy nor our psychology as a nation—and certainly not our economy—must become dependent subject to ultimate civilian control and command at all times. . . ." N.Y. Times, Mar. 29, 1961, at p.16, col. 1.

cise clauses, and is thus illustrative of the way the courts may in the future balance these diverse but essential interests.

Throughout the rest of this note an attempt will be made to give a brief historical development of the law upon which the *Anderson* court based its opinion, and to discuss briefly some of the problems and limitations of civilian review of military policy. Lastly, an attempt will be made to assess the possible effect this case will have on future interpretations of the establishment clause.

The first amendment of the Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court has construed this to mean that the Constitution has erected "[a] wall of separation between church and state"[16] which forbids governments to aid, encourage, or support any or all religious activities.[17]

In promulgating the religion clauses, the drafters of the Constitution "prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages."[18] In light of the evils which these provisions were designed to suppress, the courts have given the religion clauses of the first amendment an exceptionally broad interpretation.[19]

Over the years both the theory and the application of these clauses have often troubled the courts.[20] Much of the difficulty has stemmed from applying the rather broad language of the establishment clause[21] to a variety of factual situations and retaining some overall consistency in the

16. Everson v. Board of Education, 330 U.S. 1, 16 (1947); *accord,* McGowan v. Maryland, 366 U.S. 420, 443 (1961).

17. The object was broader than merely separating church and state in the narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. IX WRITINGS OF JAMES MADISON 288 (2d Ed. 1910).

18. McCollum v. Board of Education, 333 U.S. 203, 208 (1948).

19. *See* McGowan v. Maryland, 366 U.S. 420, 441-42 (1961).

20. *Compare* Zorach v. Clausen, 343 U.S. 306, 312 (1952), *with* Walz v. Tax Commission, 397 U.S. 664, 668-89 (1970). The argument continues as to whether the religious proscriptions of the first amendment are absolute or not.

21. "True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

decisions.[22] Yet, despite the difficulties, many questions in this area are now settled beyond dispute.

In *Everson v. Board of Education*,[23] one of the first and most frequently cited cases construing the establishment clause, Justice Black set forth its minimum scope as follows:

> The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious belief or disbelief, for church attendance or non-attendance.[24]

This quotation from *Everson* has been repeated and reaffirmed in several subsequent cases.[25]

The Supreme Court in *Everson* set forth certain categories of absolutely proscribed conduct, one of which was obligatory church attendance, historically one of the prime reasons for the adoption of the establishment clause.[26] The decision in *Everson* clearly reflects the Court's opinion that a profession of religious belief, or attendance at church or synagogue, is so inherently a matter of individual conscience that the state cannot under any circumstances lawfully compel an individual to participate in that type of conduct.

The *Everson* opinion, while useful as a foundation, was not sufficiently precise to evaluate some of the more ambiguous forms of "establishment." The school prayer and Bible reading cases of a decade ago called for a more specific test in analyzing those governmental practices which did not fall squarely within those categories proscribed by *Everson.*

Such a test was first articulated in *Abington School District v. Schempp.*[27] This new and more precise set of guidelines, known as the "purpose/primary effect" test,[28] was designed to provide a standard for dealing in those "grey" areas of constitutional interpretation left open by *Everson.* In *Schempp* the Court stated:

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22. *Compare* Zorach v. Clausen, 343 U.S. 306 (1952), *with* McCollum v. Board of Education, 333 U.S. 203 (1948). A seemingly slender difference in factual settings produced two different constitutional conclusions.

23. Everson v. Board of Education, 330 U.S. 1 (1947).

24. *Id.* at 15-16.

25. Torcaso v. Watkins, 367 U.S. 488, 492-93 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961); McCollum v. Board of Education, 333 U.S. 203, 210-11 (1948).

26. 330 U.S. at 13.

27. 374 U.S. 203 (1963).

28. *Id.* at 222.

The test may be stated as follows: What is the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[29]

It is crucial to an understanding of this area to realize that the *Schempp* test does not equivocate the clear prohibitions of *Everson*, but merely supplements them.[30]

There can be no doubt that the compulsory chapel regulations of the military academies "force or influence" cadets to go to church or chapel under penalty of severe disciplinary action in derogation of the unambiguous proscriptions of *Everson*.[31] Yet, the district court reasoned that there was a crucial distinction between required church attendance and required church worship. Each cadet was required to attend, but the matter of worship was left solely to the individual.[32] On this slender distinction, the lower court ruled that the regulations did not fall within the categories prohibited by *Everson*. The court of appeals was explicit in its denunciation of this fallacious distinction:

The Government's contention that there is a difference between compelling attendance at church and compelling worship or belief is completely without merit. Neither appellees, nor the dissenting opinion *infra*, reveal how a government could possibly compel individual worship or belief other than by compelling certain overt acts . . . . Attendance during chapel services is indistinguishable from these other overt acts, the compulsion of which has been declared unconstitutional in *Torcaso v. Watkins, School District of Abington Township v. Schempp*, and *Engel v. Vitale*.[33]

Nevertheless, even if the court felt obligated to utilize the "purpose/primary effect" test,[34] under the proper interpretation of this provision, the unconstitutionality of the regulations would still be disturbingly apparent.

At the trial court level, the government attempted to show that the regulations were totally secular and had a purpose and therefore by their reasoning, a primary effect which neither advanced nor inhibited religion. In furtherance of this contention, the Assistant Secretary of Defense and the Chairman of the Joint Chiefs of Staff testified that the sole purpose of the compulsory chapel regulations was to train more effective officers

29. *Id.*

30. The *Schempp* Court reviewed the interpretation of the religion clauses and cited *Everson* and *McGowan* in support of its test, rather than proposing it as a break with tradition. *Id.*

31. 330 U.S. at 13-14.

32. Anderson v. Laird, 316 F. Supp. 1081, 1091 (D.D.C. 1970).

33. 466 F.2d 283, 291 (D.C. Cir. 1972).

34. 374 U.S. 203 (1962).

by providing the cadets with an understanding of the religious beliefs and practices of others.[35] Had the government proven this to be their only aim in requiring chapel attendance, the regulations would undoubtedly have been held permissible.[36] However, a close scrutiny of the history and impact of these regulations show this proposition to be untenable.

It is conceded by the various academies that the regulations were originally motivated by religious influences.[37] In *McGowan v. Maryland*,[38] the Supreme Court held that religious origin did not conclusively prove a religious purpose, but instead raised a strong presumption to that effect, which could only be overcome by evidence showing that the legislation had undergone extensive change since its enactment, and is now essentially secular in nature.[39]

The history of the academy regulations concerning compulsory chapel attendance discloses no evolution from the sectarian to the secular; indeed the recent catalogues of the academies belie the purported secular purpose and underscore its religious significance. For example, the Annapolis catalogue states: "Because we are one nation under God it is appropriate that the Midshipmen who will some day become the leaders of our Navy should regularly attend divine worship service."[40] Similarly, the Air Force regulations state that the purpose is:

> To make it possible for a cadet to develop his religious experience in the church in which he was reared and to permit the cadets to understand the responsibilities held by an Air Force Officer in the assumption of leadership of those under his command.[41]

Obviously these purposes advance religion in direct prohibition of the *Schempp* test.

Apart from the blatant inconsistencies between government witnesses and academy brochures, the chapel regulations have the inevitable effect of preferring, and thereby advancing, certain religions over others. As an

35. Part II, ch. 15, §1501(a), U.S. Naval Academy Regulations, ch. 8, § IV, para. 11819, Regulations U.S. Military Academy; Air Force Cadet Regulation 265-1.

36. Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970). In this instance the defendant prevailed because he argued that an understanding of western civilization requires some religious background. The court held that the manner in which the lessons were taught indicated that the purpose was secular.

37. Part II, ch. 15, §1501(a), U.S. Naval Academy Regulations, ch. 8, § IV, para. 11819, Regulations U.S. Military Academy, Air Force Cadet Regulations 265-1.

38. 366 U.S. 420 (1961).

39. *Id.* at 431.

40. Part II, ch. 15, §1501(c), U.S. Naval Academy Regulations.

41. U.S. Air Force Academy Regulation 265-1 (1970).

illustration, all cadets at West Point are required to attend one of three campus chapels—Protestant, Catholic or Jewish.[42] It is difficult to imagine a clearer violation of the prohibition against "preferring one religion over another."[43] While it is therefore axiomatic that some religions are advanced per se, by the regulations requiring cadets to attend their services, implicit in that practice is that other religions are inhibited because cadets are forced to make their denominational selections among those chapels offered. Unfortunately, compulsory chapel attendance has a far more deleterious effect on religion than merely limiting the selection.

As many prominent theologians testified at the trial, nothing could have a more adverse effect upon a religious service than compelled attendance.[44] Worship must be an expression of free will. To order solely for "training purposes" the attendance of men who would perhaps not otherwise attend is to inject contempt and hostility into the religious ceremony, and degrade religion as a tool of the state. Madison, the author of the first amendment, warned us never "to employ religion as an Engine of Civil policy," for to do so would be "an unhallowed perversion of the means of salvation."[45]

From these few examples it is obvious that the *Schempp* test is violated by the academy regulations, for in some ways they advance, and in other ways inhibit religion. No inquiry into other violations of the "purpose/primary effect" test need be made, for the Supreme Court further ruled in the *Schempp* case that a governmental practice which has both a secular purpose and a secular primary effect may nevertheless be in violation of the establishment clause if it uses religious means to achieve secular goals, where non-religious means would suffice.[46]

The teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that non-religious means will suffice.[47]

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42. Ch. 8, § IV, para. 11819, Regulations U.S. Military Academy.

43. Everson v. Board of Education, 330 U.S. 1, 15 (1947).

44. Anderson v. Laird, 316 F. Supp. 1081, 1090 (D.D.C. 1970).

45. II WRITINGS OF JAMES MADISON 183-87 (2d Ed. 1910) cited by Justice Rutledge in Everson v. Board of Education, 330 U.S. 1, 67 (1947).

46. Abington School District v. Schempp, 374 U.S. 203, 265 (1963). For examples of the principle that where first amendment freedoms are or may be affected, government must employ those means which will least inhibit the exercise of constitutional liberties, *see* Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. Town of Irvington, 308 U.S. 147, 165 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

47. 374 U.S. 203, 265 (1963).

In order to satisfy this requirement, the government would have to show that classroom instruction would be inadequate as a tool in teaching the cadet about the religious beliefs of other Americans—a demand that the government did not even seriously attempt to fulfill.

In a recent decision concerning the establishment clause, *Walz v. Tax Commission*,[48] the Court reiterated "two concepts frequently articulated and applied in our case . . . neutrality and voluntarism."[49] As Justice Harlan explained, these two principles mean that the government must not act "to accord benefits that favor religion or non-religion" nor "encourage participation in nor abnegation of religion."[50]

The *Walz* decision also condemned what it called sponsorship of religion[51] and "excessive government entanglement with religion,"[52] but more significantly, in this case the Court attempted to reach some accommodation between the two religion clauses of the first amendment. In the past, certain forms of governmental involvement which recognized and even favored religious interests were sustained by the Court under the establishment clause in order to avoid conflict with the free exercise clause.[53] While the *Walz* opinion alludes to a greater flexibility between Church and state to accommodate no establishment and free exercise values,[54] the court of appeals in *Anderson* determined that this conciliatory language did not affect the clear prohibitions of the first amendment applicable to this case:

> In this case, rather than conflicting, the two Clauses compliment each other and dictate the same result. Abolition of the attendance requirements enhances rather than violates the free exercise rights of cadets and midshipmen. The Establishment Clause should therefore be read as it was in *Everson*: Neither a state nor the Fed-

48. Walz v. Tax Commission, 397 U.S. 664 (1970). Appellant property owner unsuccessfully sought an injunction in the New York courts to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for property used solely for religious worship.

49. *Id.* at 694.

50. *Id.*

51. *Id.*

52. *Id.* at 672; The *Walz* test concerning excessive government entanglement differs from the *Everson* and *Schempp* standards, for *Walz* clearly repudiates *Everson*'s "no aid" approach. *Walz* seems to suggest that governmental aid may be acceptable as long as the two spheres are not co-mingled.

53. 397 U.S. at 669; Chief Justice Burger, speaking for the court, reasoned: "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of this provision, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited."

54. *Id.* at 674.

eral Government . . . can force nor influence a person to go to or remain away from church against his will.[55]

In brief, *Walz* concurs with the language of both *Everson* and *Schempp*, which seems undeniably to condemn the compulsory chapel service as a violation of the establishment clause of the first amendment.

Much of what has been said in respect to the establishment clause is equally applicable to the free exercise clause. The coercive nature of the regulations denies cadets the religious expression which is the essence of religious freedom protected by the free exercise clause.[56]

The right of the free exercise of religion is generally considered one of the paramount protections afforded under the Constitution.[57] The scope of the immunity pledged an individual in his choice of religious worship was succinctly stated by the Supreme Court in *Cantwell v. Connecticut*:[58]

On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.[59]

Similarly in *Schempp*, Justice Clark underscored the principle that the free exercise clause insures that every person be free from governmental coercion in determining the direction of his religious life. Justice Clark stated that the clause

recognizes the value of religious training, teaching, and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state.[60]

In sum, to be free in its exercise, it is essential that religion be unhampered by governmental advocacy or restraint, and only the gravest abuses endangering paramount interests give occasion for permissible limitation.[61] The mere assertion by the military that instructional practices for future officers be left solely in their hands to insure national security cannot

55. Anderson v. Laird, 466 F.2d 283, 288 (D.C. Cir. 1972).

56. Abington School District v. Schempp, 374 U.S. 203, 223 (1963).

57. Sherbert v. Verner, 374 U.S. 398, 413 (1963) (concurring opinion of Justice Stewart).

58. 310 U.S. 296 (1940). Defendant, while on a public street endeavoring to interest passersby in the purchase of a publication, or to make a contribution, in the interest of what he believed to be true religion, induced individuals to listen to the playing of a phonograph record. The Court held that defendant's conviction of the common law offense of breach of the peace was violative of his constitutional guarantee of religious liberty and freedom of speech.

59. *Id.* at 303.

60. 374 U.S. 203, 222 (1963).

61. Anderson v. Laird, 466 F.2d 283, 296 (D.C. Cir. 1972).

by itself suffice. The chilling effect on religious freedom that these regulations must have on atheists and agnostics alone, compels the conclusion that mandatory chapel attendance violates the rights secured by the free exercise clause and should be held unconstitutional.

Although there are few decisions on the subject, it would seem probable that the regulations are also in violation of article VI, clause three of the Constitution. This article ends with the sweeping prohibition: "No religious test shall ever be required as a Qualification to any office or public Trust under the United States." A system which requires future officers to attend chapel each Sunday for three years of their academic careers, and expells those who refuse to comply, is obviously making attendance at church a qualification for becoming an officer through the highly respected Academy programs. This type of religious affirmation is precisely what is prohibited by the Constitution,[62] and on this basis alone the Academy regulations could be shown unconstitutional.

The decisions of the Supreme Court enumerated above make it clear that if the schools involved in this suit were non-military public educational institutions, the invalidity of the challenged regulations would hardly be open to question.[63] Yet, the district court and the Department of Defense would assert that merely because these institutions are military and maintained in the interest of national defense, these otherwise unconstitutional practices must be condoned. This is an inconsistency which the court of appeals rightly rejected.

The claim that the military is independent of the judiciary has often been asserted, but it has consistently been rejected by the Supreme Court. Even during the darkest years of the Civil War when survival of the Union was in great danger, Chief Justice Taney strongly rejected this concept, asserting that if the authority vested by the Constitution was usurped by the military powers at its discretion, the people of the United States would no longer live under a government of laws but under military power.[64]

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62. Torcaso v. Watkins, 367 U.S. 488 (1961). In this case, the appellant, a notary public, refused to swear or affirm that he believed in God as the state law required, and was refused certification. The law was held unconstitutional by the Supreme Court.

63. *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). The Court held unconstitutional a public school regulation penalizing by expulsion pupils who refused to participate in flag salute exercises for reasons of conscience.

64. *Ex parte* Merryman Fed. Case No. 9487 (1861); *accord, Ex parte* Milligan, 71 U.S. 2 (1886); In *Milligan,* the Court held that military commissions organized during the Civil War, in a State not invaded and not engaged in rebellion, in

In *Anderson*, as in all significant constitutional cases, there are of course countervailing issues and arguments. The academies and the dissent in this case are correct in their contention that the courts have been reluctant historically to interfere in the management of the military services.[65] As a general principle, the Justices have in the past taken the position that judicial interference with the military should be limited, partly because of the unusual nature of military life,[66] and partly because the courts consider themselves ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.[67]

The Supreme Court long ago challenged the wisdom of making any right or privilege absolute, and have seen fit to limit first amendment rights with respect to the military,[68] and other special groups[69] where the Court found it necessary to protect or promote valid and substantial state interests.

Nevertheless it remains uncontested that a member of the Armed Forces retains certain fundamental rights notwithstanding his participation in the military. The Supreme Court has left no doubt as to the applicability of the Constitution to the military establishment.[70] Similarly, the Court of Military Appeals has said: "[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces . . . ."[71]

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which the federal courts were open, and in the proper exercise of their judicial functions, had no power to try, convict, or sentence a citizen for any criminal offense and Congress could not invest them with such power.

65. Orloff v. Willoughby, 345 U.S. 83 (1953); Nixon v. Secretary of the Navy, 422 F.2d 934 (2nd Cir. 1970); Bryne v. Resor, 412 F.2d 774 (3rd Cir. 1969).

66. Mr. Justice Harlan succinctly noted in Noyd v. Bond, 395 U.S. 683, 694 (1969) that "in reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal."

67. Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953); *accord*, Burns v. Wilson, 346 U.S. 137 (1953).

68. In the military as elsewhere, first amendment rights are limited by reasonable restrictions as to time, place, and circumstances. The circumstances will necessarily include the military's special role and peculiar needs. Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

69. United Public Workers v. Mitchell, 330 U.S. 75 (1947).

70. Burns v. Wilson, 346 U.S. 137 (1953). Petitioners were found guilty by court-martial proceedings of murder and rape and sentenced to death. Court held unequivocally that under 28 U.S.C. 2241 they had jurisdiction to review the judgement of the court-martial proceedings. The court affirmed the military decision.

71. United States v. Jacoby, 11 U.S.C.M.A., 428, 430-31, 29 C.M.R. 244,

On the whole, in the resolution of this and similar first amendment problems, the Court appears to have steadfastly adhered to two propositions. First, that we as a nation have but one Constitution for all citizens —not one for the military, and one for the civilian sector. Secondly, and perhaps of greater import, the Court has viewed the separation and subordination of the military establishment as a compelling principle. In order for the military to prevail in substantial violation of a provision of the Bill of Rights, an extraordinary showing of military necessity in defense of the nation must be made.[72] The record in *Anderson* discloses that the government failed to show any need, much less a compelling need, for the regulations other than the statements of military officials who sought to perpetuate military tradition.

The recent disclosures of civilian surveillance by the military, most notably the disclosure that army intelligence units have collected dossiers on tens of thousands of Americans, has alerted our nation to the dangers of unrestrained military interference with civilian life. The way in which the nation as a whole, not merely the judiciary, handles this and similar threats may well determine the fate of our democracy. There are illuminating statistics which might suggest that the courts may well revaluate the wide deference they have accorded military officials in the past. A few months after Washington's first inauguration, the army numbered 672 of the 846 total force strength authorized by Congress.[73] Today in dramatic contrast, the army numbers over two million, added to whose numbers are millions more with reserve obligations of varying length, and a list of veterans surpassing the twenty-six million mark.[74] All of these individuals, and millions of others in the other military services are under the scope of military administration. In the words of Chief Justice Warren:

> When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment beyond the reach of the civilian courts almost inevitably is drawn into question.[75]

The ultimate impact that *Anderson v. Laird* may have upon a nation gradually becoming desensitized to the problems of the military may reach beyond legitimate concern for constitutional guarantees accorded

246-67 (1960); *accord*, United States v. Voorhees, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954).

72. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

73. Report of Secretary of War Knox to the Congress on the military force in 1789. 1 AMERICAN STATE PAPERS—MILITARY AFFAIRS No. 1.

74. U.S. Dept. of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES, 245, 265 (1971).

75. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962).

servicemen. The careful balance between civilian control and military self-direction must be maintained, and military disdain for constitutional guarantees does little to preserve it. Continued judicial awareness of the implications of such disdain is to be encouraged.

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