July 9, 2008

Vice Admiral Jeffrey L. Fowler
Superintendent
United States Naval Academy
121 Blake Road
Annapolis, MD 21402

Re: Constitutionality of the Naval Academy's Noon Meal Prayer

Dear Admiral Fowler:

The American Center for Law and Justice (ACLJ) has learned of the ACLU of Maryland's demand that the Naval Academy discontinue its longstanding practice of having a chaplain offer a short word of prayer before lunch. We strongly support the Naval Academy's decision to maintain this longstanding tradition.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.[1]

As we understand, the voluntary saying of grace before the midshipmen's lunch likely dates back to the Naval Academy's founding in 1845.[2] The Naval Academy's noon meal prayer is offered on a rotating basis by a diverse group of several chaplains.

[1] *See, e.g., Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment).

[2] Associated Press, *Naval Academy to Keep Saying Prayers*, Aug. 31, 2005.

> Each day during the academic year, midshipmen assemble in the dining hall at the United States Naval Academy and stand for prayer before the noon meal. They are not required to recite the prayer or to bow their heads in observance, but they must remain standing during its recitation and cannot move about or attend to other matters.[3]

The ACLU of Maryland has demanded that the Naval Academy "discontinue its practice of requiring all midshipmen to stand in attendance at an official 'noon meal prayer.'" The ACLU of Maryland relied almost exclusively on a panel opinion issued by the United States Court of Appeals for the Fourth Circuit in *Mellen v. Bunting*,[4] which invalidated supper prayers at Virginia Military Institute (VMI). The following discussion explains that *Mellen* applied to a different situation and does not provide the proper framework for considering the Naval Academy's lunchtime prayer. When properly considered, it is clear that the Naval Academy's noon meal prayer is constitutionally sound.

I. Federal courts review military policies under a deferential standard.

While the Supreme Court's decision in *Lemon v. Kurtzman*[5] still nominally governs most Establishment Clause cases, it has little relevance to the lunchtime prayer at the Naval Academy, a federal military institution whose midshipmen are part of the active naval service administrative chain of command.[6] The Supreme Court has noted on numerous occasions that "the military in important respects remains a 'specialized society separate from civilian society.'"[7] "[T]he different character of the military community and of the military mission requires a different application of [the First Amendment]."[8] A strict application of *Lemon* is inappropriate when military policies are at issue, as courts "must take into account the deference required to be given to Congress' exercise of its War Power."[9]

In *Goldman v. Weinberger*,[10] the Court explained that its "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[11] The Court noted that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[12] The Court explained that, in reviewing challenges to military policies that bear upon

---

[3] Steven R. Obert, *Public Prayer in the Navy: Does it Run Afoul of the Establishment Clause?*, 53 Naval L. Rev. 321, 344-45 (2006).
[4] 357 F.3d 355 (4th Cir. 2003).
[5] 403 U.S. 602 (1971).
[6] *See Commandant of Midshipmen Instruction 1601.12B* (Aug. 17, 2006), *available at* http://www.usna.edu/Commandant/Instructions/COMDTMIDNINST%201601_12B_Brigade%20Organization%20With%20CH-1%20Entered.pdf (last visited July 7, 2008).
[7] *Weiss v. United States*, 510 U.S. 163, 174 (1994) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).
[8] *Parker*, 417 U.S. at 758.
[9] *Katcoff v. Marsh*, 755 F.2d 223, 235 (2d Cir. 1985).
[10] 475 U.S. 503 (1986). While the policy at issue in *Weinberger* was later superseded by statute, the case's discussion of the First Amendment remains instructive. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).
[11] 475 U.S. at 507.
[12] *Id.*

religion, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[13]

Moreover, a federal court of appeals has noted that

> caution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by [a branch of the military] appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.[14]

Recognizing the importance of voluntary prayer at the Naval Academy and other federal service academies, Congress stated in 2006 that

> [t]he superintendent of a service academy may have in effect such policy as the superintendent considers appropriate with respect to the offering of a voluntary, nondenominational prayer at an otherwise authorized activity of the academy, subject to the United States Constitution and such limitations as the Secretary of Defense may prescribe.[15]

This provision was enacted *after* the *Mellen* case was decided and signals Congress' support for practices such as the Naval Academy's lunchtime prayer. As such, the Naval Academy's practice is entitled to great deference from the courts.

II. *Marsh v. Chambers* is the most relevant Supreme Court case.

In light of the deference given to military leaders in First Amendment matters, the Naval Academy's longstanding tradition of lunchtime prayer should be analyzed under *Marsh v. Chambers*. In *Marsh*, the Court considered "whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment."[16] The Court observed that

> [t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.[17]

---

[13] *Id.*
[14] *Katcoff*, 755 F.2d at 234.
[15] National Defense Authorization Act for Fiscal Year 2006, 109 P.L. 163, Sec. 598, 119 Stat. 3136 (Jan. 6, 2006). While the 2006 Act has since been superseded by the 2007 Act, which contains no analogous provision regarding prayer at service academies, the 2006 Act still illustrates Congressional approval of voluntary prayer at the Naval Academy.
[16] 463 U.S. 783, 784 (1983).
[17] *Id.* at 786.

The "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent."[18] Declining to apply *Lemon*, the Court explained that,

> [i]n 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 laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."[19]

The Court emphasized *intent* over *content*:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.[20]

Like the practice of legislative prayer upheld in *Marsh*, the Naval Academy's lunchtime prayer is a longstanding historical practice. The Naval Academy tradition has existed for over 160 years. It has "become part of the fabric of" the Naval Academy and is "deeply embedded in the [Academy's] history and tradition."[21] As in *Marsh*, "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[22]

III. A reasonable observer would not find the Naval Academy's practice objectionable.

The result should be the same if the Naval Academy's practice is reviewed under *Lemon* rather than *Marsh*. An objective reasonable observer, with knowledge of the history of the Naval Academy prayer as well as the broader traditions of the American military, would conclude that the Naval Academy has *not* endorsed a particular religious viewpoint. Voluntary public acknowledgment of God is uniquely compatible with military service.

In determining whether a government action has the primary effect of endorsing religion in violation of the Establishment Clause, a court considers whether a "'reasonable observer' would perceive an advancement of religion" from the government action.[23] The reasonable observer is

---

[18] *Id.* at 790.
[19] *Id.* at 792 (citations omitted).
[20] *Id.* at 794-95.
[21] *See id.* at 786, 792.
[22] *See id.* at 794-95.
[23] *Freedom from Religion Found., Inc. v. Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

not a "mere casual passerby nor a particular individual" but rather is a "personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."[24]

The hypothetical reasonable person is "presumed to possess a certain level of information that all citizens might not share," including an "awareness of the history and context of the community and forum in which the religious display appears."[25] In other words, the reasonable observer does *not* focus solely on the religious aspects of the conduct at issue but rather takes into account the history, ubiquity, and context of the overall situation.

> [W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the government] endorses religion. Rather, the inquiry here is whether *the* reasonable person *would* conclude that [the government's conduct] has the effect of endorsing religion. Context is crucial to this analysis.[26]

Courts will not apply an "Ignoramus's Veto" that "lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed."[27]

Here, a reasonable observer would conclude that prayer at the Naval Academy is unsurprising given the rich religious traditions deeply interwoven with American military history. A reasonable observer understands that "[h]istorically, one of the most successful vehicles for ensuring a high level of motivation has been religion—both the ceremonies associated with it and the belief that, by fighting, the individual soldier increases his chances of an enjoyable life in the hereafter."[28] Indeed, the Navy Hymn, entitled "Eternal Father, Strong to Save," has been a part of Navy culture for over 130 years.

> This hymn is often used at funerals for personnel who served in or were associated with the Navy. *Eternal Father* was the favorite hymn of President Franklin D. Roosevelt and was sung at his funeral at Hyde Park, New York in April 1945. Roosevelt had served as Secretary of the Navy. This hymn was also played as President John F. Kennedy's body was carried up the steps of the capitol to lie in state.[29]

In addition, given the very real threat of harm posed by their commitment to the American war effort, the signers of the Declaration of Independence concluded with an appeal "to the Supreme

---

[24] *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).
[25] *Id.*
[26] *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) (citations omitted).
[27] *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992).
[28] Dale R. Herspring, SOLDIERS, COMMISSARS, AND CHAPLAINS: CIVIL-MILITARY RELATIONS SINCE CROMWELL 4 (2001). Professor Herspring served in the U.S. Navy and is a member of the Council on Foreign Relations. *Dale Herspring*, http://www.k-state.edu/media/mediaguide/bios/herspringbio.html (last visited July 7, 2008).
[29] *"Eternal Father, Strong to Save": The Navy Hymn*, http://www.history.navy.mil/faqs/faq53-1.htm (last visited July 7, 2008).

Judge of the world for the rectitude of our intentions" and a statement of "firm reliance on the protection of Divine Providence."[30] Use of the slogan "In God We Trust" dates back to the War of 1812. In September 1814, fearing for the fate of his country while watching the British bombardment of Fort McHenry in Baltimore, American Francis Scott Key composed the poem the "Star Spangled Banner." The last verse of the poem—which is now our national anthem—states: "Then conquer we must, when our cause it is just, and this be our motto: 'In God is our trust.'"[31]

During the Civil War, President Abraham Lincoln's Gettysburg Address of 1863 proclaimed that "this nation, under God, shall have a new birth of freedom."[32] The national motto, "In God We Trust," first appeared on coins the following year.[33] *The Battle Hymn of the Republic*—popularized during the Civil War—is replete with religious references. Many patriotic songs popular today contain religious references such as *God Bless America* and *America the Beautiful*.

World War II General of the Army (and future President) Dwight D. Eisenhower famously ended his 1944 D-Day order to the Allied forces by stating, "Good Luck! And let us all beseech the blessings of Almighty God upon this great and noble undertaking."[34] "[I]n recalling his decision to launch the Normandy invasion in 1944 and the time he spent in prayer then, [Eisenhower] reflected that 'prayer gives you the courage to make the decisions you must make in a crisis and then the confidence to leave the result to a Higher Power.'"[35]

General of the Army George C. Marshall commented at the end of World War II:

> I look upon the spiritual life of the soldier as even more important than his physical equipment. It's morale—and I mean spiritual morale—which wins the victory in the ultimate, and that type of morale can only come out of the religious nature of the soldier who knows God and who had the spirit of religious fervor in his soul. I count heavily on that type of man and that kind of Army.[36]

President Truman wrote during the Korean War that, "[a]s we build up our military strength to secure the free world from aggression, we must be equally diligent to strengthen the moral and spiritual life of our armed forces."[37] General of the Army Douglas MacArthur noted in his "Duty, Honor, Country" speech at West Point in May, 1962, that

---

[30] THE DECLARATION OF INDEPENDENCE para 32 (U.S. 1776).
[31] Steven Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2122 (1996) (citing George J. Svejda, HISTORY OF THE STAR SPANGLED BANNER FROM 1814 TO THE PRESENT ii (1969)).
[32] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 28 (2004) (Rehnquist, C.J., concurring).
[33] *Id.* at 29.
[34] *Id.*
[35] John W. Brinsfield, *Army Values and Ethics: A Search for Consistency and Relevance*, XXVIII PARAMETERS: U.S. ARMY WAR COLLEGE QUARTERLY 69-84 (Autumn 1998), *available at* http://www.carlisle.army.mil/usawc/Parameters/98autumn/brinsfie.htm (last visited July 7, 2008).
[36] *Id.* (quoting Robert Gushwa, THE BEST AND WORST OF TIMES: THE UNITED STATES ARMY CHAPLAINCY, 1920-1945 186 (Washington, 1977)).
[37] *Id.* (quoting Rodger Venzke, CONFIDENCE IN BATTLE, INSPIRATION IN PEACE: THE UNITED STATES ARMY CHAPLAINCY, 1945-1975 114 (Washington, 1977)).

> [t]he soldier, above all other men, is required to practice the greatest act of religious training—sacrifice. In battle, and in the face of danger and death, he discloses those divine attributes which his Maker gave when He created man in His own image. No physical courage and no greater strength can take the place of the divine help which alone can sustain him.[38]

In June 2006, Marine Corps Commandant General Michael Hagee noted at the dedication of an Islamic Prayer Center at Marine Corps Base Quantico that "spiritual devotion is an important component of the profession of arms, as well as important element in quality of life," and added that "events like the dedication of the prayer center strengthen the ties that bind."[39]

More generally, the reasonable observer is aware of America's rich religious heritage.[40] "We are a religious people whose institutions presuppose a Supreme Being."[41] One Supreme Court Justice noted that "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today."[42] The "history, character, and context" of things such as the national motto ("In God We Trust") and religious references in patriotic songs "prevent them from being constitutional violations."[43]

A reasonable observer of the Naval Academy's prayer tradition realizes that the practice has become engrained into the fabric of daily life at the Academy. The lunch prayer "encourages religious tolerance, aids students in reflecting on their own beliefs, and allows midshipmen to celebrate the American tradition of expressing thanksgiving."[44] As one parent of a midshipman recently explained, "I think the mids understand they have to live in a world of diversity, and have to learn to tolerate other religious beliefs."[45] A reasonable person who observes the prayer would think tradition, camaraderie, unity, and service, not sectarian strife or religious establishment.

IV. *Mellen* is distinguishable from the present matter.

The ACLU of Maryland's letter relied extensively on *Mellen* in which a three-judge panel of the Fourth Circuit invalidated supper prayers at VMI which were provided by the Post Chaplain. While the panel acknowledged that "the Supreme Court has never addressed the constitutionality of state-sponsored prayer in any university setting, much less in a military college," it treated the case as a run-of-the-mill "school prayer" case and applied Supreme Court cases involving

---

[38] *Id.* (quoting Vorin E. Whan, Jr., ed., A SOLDIER SPEAKS 353, 355 (New York, 1965)).
[39] American Forces Press Service, *Marine Corps' First Islamic Prayer Center Dedicated*, http://www.defenselink.mil/news/newsarticle.aspx?id=16101 (last visited July 7, 2008).
[40] *See generally McCreary County v. ACLU*, 125 S. Ct. 2722, 2748-50 (2005) (Scalia, J., dissenting).
[41] *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).
[42] *Newdow*, 542 U.S. at 35-36 (O'Connor, J., concurring).
[43] *Id.* at 37 (O'Connor, J., concurring).
[44] Obert, *supra* note 3, at 346.
[45] Jason Flanagan, *Midshipmen parents say meal prayer OK at Naval Academy*, *available at* http://www.examiner.com (last visited July 7, 2008).

elementary or secondary schools.[46] The court declined to apply *Marsh* and instead held that VMI's practice was inconsistent with *Lemon* and the school prayer cases.[47]

Importantly, the Fourth Circuit panel expressly noted: **"[W]e are not called upon to address whether, or to what extent, the military may incorporate religious practices into its ceremonies. The Virginia General Assembly, not the Department of Defense, controls VMI."**[48]

The panel's decision conflicts with decisions of other federal courts of appeal that have upheld voluntary prayer at public university events.[49] However, the Fourth Circuit denied rehearing en banc by a 6-6 vote.[50] Judge Widener, a Naval Academy graduate,[51] noted in his dissenting opinion "the frequent and implicitly approved use of prayer and like religious symbolism by branches of the United States government in situations and ceremonies similar to the VMI supper prayer."[52] Judge Widener explained that

> [a]n Act of Congress of March 2, 1799, Ch. XXIV, 1 stat. 709, provided that the "commanders of ships of the United States, having on board chaplains, are to take care, that divine service be performed twice a day, and the sermon preached on Sundays." And in 1800, an even stronger statute provided that ships' commanders "cause all, or as many of the ships company as can be spared from duty, to attend at every performance of the worship of Almighty God." Act of April 23, 1800, ch. 33, 2 stat. 45.[53]

Judge Wilkinson also dissented, stating, "I doubt that cadets who are deemed ready to vote, to fight for our country, and to die for our freedoms, are so impressionable that they will be coerced by a brief, non-sectarian supper prayer."[54] He observed that "neither the early school prayer cases, nor *Lee*, nor *Santa Fe* supports the panel's result."[55] Judge Wilkinson stated that the panel's decision

> fails to appreciate the full dimensions of military training. One does not fight a war alone. Rather, unit cohesion and bonding are necessary ingredients of success. The process of transforming cadets into soldiers entails a variety of

---

[46] 327 F.3d at 366-68, 376 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962)).
[47] *Id.* at 369-75.
[48] *Id.* at 375, n.13 (emphasis added).
[49] *See, e.g.*, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (holding that a public university may include a religious invocation as part of its graduation ceremony); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997) (same). In addition, being present while a chaplain gives a brief word of prayer before lunch is entirely different than being required to attend religious services contrary to one's faith. *See Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972).
[50] 341 F.3d 312 (4th Cir. 2003).
[51] Federal Judicial Center, *Widener, Hiram Emory Jr.*, http://www.fjc.gov/servlet/tGetInfo?jid=2574 (last visited July 7, 2008).
[52] 341 F.3d at 313 (Widener, J., dissenting from denial of rehearing en banc).
[53] *Id.*
[54] *Id.* at 319 (Wilkinson, J., dissenting from denial of rehearing en banc).
[55] *Id.* at 321.

> exercises that are aimed at creating just such bonds, and to ban communal exercises is to ban a form of fellowship that may sustain soldiers in their darkest and most dangerous hours. Both the act of prayer and the fact of death may have more meaning if they occur in the company of family or of friends. Sadly, the majority's rule of private reflection only denies the communal value of votive expression when the need is thought, by those entrusted with the training of soldiers, to be the most profound.[56]

He feared that the panel's opinion would be applied to the Naval Academy's practices despite the panel's statement that it was not addressing those practices.[57]

In addition, Judge Niemeyer wrote a dissenting opinion in which he noted the panel's failure to recognize the important difference between young elementary or secondary school students who are compelled by law to attend school and adults who voluntarily choose to attend VMI.[58] He explained that

> [a]n adult possessing the disciplined willpower demonstrated by the cadets at VMI, standing in silence while a short prayer is read, is not forced to engage in any act of worship contrary to his or her beliefs. Listening to a prayer in that passive posture is no more intrusive than being exposed to the broad array of daily messages involuntarily heard or read to every citizen as the result of legitimate exercises of free speech.[59]

Judge Niemeyer added:

> [T]he panel opinion regrettably treats religion as a virus that somehow will infect the public square if acknowledged in even the most unintrusive of circumstances. This idea is new and certainly foreign to the Establishment Clause. I observe that the panel holding now places religious prayer in a more restrictive category than dirty books by extending unnecessarily the holding of *Lee* from the child and adolescent context where children and adolescents are *required* to be present to the adult context where the adults are voluntarily assembled.[60]

Justice Scalia, joined by Chief Justice Rehnquist, dissented from the Supreme Court's denial of certiorari.[61] He stated, "we have before us in this petition a constitutional issue of considerable consequence on which the Courts of Appeals are in disagreement."[62] He also explained that "it might be said that [a supper prayer at a military college] is *more*, rather than *less*, likely to be constitutional [than a graduation prayer at a nonmilitary college], since group prayer before military mess is more traditional than group prayer at ordinary state colleges."[63] In addition,

---

[56] *Id.* at 323-24.
[57] *Id.* at 324-25.
[58] *Id.* at 327-28 (Niemeyer, J., dissenting from denial of rehearing en banc).
[59] *Id.* at 329 (citation omitted).
[60] *Id.* at 331.
[61] 541 U.S. 1019, 1022 (2004) (Scalia, J., dissenting from denial of certiorari).
[62] *Id.* at 1025.
[63] *Id.* at 1026.

Justice Stevens' concurring opinion stated, "[g]iven the unique features of VMI, we do not know how the Fourth Circuit would resolve a case involving prayer at a state university."[64]

There are several aspects of the Naval Academy's prayers that are different than VMI's. First and foremost, the Naval Academy is a **federal** military institution. An entire Chapter of the United States Code is dedicated to the Naval Academy.[65] Midshipmen are nominated by various federal officials such as Senators, Representatives, the President, or the Vice President,[66] they are part of the active naval service administrative chain of command,[67] and their pay is annually assessed and adjusted by Congress.[68] By contrast, VMI is a **state**-run institution, cadets participate in an R.O.T.C. program but are not part of the active service chain of command,[69] they are not required to join the service upon graduation,[70] and they must pay their own way through school.[71] Naval Academy midshipmen are subject to provisions of the Uniform Code of Military Justice, while cadets at VMI are not.[72]

The Naval Academy's noon meal prayer is also distinguishable from VMI's in that it is offered *on a rotating basis by a diverse group of several chaplains* representing a cross-section of the active duty Navy Chaplain Corps, which encompasses over 100 denominations and faith groups.[73] The noon-meal prayer at the Naval Academy is proffered under the established, stated vision of the Chaplain Corps (which has been implemented *fleet-wide*, not merely at one institution): "Mission ready sailors and marines, and their families, demonstrating spiritual, moral and ethical maturity supported by the innovative delivery of religious ministry and compassionate pastoral care."[74] By contrast, the prayers at issue in *Mellen* were offered by the same Post Chaplain.[75]

In addition, unlike the VMI prayers, the Naval Academy's practice is supported by an express statement by Congress—issued after *Mellen*—that federal service academies "may have in effect such policy as the superintendent considers appropriate with respect to the offering of a voluntary, nondenominational prayer at an otherwise authorized activity of the academy."[76] VMI is noticeably absent from the definition of "service academy."

---

[64] *Id.* at 1021 (Stevens, J., concurring in denial of certiorari).
[65] U.S. Code Title 10, Subtitle C, Part III, Chapter 603, *United States Naval Academy* (10 U.S.C. §§ 6951-6980).
[66] USNA Admissions, *Apply for Nomination*, http://www.usna.edu/Admissions/steps4.htm (last visited July 7, 2008).
[67] *See* Commandant of Midshipmen Instruction 1601.12B, *supra* note 6.
[68] 37 U.S.C. § 203(e)(1).
[69] VMI Office of Admissions, *Quick Facts*, http://www.vmi.edu/Admissions.aspx?id=4255&rsm=7115 (last visited July 7, 2008).
[70] VMI Office of Admissions, *Myths & Truths about VMI*, http://www.vmi.edu/Admissions.aspx?id=4259&rsm=7115&ekmensel=fb5d653b_20_239_4259_1 (last visited July 7, 2008).
[71] VMI Office of Admissions, *Tuition and Fees*, http://www.vmi.edu/Admissions.aspx?id=8617&ekmensel=fb5d653b_20_307_btnlink (last visited July 7, 2008).
[72] 10 U.S.C. § 802(a)(2).
[73] U.S. Navy, *Officer: Clergy*, www.navy.com/careers/officer/clergy/ (last visited July 7, 2008).
[74] U.S. Navy, *ChaplainCare*, chaplaincare.navy.mil/index.htm (last visited July 7, 2008).
[75] 327 F.3d at 362.
[76] 109 P.L. 163, Sec. 598.

Conclusion

In sum, the Naval Academy's longstanding tradition of having a chaplain offer a brief word of prayer before lunch does *not* violate the First Amendment. Courts review federal military policies under a greater standard of deference than that afforded to civilian government policies. A reasonable observer with knowledge of the history of the Naval Academy's practice, as well as the broader traditions of the American military, would conclude that the Naval Academy has *not* endorsed a particular religious viewpoint. A 2006 *Naval Law Review* article reviewing the Naval Academy's lunch prayer in light of *Mellen* concluded that "[i]t is reasonable for the Department of Defense's categorization of a military interest to be entitled to a greater level of deference by the courts than VMI's."[77]

We support the Naval Academy's decision to uphold this tradition and sincerely appreciate your service to our country and your commitment to defending the lives and freedoms of Americans both at home and abroad.

Sincerely,

Jay Alan Sekulow
Chief Counsel

Robert W. Ash
Senior Litigation Counsel for
National Security Law

[77] Obert, *supra* note 3, at 345, n.160.