

2000 WL 35633619 (D.D.C.) (Trial Pleading)
United States District Court, District of Columbia.

Robert H. ADAIR, and Michael Belt and Dr. Gregory R. De Marco and Furniss Harkness and Michael Lavelle and George W. Linzey and Timothy D. Nall and Thomas Rush and James M. Weibling and Michael A. Wright and John Witherspoon and William C. Blair and Larry Farrell and Rafael J. Quiles and Lyle Swanson and Ronald Tomlin and David S. Wilder, Plaintiffs,

v.

The Honorable Richard J. DANZIG, and Vice Admiral Norbert R. Ryan Chief of Naval Personnel, and Rear Admiral Byron Holderby, Jr Chief of Chaplains and Rear Admiral Barry Black Deputy Chief of Chaplains and The United States Navy, Defendants.

No. 1:00CV00566(JLG).
September 5, 2000.

Class Action First Amended Complaint for Declaratory Judgment, Injunction and Equitable Relief to Address Defendants' Unconstitutional Religious Discrimination, Violations of First and Fifth Amendments, and the Religious Freedom Restoration Act

Respectfully submitted, Arthur A. Schulcz, Sr., Counsel for the Plaintiffs, D.C. Bar No. 453502, 2521 Drexel Street, Vienna, VA 22180.

I. INTRODUCTION

1. This first amendment to the Navy non-liturgical¹ Christian chaplains' Class Action Complaint adds six additional Plaintiffs; provides specific information as to when some of the Plaintiffs were injured; alleges both the self-concealing nature of the Defendants illegal prejudice and actions as well as fraudulent concealment of that prejudice and Plaintiffs' cause of action; and adds an additional Navy defendant and three additional counts.

This a federal class action challenging religious discrimination in the U.S. Navy Chaplains Corps (the "Corps") including the establishment of illegal religious quotas for Navy chaplain promotions and career opportunities; the establishment of a preferred religious tradition and a religious patronage system in the Corps; and creation of a pervasive climate of bias, animosity and deceit toward non-liturgical Christian Navy chaplains; and violations of the First and Fifth Amendments in the Corps' promotion, accession, retention and separation decisions.

II. JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343, and 1346, and 5 U.S.C. § 702. A declaration of the rights of Navy non-liturgical Christian chaplains and the constitutionality of various Navy and Corps policies is sought pursuant to 28 U.S.C. §§ 2201 and 2202. Venue is appropriate under 28 U.S.C. § 1391 (e) since the defendants are a federal agency and its officials which are located in Washington D.C.

III. PARTIES

A. Plaintiffs

3. The following named plaintiffs bring this action as a class action on behalf of themselves and all other persons similarly situated in the class as defined below in ¶ 9:

a. ROBERT H. ADAIR resides at 304 Cowan Street, Columbia, TN 38401. He enlisted in the Navy in January, 1967. After completing his enlistment in 1970, he went to college and seminary, earning a Master of Divinity Degree in 1977. Endorsed by the Southern Baptist Convention, a non-liturgical Christian denomination, he entered active duty as a Navy chaplain in 1979. Despite his outstanding service, he was selected for early retirement in FY 95 by a Selective Early Retirement Board (SERB) that selected only non-liturgical Christian chaplains while allowing liturgical chaplains with inferior records to continue on active duty. He involuntarily retired in 1996. But for the SERB decision, believed to rest on illegal religious discrimination and animosity toward his faith group, Ch. Adair would have continued on active duty and retired at a higher pay rate.

b. MICHAEL BELT is an active duty chaplain in the grade of Lieutenant residing at 44856 Corte Siera, Temecula, CA 92592. Enrolling in the Navy Chaplain Candidate Program as a United Methodist, he changed his endorsement to the non-liturgical Church of the Nazarene before entering on active duty in September 1991. While stationed on Okinawa from 1991 to 1993, his liturgical Protestant rating chaplain gave him a poor fitness report after Ch. Belt failed to support his rater's selling of tickets to the rater's prayer breakfasts. This same liturgical Protestant chaplain later berated Ch. Belt for preaching that men who call themselves Christians should live as Christians and accordingly gave Ch. Belt a low mark on his fitness report. After Ch. Belt and another non-liturgical chaplain reformatted a Protestant worship service with low attendance, the congregation grew from 40 to approximately 130. In recognition for this, he was told by his rating liturgical Protestant chaplain that his style of worship was "hogwash." The liturgical Protestant then took over the service, changed it back to a liturgical service, effectively killed the service and drove the congregation away.

At his current station in San Diego, he has witnessed and experienced liturgical bias and prejudice against himself and other non-liturgical chaplains, including being excluded from decisions and meetings that affected he-and other chaplains until after decisions had been made at exclusively liturgical chaplain meetings, and seeing liturgical Protestant chaplains whose work output was below their peers nonetheless being given higher fitness reports. As a result of the Navy's denominational prejudice, Ch. Belt was non-selected for promotion to the grade of Lieutenant Commander ("LCDR") by the fiscal year ("FY") 1999 and 2000 chaplain promotion boards. Ch. Belt became aware of the Navy's systematic bias in early 2000 after talking with another chaplain whose endorsing agency (the Chaplaincy of Full Gospel Churches) had filed suit against the Navy.

c. Dr. GREGORY R. DE MARCO resides at 113 Tanning Way, Clovis, NM 88101. He served as an enlisted Navy "hard hat" deep sea diver from 1972 to 1981 when he left the Navy for seminary. He was commissioned as a non-liturgical chaplain in 1983 and remained in the Navy Reserve until he was recalled to active duty in 1987. He was promoted to Lieutenant Commander in 1993 and remained on active duty until 1998. His last duty assignment was in Naples, Italy, from October 1995 to June 1998. In December 1997, he was criticized by the liturgical command chaplain for ending his prayers "in Jesus name". When he insisted on praying in accordance with his beliefs and religious tradition as allowed under Navy regulations and federal statute, the liturgical command chaplain rated him in a way that made him non-competitive for promotion. This rating was based on faith group prejudice and bias and deliberately ignored Ch. De Marco's service to the Naples Protestant community including the fact that the congregation had grown from 25 to over 200, making it the largest Protestant worshiping community in the Navy in Europe. His evaluation also ignored the large corresponding increases in the religious education and children's programs due to Ch. De Marco's efforts. The systematic faith group hostility and prejudice evidenced at Naples made it clear to Ch. De Marco that he had no chance for promotion, that his Navy career was effectively finished and that the Navy's continuing covert prejudice would make his life unbearable. He chose to retire early to save further humiliation, minimize his personal and professional injury, and minimize the disruption and damage to his family. In effect, the Navy's actions were a constructive discharge based on religious prejudice. But for this hostility, Ch. De Marco would have successfully continued his Navy career as evidenced by his outstanding record prior to Naples.

d. FURNISS HARKNESS is a non-liturgical Navy Reserve chaplain residing at 400 Green Acres, Memphis, TN 38117. He entered active duty in March 1987 under the endorsement of the non-liturgical Christian Church (Disciples of Christ). Although he had outstanding fitness reports, he found that the Navy had two systems, one for liturgical chaplains and one for non-liturgical chaplains. After unsuccessfully attempting to obtain the same information concerning graduate school that was provided to liturgical chaplains, he realized that those efforts to obtain equal treatment had effectively ended his Navy active

duty career. He left active duty in June 1995 and attempted to return to his Reserve status. In an illegal act of retaliation, the Navy Chaplain Corps issued a new instruction in an attempt to deny his reserve affiliation. Ch. Harkness asked the Navy Inspector General (NIG) to investigate the legality of that attempt. The NIG subsequently found the Chaplain Corps' actions and its "new policy" to be without authority, vindicating Ch. Harkness' position. The report admonished several senior chaplains for retaliation. The Chaplain Corps' retaliatory and discriminatory actions, based on religious prejudice, precluded Ch. Harkness from drilling for a year and a half.

As a further act of retaliation, in mid-2000, the Navy failed to select Ch. Harkness to the grade of Commander, despite his outstanding record and his completion of the Naval War College. On information and belief, the reason for his non-selection was his participation in this lawsuit, his previous attempts to obtain equality in treatment, and his prior complaint to the NIG concerning the Chaplain Corps' illegal attempt to deny him Reserve affiliation. One of the board members on his recent selection board was implicated in his prior successful NIG retaliation complaint.

e. MICHAEL LAVELLE resides at 16 Rosewood Circle, Silver City, NM 88061. Despite an outstanding career as a non-liturgical Navy chaplain including participation in Operation Desert Storm and a preponderance of duty with the Marines, he was passed over for Commander in FY 1998. Faced with the reality that few, if any, chaplains are subsequently selected once they have been non-selected, and to avoid further humiliation, prejudice and the possible financial injury he and his family might suffer if he continued to remain on active duty, Ch. Lavelle applied for early retirement under the Temporary Early Retirement Act (TERA) and retired on October 1, 1998.

A Department of Defense (DOD) investigation of that FY 98 board following a complaint of religious discrimination by another chaplain revealed that the board had illegally used faith group as a promotion criteria and promoted liturgical chaplains with records inferior to those who were not selected, including Ch. Lavelle. See ¶ 52 *infra*. But for the Navy's illegal prejudice and faith group quota system, he would have been promoted and continued his Navy career. The Navy's faith group prejudice and the realities of the Navy's promotion and separation policies constitute a constructive discharge.

f. GEORGE W. LINZEY resides at 1555 Satellite Blvd., No. 65, San Diego, CA 92154. He was commissioned as a chaplain in the Naval Reserve in April, 1975 and entered active duty as a Navy chaplain on September 6, 1975 under the endorsement of the National Association of Evangelicals. Although he was the youngest chaplain to make Captain, he was selected for early retirement by the FY 1998 SERB. Of the five chaplains selected by that board for early retirement, four were non-liturgical. On information and belief, the persons selected for involuntary retirement by the SERB were personally pre-selected by the Chief of Chaplains (hereafter the "Chief"), rather than by the board itself based on an independent records review. The Chief's selections for early retirement, including Ch. Linzey, were based on religious reasons, rather than on the basis of the selectees' records as chaplains.

g. TIMOTHY D. NALL is currently a chaplain in the Naval reserve endorsed by the Baptist Missionary Association of America and lives at 12010 Black Walnut Circle, Little Rock, AR 72209. He entered active duty as a chaplain in October 1984. Asked to take over a small chapel and breath life into it, he increased the congregation from 40 to 150 in 13 months. Despite this and other exemplary work, he received no credit for his accomplishments on his fitness reports. As a result of the Navy systematic discrimination, he was forced to leave active duty in September 1988, but has remained in the Navy reserves. Since 1938, he has served numerous active duty tours, on some of which he has encountered the same covert non-liturgical prejudice and bias and to which the Navy has turned a blind eye.

He became aware of the evidence exposing the Navy's faith group quota system and systematic non-liturgical prejudice only after talking with one of the other Plaintiffs in early 2000 and examining the results of the Stafford and Ellis Reports described *infra*.

h. THOMAS RUSH lives at 633 Anthony Drive, Clovis NM 88101. He entered the Navy as a Surface Weapons line officer in 1977. In 1982 he left to attend seminary. He was commissioned as a Reserve chaplain in 1986 and came on active duty as a Navy chaplain in January 1990. Despite outstanding fitness reports, he was not selected for promotion because the Navy discriminated against his non-liturgical status by turning his excellent prior Navy line service into a promotion liability. The Navy counted his prior line officer service to place him before the chaplain promotion board but then disregarded his previous fitness reports, considering only the few that he had as an active duty chaplain. Because the other chaplains being

considered had more reports as chaplains, he was non-competitive for promotion. When he asked why he was not selected for promotion to Lieutenant Commander (hereafter “LCDR”) in 1993, the senior Navy Chaplain “detailer” told Ch. Rush that he did not have enough “sea time”, an obvious fabrication due to Ch. Rush’s extensive time at sea.

Knowing that subsequent selection for promotion was an impossibility for a non-Liturgical who had been previously non-selected, he applied for and was approved for the Voluntary Separation Incentive Program. Asked by the Navy to remain on active duty for a short period of time to meet the Navy’s temporary need for chaplains, he agreed and remained in the Navy until August 31, 1994. Despite the Navy’s promise that his extension would not result in his second consideration for active duty promotion (adversely affecting his chance for promotion in the Reserve), the Navy considered and non-selected him a second time in 1994.

Forced to leave active duty because of the Navy’s systematic denominational bias in promotions, he returned to the Navy Reserve. In the context of its inter-related promotion and separation systems, i.e., up or out, the Navy’s actions were in effect a constructive discharge based on religious prejudice. But for this hostility, Ch. Rush would have successfully continued his Navy career as evidenced by his outstanding record. In 1996 he applied for and was accepted by the U.S. Air Force Reserve. There he was promoted to Major, largely on the strength of his Navy fitness reports. He is endorsed by the Southern Baptist Convention.

This treatment of Ch. Rush is an example of a systematic policy and pattern of special prejudice against non-liturgical chaplains with prior military service. On information and belief, the motivation behind this prejudice is the liturgical hierarchy’s fear that a non-liturgical chaplain’s prior military service gives him a competitive edge against other liturgical chaplain. Prior service gives a chaplain a better understanding of how the Navy works and can provide instant rapport with the sailors and Marines resulting in more effective ministry. This could result in better fitness reports. In an equitable promotion system, some of these prior service chaplains would rise to the top of the Chaplain Corps, posing a threat to liturgical domination and control.

i. JAMES M. WEIBLING resides at 4840 Stanley Ave., Ft. Worth, TX 76115. He entered Navy Officer Candidate School in March of 1980, graduated in July 1980 and was commissioned as an Ensign line officer. In 1985 he left active duty to attend seminary but remained a drilling reservist. In August 1988, he resigned as a Navy line officer in exchange for a commission as a chaplain and began his active duty in September 1989. Despite his outstanding career as a line officer, the Navy Chaplain Corps considered such service as a liability and because of its religious animosity against non-liturgical Christian chaplains, particularly those who had prior line service, twice failed to select him for LCDR. He was released from active duty in February 1994.

Ch. Weibling’s attempts to understand why he was not selected for promotion were met with lies, misrepresentation and obfuscation on the part of senior Navy chaplains, e.g., all chaplains have outstanding fitness reports, need more sea time. The Chief of Chaplains denied the possibility of faith group bias or improper board member influence when Ch. Weibling raised these issues with him. Ch. Weibling’s every effort to verify whether such prejudice and impropriety existed was met with denial and deceit by senior Chaplains. He became aware of evidence of this prejudice only in Late 1999 when recalled to active duty for a short time in Naples, Italy, and he learned of the Stafford Report and its implications. A lawyer specializing in military claims that he consulted in early 2000 after his return from active duty told him he had to have “hard” evidence before filing suit. Ch. Weibling’s efforts to obtain that evidence in a timely manner were met with more Navy obfuscation and delay.

But for the Navy’s religious prejudice and denominational quotas challenged here that led to his separation, Ch. Weibling would have been prompted and continued his active duty career. The Navy’s deliberate deceit and fraudulent concealment precluded his ability to bring his claim sooner.²

j. MICHAEL WRIGHT resides at 271 Blaydes Drive, Atoka, TN 38004. He is an active duty Navy non-liturgical Christian chaplain and an original plaintiff under the pseudonym of JOHN ADAMS. Ch. Wright, eligible for selection to the grade of Commander when this class action was filed and having heard that senior Navy officials had expressed their displeasure with chaplains who dared to challenge the illegal policies cited herein, feared prejudice and retaliation during the Commander Selection Board if his real name had been revealed before the board adjourned. That Commander board non-selected him because of the Navy’s non-liturgical prejudice as evidenced by the fact that there were no non-liturgical Christian

chaplain board members and the disproportionate number of liturgical chaplains selected. He has witnessed and been a recipient of instances of discriminatory treatment against non-liturgical Christian chaplains and preference for liturgical chaplains. He has been subject to disparate treatment and suffered injury from the Navy's faith group prejudice and bias as evidenced by his recent non-selection.

k. JOHN WITHERSPOON is the pseudonym for a non-liturgical Christian chaplain Navy in the Navy Reserve who, despite an outstanding record, superior to that of many other liturgical chaplains, was non-selected for promotion because he was of the wrong faith group and category, i.e., non-liturgical Christian. As a result of the Navy's illegal discrimination, his Navy career was terminated and he was forced to leave active duty. Ch. Witherspoon is in a sensitive position in the Reserve and fears that if his real name were to become known, he would be subject to retaliation for this exercise of his right to seek redress for the defendants' unlawful actions challenged herein. He requests that he be allowed to pursue this action under a pseudonym. Rear Admiral Peter Beckwith, in addressing a group of Navy Reserve officers recently, said he did not like people who sued the Navy and they had no place in the Navy. A motion to allow his use of a pseudonym will be submitted on his behalf separately.

l. WILLIAM C. BLAIR resides at 1 Idlewood Drive (W.E.), Jamestown, NY 14701. He is endorsed by the non-liturgical Assemblies of God faith group. Before attending seminary, he had prior enlisted service in the U.S. Marine Corps from September 1972 to August 1976. He became a Navy chaplain in July 1983 and was recalled to active duty in September 1983. He was promoted to Lieutenant Commander and selected for post graduate school. As a non-liturgical Christian chaplain, he was required to be able to officiate at liturgical Protestant services, but liturgical Protestant chaplains were not required to know how to or to officiate at non-liturgical services. Yet, he was not selected for Commander by the FY 97 chaplain Commander selection board, despite an outstanding record superior to many of those selected for promotion.

When Ch. Blair attempted to find out the cause of his non-selection, he was told by a senior Chaplain Corps official that his one rating (in 16 years of service) of 3 of 3 was the only indication in his record. He appealed that rating and his non-selection to the Board of Correction of Naval Records who in effect informed him that there was nothing wrong with the board and that he had no basis for a complaint. He subsequent requests for an explanation were met with a "we can't talk about the board - its a secret."

Following his second non-selection, he was told by the Chaplain Corps to "either retire or be retired." In the face of the Navy's threat and prejudice, he retired on September 1, 1999. The result of the Navy's prejudice, actions, and threats, constitutes a constructive discharge.

Subsequent investigations of the FY 97 Commander's board (and the FY 98 board) found that a chaplain's faith group became a consideration and criteria for promotion, *see, e.g., ¶ 52, infra*. Being a non-liturgical, Ch. Blair did not belong to a favored faith group. Upon examination of the information in the Stafford Report, *id.*, Ch. Blair could see that his record was superior to many who were promoted; some of those promoted had in their records the very things which Chaplain Corps senior officials had consistently said would keep a chaplain from being promoted.

Other examples of the prejudice he received include the Navy's lack of support and hostility to a "full gospel" worship service he started around 1992 in Naples, Italy, that became the largest on-base Protestant service. While the poorly attended liturgical General Protestant service received full support and funding, his well attended service had to improvise just to survive, including using a borrowed personal stereo amplifier to run the service's sound system.

m. LARRY FARRELL resides at 117 Quail Creek Dr.O, Hubert, North Carolina 28539. Chaplain Farrell is endorsed by the Church of God, Cleveland, TN, a non-liturgical Christian faith group. He entered active duty in 1984. He was selected for promotion to Lieutenant Commander but, because he is not a liturgical and the Navy's prejudice against his Pentecostal faith, he was not selected for promotion to Commander in fiscal year 1998, 1999, and 2000, despite outstanding fitness reports and an exemplary career.

n. RAFAEL J. QUILES resides at 4034 28th Avenue North, St. Petersburg, FL 33713. Ch. Quiles had prior enlisted service in 1970 - 1972 and 1973 - 1977. He reentered the Navy as a chaplain in January 1984. He is endorsed by the Church of God, Cleveland, TN, a Pentecostal denomination and reached the rank of Lieutenant Commander. Ch. Quiles' career and his exemplary record should have qualified him for promotion to Commander. He was non-selected for promotion to Commander

by the FY 1997 and 1998 chaplain promotion boards. The evidence from the Naval and DOD inspector General investigations clearly shows 1) that faith group played a determining part in the selection of chaplains for promotion during those boards and 2) chaplains with records inferior to Ch. Quiles were selected for promotion while he was not. The reason he was not promoted was because he was a non-liturgical Christian and a member of a disfavored faith group, whereas those with the inferior records who were promoted were from favored liturgical faith groups. After his non-selection, Ch. Quiles was told by the Navy to leave the Navy. His retirement in December 1998 following his second non-selection was a constructive discharge.

At first Ch. Quiles thought that his non-selection was “the luck of the draw.” However, through one of the co-Plaintiffs, he learned of the Stafford report described in ¶ 52 *infra*, and by comparing his record objectively with those who had been promoted, he discovered the cause of his injury and the injustice done to him.

o. LYLE SWANSON resides at 7052 Bennington Drive, Gurnee, Illinois 60031. Ch. Swanson was commissioned as a Navy Chaplain in June 1982. He is endorsed by the Christian Churches and Churches of Christ, a non-liturgical faith group. Despite outstanding fitness reports, including two years (1992-93) as the command chaplain in Bahrain during the Gulf War and the subsequent period of semi-hostility, and selection for post-graduate school, he was not-selected for Commander in 1994 and 1995. He was offered and accepted the opportunity to qualify for the Temporary Early Retirement (TERA) Program. With no other viable options, he retired under TERA in August 1997, but the Navy’s actions and prejudice constitute a constructive discharge.

On information and belief, the basis for his non-selection to Commander and forcing his subsequent early retirement was the fact that he was a non-liturgical Christian chaplain. In early 2000 while talking with an active duty chaplain friend, Ch. Swanson first became aware of the evidence revealed in the “Stafford Report”, para. 52 *infra*, of the Navy’s faith group quota system, the consistent promotion of chaplains with records inferior to his and the use of religious criteria in Navy chaplain promotions, and other information concerning the allegations of this lawsuit.

P. RONALD TOMLIN resides at 2285 Cedar Gate Rd., Madison Heights, VA 24572. Ch. Tomlin originally entered the Navy as a seaman in 1972. He later left the active Navy to attend seminary. Endorsed by Liberty Baptist Fellowship, he was commissioned as a chaplain in the Naval Reserve in October 1987. From then until he was recalled to active duty on in June 1992, he answered 12 requests for temporary active duty at twelve different commands.

Despite Ch. Tomlin’s efforts to avoid consideration for promotion to Lieutenant Commander before he had obtained sufficient active duty fitness reports to make him competitive with his active duty peers, he was improperly considered by the FY 1995 and 1996 LCDR promotion boards. Ch. Tomlin brought to the Secretary of the Navy’s attention the inequity of placing recalled reservists with few active duty fitness reports in competition for promotions with other active duty chaplains who had many fitness reports. The Secretary then changed that policy. Lt. Tomlin also successfully appealed his 95 and 96 non-selections to the Board of Correction of Naval Records which voided them. The BCNR directed that he be considered for promotion by the FY 97 board.

His alleged consideration by the FY 97 LCDR promotion board was marred by several Navy improprieties, such as twice adjusting his lineal number in a six month period without changing his date of rank and placing an “A” beside only his name on the list of potential selectees. Ch. Tomlin believes this “A” was to highlight him for purposes of retaliation because of his previous successful challenge to his earlier non-selection.

A former chaplain supervisor who was a member on the FY 97 LCDR board later told Ch. Tomlin that he had no recollection of seeing Ch. Tomlin’s records in the board process. Another friend of Ch. Tomlin who was involved with the board and saw the records that went before the board also said that he had not seen Lt. Tomlin’s records.

The Board of Correction of Military Records denied Ch. Tomlin’s efforts to obtain correction of this last and continuing injustice in 1998. His request for a Navy Inspector General’s investigation of this breach of regulations and denial of his due process in promotions has been ignored and gone unanswered.

q. DAVID S. WILDER resides at 453 N.C. Highway 172, Hubert, NC 28539. He is endorsed by the Southern Baptist Convention. He entered active duty in September 1985, and has served continuously since then. Despite an outstanding record,

he was non-selected for Commander in 1999 and 2000 due to the Navy's systematic discrimination manifested against non-liturgical Christians.

Ch. Wilder experienced blatant and obvious examples of faith group prejudice on many occasions. An example is the following incident where in violation of 10 U.S.C. § 6031 (chaplain may conduct public worship according to manner and forms of the church of which he is a member), his liturgical superior told him to conduct a service completely foreign to his religious tradition and individual faith.

From July 1990 to July of 1993, Ch. Wilder was assigned to Marine Corps Base, Camp S.D. Butler on Okinawa. He was leading the General Protestant service while Ch. Larry Farrell, a co-plaintiff, lead-an alternative Pentecostal service in the same chapel at a later time. Ch. Wilder's General Protestant service averaged approximately 100 to 125 while Ch. Farrell's service averaged 250-275 per week. In June 1992, Episcopal Ch. Williams, the incoming Marine Expeditionary Force chaplain, visited Ch. Wilder's service and made "suggestions" how Ch. Wilder could "improve" his service. These amounted to making the General Protestant service into an Episcopal service. When Ch. Wilder refused, he was removed from being pastor of his chapel service although he was still the Camp chaplain. Ch. Williams took over Ch. Wilder's General Protestant service, converting it into an Episcopal mass; attendance decreased to about 12 people per week.

Ch. Wilder started holding a Baptist service in the base theater. When his service became ten times as large as Ch. Williams', Ch. Williams tried to close Ch. Wilder's service, accusing him of sabotage.

Ch. Wilder became aware of the evidence of the Navy's systematic and pervasive anti-non-liturgical prejudice in 2000 after this lawsuit was filed by talking with other Plaintiffs and seeing evidence of the Navy's systematic faith group bias.

B. The Defendants

4. The Honorable Richard J. Danzig is the Secretary of the United States Navy (the "Secretary"). His office is in the Department of Navy, headquartered in Washington, D.C. He is sued only in his official capacity, as civilian head of the co-defendant organization, the United States Navy (the "Navy").
5. The Naval Defendants. Vice Admiral Ryan is the Chief of Naval Personnel, an organization within the defendant U.S. Navy, which supervises the promotion policies and personnel procedures challenged herein. Admiral Ryan's office is in the Navy Department in Washington, D.C. and, on information and belief, he exercises supervisory responsibilities over both the current Navy Chief of Chaplains, Rear Admiral (RADM) Holderby and his Deputy Chief of Chaplains, RADM Barry Black, who is in line to be the next Chief of Chaplains. Both RADMs Holderby and Black have cooperated and conspired together and with others, to maintain the illegal policies and procedures challenged herein and to deny Plaintiffs their rights as detailed in this Complaint. They are sued in their official capacities.
6. The Navy is a military department of the U.S. Armed Forces created by an Act of Congress. 10 U.S.C. § 5011 *et seq.* The Navy is organized into several branches or categories, i.e., subordinate groupings of individuals possessing similar qualifications or skills. One of these branches is the Navy Chaplain Corps, 10 U.S.C. § 5142, whose members are commissioned officers possessing specialized education, training and experience to meet the spiritual needs of those who serve in the Navy and their families.

IV. DEFINITIONS

7. The Navy divides most of its Christian personnel into three general categories: Catholic, liturgical Protestant, and non-liturgical Christian³. These are terms commonly used by Navy chaplains and the last two terms have particular significance to this case and its issues. To assist the Court in understanding these terms, the following general definitions are provided:

a. Navy chaplains use “liturgical Protestant” to collectively describe those Christian Protestant denominations whose religious services are characterized by a set liturgy or order of worship. This primarily includes those Protestant traditions or denominations that began during the Protestant Reformation and who retained an established liturgy in their worship services such as the Lutheran, Reformed and Episcopal denominations, and the denominations which later evolved from them, e.g., Presbyterian and Methodist.⁴ Navy chaplains sometimes refer to these liturgical denominations as “baby baptizers” since the common feature of these liturgical denominations is that they all practice infant baptism, or “high church” or “main line churches”. As used herein, “liturgical Protestant” shall mean chaplains of the Lutheran, Episcopal, Methodist, Methodist Episcopal, United Church of Christ, Congregational, Reformed and Presbyterian denominations and the Orthodox tradition.

b. “Non-liturgical” refers to these Christian denominations or faith groups without a formal liturgy or order in their worship service. In general, they baptize only adults or children who have reached the age of reason and their clergy do not usually wear vestments or special religious dress during services. Some Navy chaplains refer to these faith groups as “low church”. Baptist, Evangelical, Pentecostal and Charismatic faith groups or traditions fall into the non-liturgical Christian category. Although these faith groups see their tradition and beliefs arising from first century Christianity rather than the Protestant Reformation, the Navy often refers to these faith groups as “non-liturgical Protestant”. The Plaintiffs belong to this category and represent Southern Baptist, Christian Church, Pentecostal and other non-liturgical Christian faith groups.

V. CLASS ACTION ALLEGATIONS

8. Plaintiffs bring this action as a class action on their own behalf and as representative parties on behalf of all members of the class under the provisions of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure for declaratory and injunctive relief, and relief incident to and subordinate to it, including costs and attorney fees. A class action is appropriate because, as shown below: (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of Law and fact common to the class, (c) the claims of the Plaintiffs are typical of the claims of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

9. Definition of the Class. The class so represented by Plaintiffs in this action, and of which Plaintiffs are themselves members, consists of present and former non-liturgical Christian Navy chaplains. It includes those non-liturgical chaplains whose active duty careers have been terminated or otherwise adversely affected by the Navy’s and the Corps’ unlawful bias and prejudice against non-liturgical Christian chaplains including the Navy’s use of religious and other illegal quotas, since the Navy began its “Thirds Policy” as defined below, in violation of the First and Fifth Amendments, 42 U.S.C. § 1981, and Department of Defense and Navy regulations concerning equal opportunity. It also includes those members of the class who have not yet personally suffered career injury as a result of the practices and policies challenged here, but who nonetheless may be subject to the defendants’ arbitrary religious discrimination or hostility in the future.

10. As a further explanation, the class includes those non-liturgical Christian chaplains who because of the Navy’s quota system or denominational bias against their faith group, denomination or non-liturgical tradition: (a) were non-selected for promotion (also known as a “pass over”) while on active duty and who are still on active duty, or who left the Navy voluntarily, or were involuntarily separated from the Navy based on their non-selection(s); (b) who were passed over while on active duty but are still active in the Reserves; (c) who were forced to retire as the result of Selective Early Retirement Boards (“SERB”); (d) active duty non-liturgical chaplains who may suffer prejudice as a result of the Navy’s policies challenged herein unless the Navy is restrained from continuing those actions and policies; (e) who saw or experienced the Navy’s non-liturgical bias and left active duty rather than endure that bias and prejudice; and, (f) who because of the Navy’s denominational bias were not continued on active duty past their initial tour as a result of Chaplain Accession and Reserve Evaluation (“CARE”) boards or similar procedures. The preceding examples are representative illustrations only and do not include all the examples or prejudice or harm caused by the Navy’s illegal prejudice and conduct.

11. The exact number of the class identified above is not known, but it is estimated that there are not less than 600 members. The class is so numerous that joinder of individual members in-this action is impractical.

12. There are common questions of law and fact involved in this action that affect the rights of each member of the class and the relief sought is common to the entire class, namely:

- a. A long and continuing pattern of violations of the First and Fifth Amendments including: a chaplain promotion system that uses promotion boards dominated by chaplains personally selected by the Chief of Chaplains (the “Chief”) to select other chaplains for promotion; the establishment of religious quotas for chaplain promotions; the establishment of a preferred religious tradition; unconstitutional discrimination and hostility on religious grounds against non-liturgical chaplains and non-liturgical Navy personnel; the establishment of a religious patronage system; the illegal use of the SERB process to separate non-liturgical Christian chaplains based on their religious beliefs and speech;
- b. The violation of non-liturgical Christian chaplains’ First Amendment rights of Free Speech; and
- c. The violation of non-liturgical Christian chaplains’ Fifth Amendment right to equal treatment and other statutes and laws including 42 U.S.C. § 1981, the Religious Freedom Restoration Act and Department of Defense and Navy regulations.

13. The claims of the Plaintiffs, who are representatives of the class are typical of the claims of the class, in that the claims of all members of the class, including Plaintiffs, depend on a showing of the acts and omissions of defendants giving rise to the right of Plaintiffs to the relief sought. There is no conflict as between any individual named plaintiff and other members of the class with respect to this action, or with respect to the claims for relief set forth in this complaint. The class has similar injuries flowing from the Navy’s systematic and intentional religious prejudice.

14. The named Plaintiffs are the representative parties for the class, and are able to, and will, fairly and adequately protect the interests of the class. The attorney for Plaintiffs, Arthur A. Schulcz, Sr., will actively conduct and be responsible for Plaintiffs’ case.

15. This class action is maintainable under Fed. Rule of Civil Procedure (the “Rules”) 23(b) because it satisfies the prerequisites of Rule 23 (a) and in addition it satisfies the following conditions of Rule 23(b): (1) the prosecution of separate actions by individual members of the class would create a risk of

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants, all of whom oppose the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted and refused to act on grounds generally applicable to the class, as more specifically alleged below, on grounds which are generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole which this action seeks; or

(3) the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

16. The findings required by Rule 23(b)(1) and (2) are supported by the fact that there is a large class of non-liturgical Christian chaplains against whom the Navy has operated in a systematic discriminatory purpose violating the Constitution and the Navy’s own regulations and promotion policies. The declaratory and injunctive relief sought will affect all persons affected by the alleged discrimination. The findings required by Rule 23(b)(3) are supported by fact that the constitutional and federal questions raised by Plaintiffs dominate this action and apply to all members of the class. If Plaintiffs are successful, any individual relief that is incidental to this action will be determined by statute and require little if any involvement by the court. Additional considerations:

a. The cost of pursuing individual relief would seem to preclude individual actions as evidenced by the almost complete lack of individual actions in this area.

- b. This is the third action challenging the Navy Chaplain Corps' policies and procedures. The first action, *Sturm v. Danzig*, is an action brought in the U.S. District Court in San Diego in October 1999 by an active duty chaplain raising many of the same issues as in this case. The second action, *Chaplaincy of Full Gospel Churches v. Danzig*, was filed in the United States District Court for the District of Columbia, November 5, 1999 and was brought by Chaplaincy of Full Gospel Churches ("CFGC"), an organization recognized as an endorsing agency by DOD. CFGC brought its action on behalf of itself, its active duty chaplains and Navy members of its faith group churches. That case raises many of the same issues here but is limited to CFGC endorsed Navy chaplains.
- c. There are no extraordinary difficulties in the management of this class action. There are no state law issues and this type of action is analogous to civil rights actions which are often resolved in a class action.

VI. THE NAVY'S RELIGIOUS DEMOGRAPHICS

17. The Armed Forces records religious preference data for the individual service members. A 7/8/98 Report by the Defense Manpower Data Center (hereafter "DMDC") is attached at Exhibit 1. A February 2000 DMDC Report is at Exhibit 2. This data has special relevance to this case because it provides a factual religious demographic background against which to measure Plaintiffs' allegations and the reasonableness of the Navy's actions and policies.
18. The DMDC data shows that the actual Navy membership of the liturgical Protestant denominations at issue here represent about 8% of all Department of Navy ("DON") active duty personnel, i.e., both sailors and marines.⁵ Specifically, in 1998, those of various Methodist named or affiliated denominations, i.e., those who have Methodist, Wesley or Asbury in their name, represented approximately 3.78% (20,776) of all DON personnel (549,800); Presbyterian related denominations represented 1.05% (5,781); the various Lutheran denominations represent 2.90% (15,937); Episcopal and Reformed Episcopal represented 0.73% (4,039); Methodist Episcopal represented 0.2 % (402); Reformed represented 0.1% (288); Orthodox represented 0.1% (256); a total of approximately 8.76%. In the February 2000 report, this total had decreased to 8.03%.
19. Adding these totals with Catholics, another major liturgical denomination who in 1998 represented 24.09% (132,429) and 23.56% (125,892) of the Navy in 2000, results in a consistent combined total of less than one-third of the Navy's total personnel, 32.85% in 1998 and 31.59% in February 2000.
20. Identified non-liturgical faith groups represent about 50% of the Navy religious population.

VII. THE NAVY'S ILLEGAL POLICIES AND ACTIONS

COUNT 1

A. THE NAVY HAS ESTABLISHED AND MAINTAINED AN UNCONSTITUTIONAL RELIGIOUS QUOTA SYSTEM

21. The allegations of paragraphs 1 through 20 above are incorporated herein by reference as though pleaded in full.
22. In the late 1960s and 1970's, America's religious demographics began a large, steady and measurable shift away from liturgical Protestant denominations, to non-liturgical Christian churches from which come Plaintiffs and the class. This trend continues today.
23. Until the mid to late 1980s, the allocation of authorized Navy chaplains between the various faith groups was based on objective criteria, the relative percentage a faith group or denomination represented in the total American religious

population as reported in sources such as the annual Yearbook of American and Canadian Churches. For example, if there were 100 Navy chaplains authorized and Catholics made up 25% of the American religious population and Baptists made up 20%, the Navy would try to have 25 Catholic and 20 Baptist chaplains.

24. Faced with this shrinking liturgical Protestant faith group membership and its implications for Navy chaplain faith group authorizations, in the late 1980s the Navy abandoned its “objective” criteria (linking faith group membership with chaplain authorizations) for an amorphous, subjective “needs of the service” which became the “Thirds Policy” defined below. The Navy continued to emphasize recruiting of liturgical Protestant chaplains despite the shrinking memberships of those faith groups.
25. The Navy adopted “The Thirds Policy” which divided chaplain strength allocations between Catholics who received one third, and liturgical Protestant faith groups who received the second third. “Others” make up the last third, including chaplains who are non-liturgical Christian and non-Christian, e.g. Jewish, Moslem. In other words, one third of Navy chaplain promotions, retentions on active duty and accessions were allegedly reserved for liturgical Protestant chaplains, whereas this group represented less than one eleventh of the religious membership of the Navy.
 - a. The goal and effect of this Thirds Policy was to create a denominational barrier in that it allowed liturgical Protestant chaplains to maintain liturgical control of the Navy Chaplain Corps while excluding non-liturgical chaplains from influence and representation.
 - b. This policy was applied to promotions. Analysis of promotion board results shows that this original policy continued to remain generally in effect through FY 1995.
 - c. Due to national shortages of Catholic priests, Catholics have not been able to fill their quota which has impacted on the number of Catholics available for promotion.
 - d. Chaplain promotion boards have consistently promoted at least the same number of Liturgical Protestants as non-liturgical Christian chaplains i.e., the Thirds Policy has evolved into i) a quota making liturgical Protestant chaplain promotions equal to non-liturgicals and, ii) a floor of at least one third liturgical Protestants in the Chaplain Corps. For example, the chaplain LCDR and Commander promotion boards for FYs 97-99 provide the following results by religious categories. Protestant liturgicals consistently average not less than 33.33% of promotions regardless of their percentage of the Navy’s religious population.

FY Commander	Catholic	Prot. Liturgical	Non-liturgical	Special Worship
97	6	8	6	
98	2	2	3	
99	6	9	8	
Total (50)	14	19(38.0%)	17	

Lieutenant Commander

97	6	9	6	1
98	3	7	9	1
99	7	9	14	
Total (72)	16	25(34.72%)	29	2

26. The goal of the unconstitutional “Thirds Policy” above was further implemented by a deliberate, systematic, discriminatory Navy retention policy whose purpose was to keep non-liturgical chaplains from continuing on active duty, thus assuring they would not be considered for promotion and minimizing their future influence. Although liturgical Protestant chaplains represented approximately 9% of the Navy religious population, they allegedly received 33% of the allocations and were routinely selected for retention beyond their initial 3 year tour of service in numbers disproportionate to their denominational membership percentage in the Navy.
27. In contrast, non-liturgical Christian chaplains whose faith groups had been increasing and whose faith groups represent the majority of the Navy’s religious population were routinely refused retention. This policy has resulted in the over-representation of liturgical Protestant chaplains and the under-representation of non-liturgical Christians in the Navy chaplain program.
28. The decision as to who would stay on or be released from active duty after their initial three years of service was not based on meeting the religious free exercise needs of Navy personnel, but solely on the basis of a chaplain’s religious faith group. This policy clearly discriminates against non-liturgical Christian chaplains and the personnel they represent and served or serves no legitimate purpose, and was not based on remedying past discrimination nor narrowly tailored.
29. These practices are subject to strict scrutiny and they violate the Constitution’s First and Fifth Amendments.

COUNT 2

B. THE NAVY HAS ESTABLISHED A PREFERRED RELIGIOUS TRADITION

30. The allegations of paragraphs 1 through 29 above are incorporated herein by reference as though pleaded in full.
31. The Navy’s unlawful religious quota system described above favors chaplains from liturgical denominations or traditions, e.g., Catholic and liturgical Protestant, in promotions, retention, and career opportunities while non-liturgical Christian chaplains are denied these same incidents to and rewards of military service.
32. By policy and practice, the Navy Chaplain command has fostered the promotion of a disproportionate number of “high church” Protestant and Catholic Chaplains to the upper ranks, i.e., Captain and Admiral, and key billets in the Navy Chaplain Corps, i.e., those positions with decision making responsibilities. For example, through July of this year, only one non-liturgical has held the office of Chief of Chaplains since 1917. (Exhibit 3).
- a. In January 1995, the Chaplain of the United States Marine Corps, Ch. (Captain) Larry H. Ellis, wrote a memo to the Navy Chief of Chaplains detailing years of apparent institutional bias against “low-church” Protestant Navy chaplains in regard to assignments to the most prestigious and influential positions (which the Navy calls “billets”) within the Navy Chaplain Corps. Ellis Report (hereafter “Ellis”) (Exhibit 4).

b. In his memo, Captain Ellis states that as of his report (early 1995), only 14 clearly non-liturgical Navy chaplains had filled the 119 top Chaplain Corps billets over the prior 15 year period, i.e., a fill rate for non-liturgicals of 11.8%. *Id.* at ¶ 5. The fill percentage for liturgical Protestants was greater than 50%, *id.*, far out of proportion to the percentage of the liturgical denominations in the general population or the Navy.

c. Despite this clear indicator of institutionalized religious discrimination, the Navy undertook no corrective action.

33. By policy and practice, the Navy Chaplain command has fostered a “high church” Protestant and Catholic monopoly of Chief of Chaplain’s position. For example, three out of the last four and four out of the last seven Chiefs of Chaplains have been Lutheran. Through July of this year, only one clearly non-liturgical officer has held the Navy Chaplain Corp’s highest post, Chief of Chaplains. List of Chiefs of Chaplains (Exhibit 3).

34. By policy and practice, the Navy discriminates in its chaplain retention policies on the basis of a chaplain’s religious faith group or denomination.

a. In spite of Title 10 U.S.C. § 632’s mandate that an officer who is twice passed over for promotion be separated from the Navy, chaplains from favored denominations have been retained by the Navy Chaplain command even though they have been twice passed over for promotion. For example, many Catholic chaplains who have been twice passed over have been routinely provided with additional 3rd, 4th and 5th opportunities for promotion, whereas chaplains of non-liturgical Christian faith groups or denominations have routinely been separated after their two promotion pass overs.

b. On information and belief, the Navy has used the Selective Early Retirement Board (“SERB”) process to thin down the number of non-liturgical chaplains at the higher ranks, forcing them out of service early in numbers disproportionate to other chaplains as a whole. This has insured domination of the Navy Chaplain Command by the liturgical tradition and the minimization of non-liturgical Christian influence or opportunity for consideration for admiral.

c. While “SERBing” non-liturgical chaplains, the Navy has brought liturgical chaplains back on active duty, promoting some after they have returned to active duty.

d. The Chaplain Corps has used the promotion system to enforce its promotion quotas and thereby force out otherwise qualified non-liturgical chaplains thereby ensuring liturgical Protestant domination of the Chaplain Corps.

35. The effect of the Navy’s denominational quota system and granting religious preferences to the liturgical Protestant religious tradition, is to impermissibly endorse liturgical Protestant as an “official” preferred religious tradition in violation of the First Amendment’s Establishment Clause. This illegal endorsement and its associated policies do not serve a compelling government interest nor are they narrowly tailored to serve such an interest.

COUNT 3

B. THE NAVY’S POLICY OF FURTHERING ONLY A “GENERAL PROTESTANT” SERVICE AND RESTRICTING OTHER FORMS OF NON-LITURGICAL RELIGIOUS SERVICES VIOLATES THE FIRST AMENDMENT

36. The allegations in paragraphs 1 through 35 above are incorporated herein by reference as though pleaded in full.

37. Additionally, on information and belief, in violation of the First Amendment’s Establishment Clause and Free Exercise Clause, the Navy has tried to establish a *de facto* liturgical or “high church” “General Protestant” religion, disfavoring other “low church” Protestant forms of worship and limiting the opportunity for non-liturgical Navy personnel to meet their religious needs. In other words, with its mandated liturgical “General Protestant” service the Navy has attempted to squeeze all Protestant

servicemen and women (high and low church), including personnel from Plaintiffs' non-liturgical faith groups, into a single liturgical worship mold while ignoring or actively hindering the religious needs of non-liturgical personnel.

38. On information and belief, Navy senior chaplains have denied or restricted non-liturgical chaplains' access to Navy facilities for conducting non-liturgical services or have removed them from preaching or conducting religious services solely because they were non-liturgical chaplains and have hindered or opposed non-liturgical Christian worship alternatives, even when attendance at such alternatives exceeds that of the liturgical General Protestant service.
39. Non-liturgical chaplains have also been criticized and berated for preaching and teaching on truths of the Christian faith and their specific religious tradition.
40. On information and belief, senior Catholic and Protestant liturgical chaplains have attempted to force the general Protestant service, and all Protestant services into a liturgical Protestant mold.
41. The Navy's emphasis on a liturgical General Protestant service and the subsequent disfavoring of non-liturgical Protestant services violates the First Amendment's Establishment and Free Exercise Clauses. For example:
 - a. In 1999 at the Navy bases in Naples, Italy, there were nine English speaking non-liturgical churches off base whose membership was made up almost entirely of Navy personnel assigned to the Naples Navy base.
 - b. Some of the off post churches met in substandard facilities which were inadequate to hold the number of those wanting to attend, while Catholic and liturgical Protestants enjoyed spacious on post facilities designed for their styles of worship.
 - c. The Navy did not facilitate ministry to military members who could not meet their religious worship needs except by attending off post non-liturgical churches.
 - (1) Although DOD and Navy regulations provide for hiring civilian clergy when necessary to meet the free exercise needs, the Navy did not employ available English speaking non-liturgical pastors to meet non-liturgical free exercise needs and although these non-liturgical pastors were willing to minister to their parishioners at no cost to the government, the Navy denied base passes to minimally secured areas of Navy housing and the Naval hospital.
 - (2) Opportunities to worship in the non-liturgical off post churches were not advertised at the base chapels, even when off post churches provided pamphlets containing service times and directions to worship centers.
 - d. This example shows how the Navy simultaneously violates the First Amendment's Free Exercise and Establishment Clauses.

COUNT 4

D. THE NAVY'S CHAPLAIN PROMOTION SYSTEM IS UNCONSTITUTIONAL

42. The allegations in paragraphs 1 through 41 above are incorporated herein by reference as though pleaded in full.
43. In contrast to the U.S. Army and U.S. Air Force which use selection boards made up of officers from other branches (both line and staff) to select chaplains for promotion, the Navy's chaplain selection boards are dominated by chaplains; until recently, only one board member has been a non-chaplain line officer while the other board members are all Navy chaplains, who themselves represent faith groups.
44. In spite of the stated precept that the board may consider only merit and not denominational affiliation, each promotion candidate's three digit "faith group identifier" code is prominently displayed throughout the promotion board process. Thus, the Navy chaplain promotion board members, who themselves represent particular traditions and faith groups, are clearly made aware of each chaplain candidate for selection's denomination or faith group.

45. This procedure has no other purpose than to identify a candidate's faith group to the board and thereby create a suspect religious category unrelated to any legitimate Navy objective. This procedure is to allow the Navy to enforce its Thirds Policy and permit chaplains to exercise their individual or faith group prejudice for or against other chaplains or faith groups, particularly non-liturgical Christian chaplains.
46. The Navy Chief of Chaplains (the "Chief") is a Rear Admiral and approves all 3. chaplain board members for the Navy's chaplain promotion boards.
47. The Chief's control of the composition and membership of chaplain promotion boards serves no purpose or rationale except to control the composition and makeup of the Corps in a manner to insure the continued operation of the Navy's illegal religious quota system for the benefit of preferred religious traditions. This violates the Constitution's First Amendment.
48. On information and belief, Catholics and Liturgical Protestants have dominated Navy chaplain promotion boards despite the fact that these traditions represent less than a third of the religious preference of Navy personnel, *see* ¶ 19, *supra*. For example, the FY 1997 Commander promotion board had two Catholics and three Protestant liturgical board members; the 1998 promotion board for Lieutenant Commander ("LCDR") had two Catholics and one liturgical Protestant chaplain as board members; the FY 2001 Commander's board had a Catholic and two liturgical Protestants and no non-liturgical Christian chaplains.
49. On information and belief, the Chief of Chaplains has exercised enormous improper power and control over Chaplain promotions.
- a. This includes informing one board of his personal List of who he believed constituted "the future of the Navy." Those chaplains so identified were promoted. This is a *per se* violation of 10 U.S.C. §§ 615 (defining type of information provided to board) and 616(f)(2)(improper influence on board forbidden) as well as the Navy's promotion board policies.
- b. Additionally, on information and belief, the Chief has unilaterally brought senior ranking liturgical chaplains to active duty from the Naval Reserve who then compete and are selected for promotions without serving the necessary time in the difficult tours and demanding assignments the Navy requires for non-liturgical chaplains to be competitive for promotion.
50. Since these Navy promotion boards are not focused on meeting the religious needs of the Navy, placing more than one chaplain on Navy chaplain promotion boards:
- a. Serves no legitimate purpose except to maintain unofficial but illegal religious quotas in violation of the Constitution's First and Fifth Amendments. This purpose is apparent in the display of the faith group code for each chaplain being considered for promotion throughout the board process.
- b. Allows board members to exercise, either consciously or unconsciously, their denomination or faith group bias either (1) for those of their own faith group, thereby advancing their own faith group, or 2) against those faith groups whom they disagree with or dislike, and thereby penalize them, through the display of a chaplain's faith group, all in violation of the First Amendment.
- c. Unconstitutionally delegates to a religious body a governmental function.
- d. Allows the liturgical Protestant tradition to operate the Navy Chaplain Corps much like a religious patronage system in violation of the First and Fifth Amendments.
- d. Provides an opportunity for religious bias or denominational issues to interfere with selecting the best qualified chaplains for promotion.
- e. Promotes denomination factionalism and strife by creating the appearance, if not the reality, of promotion considerations being made on criteria not related to career performance and forbidden by the First Amendment. This is clearly indicated in the Stafford Report and the subsequent DOD Inspector General inspection described in ¶ 52 below.

f. Violates federal statutes and the Navy's own regulations and policy concerning selection of best qualified candidates for promotion.

51. The Navy policies and procedures challenged in this Count are subject to strict judicial scrutiny, a test the Navy will fail since they are not related to a compelling government interest and are not narrowly tailored to achieve that purpose.

Evidence of Religious Discrimination In Chaplain Promotions

52. In 1997, responding to an allegation of religious discrimination in Commander (0-5) chaplain promotions, Captain J. N. Stafford, special assistant for Navy minority affairs, submitted a report to the Chief of Naval Personnel on Navy chaplain promotion policies. (Exhibit 5). Capt. Stafford concluded that an objective analysis of the FY 1997 and 1998 chaplain promotion selection boards for Commander indicated "that the board may have systematically applied a denominational quota system." *Id.* at 1, ¶ 2. Capt. Stafford also noted that physical fitness standards that would have kept line officers from being promoted were apparently "waived" or ignored for certain liturgical chaplains who were nonetheless promoted. *Id.* at 2, ¶ 4. The March 1999 DOD IG investigation into the same boards found that faith group "may have been a factor in" both the FY 97 and 98 Commander boards in selecting chaplains for promotion. Exhibit 6 (pp.3 & 4). The DOD IG interview notes clearly show that faith group was a factor that overrode performance and less qualified personnel were promoted based on faith group.

53. Despite the DOD IG's validation of Captain Stafford's finding that denomination was used as promotion criteria, the Navy took no action to eliminate its "denominational quota system" for Navy Chaplains. This systemic, illegal Navy bias and selection of less qualified candidates based on liturgical affiliation has clearly diminished Plaintiffs and their class' opportunities for promotion in violation of both the First and Fifth Amendments.

54. On information and belief, by policy and practice, at least one seat on each promotion board is reserved for a Catholic.⁶

55. Prior to a 1986 religious discrimination case brought by Ch. (then Lt.) Ronald Wilkins, it was not unusual to have two Catholics or more than one chaplain of the same faith group on the same board. In issuing an injunction against Lt. Wilkins' discharge, the *Wilkins* Court found "that the [Navy]'s policy of placing two chaplains of the Roman Catholic faith on each and every Chaplain Corps Selection Board" was suspect and probably "a violation of the First Amendment." *Wilkins v. Lehman*, Civil No. 85-3031-GT, slip op. at 8, (S.D.Cal. 2/10/86). Pursuant to that decision, for a time the Navy discontinued having two Catholic chaplains on every chaplain promotion board.

56. Although Catholics represent about 23.6% of the Navy (*see* Exhibit 1 and ¶ 19) and despite the *Wilkins* decision indicating that placing two chaplains of the same denomination on the same chaplain promotion board was constitutionally suspect, the Navy placed two Roman Catholic chaplains on the FY 1998 Chaplain Selection Board for Lt. Commander, and on the FY 97 selection board for Commander. Because the Chief selects the board members, this is not an accident or the result of some random process.

57. The above challenged policies use facially neutral regulations and statutes in an illegal, systematic, discriminatory manner to accomplish a forbidden end, i.e., religious discrimination and homogeneity in the Navy Chaplain Corps.

58. All of the above represent arbitrary and illegal policies without any substantial government purpose and serve no other purpose than to perpetuate a religious patronage system in violation of the First and/or Fifth Amendments.

**D. THE NAVY DENIES NON-LITURGICAL CHRISTIAN CHAPLAINS AND NAVY PERSONNEL THEIR
RIGHT TO FREELY EXERCISE THEIR RELIGIOUS TRADITION IN VIOLATION OF THE FIRST
AMENDMENT**

59. The allegations of paragraphs 1 through 58 above are incorporated herein by reference as though pleaded in full.
60. On information and belief, by policy and practice some non-liturgical Christian, chaplains and like faith Navy personnel have been denied and selectively excluded from access to Navy facilities solely on the ground that the subject matter of their presentation contains religious speech from a specific viewpoint, i.e., non-liturgical, evangelical and low-church.
61. The Navy's discriminatory policies and hostility identified in this Complaint deny both non-liturgical Christian chaplains and the Navy personnel of their faith groups their First Amendment constitutional right to exercise their religion by denying or severely limiting their access to chaplains and worship services of their faith groups. See 32 C.F.R. § 65.3.
62. The deliberate and systematic over-representation of liturgical Protestant chaplains ensures that the free exercise of those faith groups are more than adequately met while limiting the ability of the Navy's non-liturgical Christian community to meet their religious needs. This also means that non-liturgical chaplains must expend more effort to meet the needs of their faith group members than is required by liturgical Protestant chaplains.
63. The above challenged policies are deliberately motivated by faith group bias. They also produce an adverse and disparate impact on non-liturgical chaplains and the Navy personnel of their faith groups.
64. The Navy's religious discrimination, its anti-non-liturgical Christian hostility, and its non-promotion and non-retention policy for non-liturgical Christian chaplains has kept the number of non-liturgical Christian chaplains small, preventing the viewpoint or needs of their faith groups from being considered in Navy religious decisions.
65. The Navy's religious quota system and preferential treatment for specific religious traditions also establishes an unconstitutional religious test for Navy chaplain promotion and career opportunities that cannot survive strict scrutiny since the test has no other purpose than to deny non-liturgical Navy personnel their First Fifth and Amendment Rights.
66. The Navy's discriminatory policies identified herein penalize non-liturgical Christian chaplains for their religious faith, free exercise of their religion, and religious speech. This results in manifest unlawful governmental hostility toward Navy non-liturgical Christian chaplains and denies non-liturgical Christian Navy personnel their First Amendment Constitutional right to exercise their religion and their. Fifth Amendment right to equal treatment under the law.

COUNT 6

**E. THE NAVY'S CHALLENGED ACTIONS DISCRIMINATE AGAINST NON-LITURGICAL CHRISTIAN
CHAPLAINS' RELIGIOUS FREE SPEECH**

67. The allegations contained in paragraph 1 through 66 of the Complaint are incorporated herein by reference, the same as though pleaded in full.
68. The Navy's discrimination against non-liturgical Christian chaplains and Navy personnel manifests unlawful disapproval of the religious speech that is inherent in their non-liturgical Christian tradition and way of faith.
69. This is a violation of the rights guaranteed under the First and Fifth Amendments.

COUNT 7

G. THE USE OF CHAPLAINS TO RATE OTHER CHAPLAINS, EXCEPT IN UNAVOIDABLE CIRCUMSTANCES, VIOLATES THE FIRST AMENDMENT

70. The allegations in paragraphs 1 through 69 above are incorporated herein by reference as though pleaded in full.
71. The Navy has established organizational structures and systems, e.g., Regional. Chaplains, in which senior chaplains (primarily liturgical) rate other chaplains, even when those chaplains are assigned to a specific Navy base or facility. In other words, the chaplain is rated by the Regional Chaplain rather than the commander of the base on which the chaplain serves.
72. The above structures and systems have no valid or reliable means of insuring religious neutrality, i.e., keeping religious animosity, bias or differences out of the rating process, and are without realistic, religiously neutral standards.
73. The above systems are part of a systematic means of maintaining the Navy's illegal Thirds Policy and other discriminatory procedures, policies and objectives.
74. Such systems violate the First Amendment. There may be exceptions based on unusual circumstances or absolute necessity, but these are not apparent in most cases, e.g., Regional ChapLains.

COUNT 8

H. FUNDING OF THE NAVY CHAPLAIN CORPS EXCEEDS CONGRESS' AUTHORITY UNDER ARTICLE I, SECTION 8 OF THE CONSTITUTION'S TAXING AND SPENDING CLAUSE

75. The allegations in paragraphs 1 through 74 above are incorporated herein by reference as though pleaded in full.
76. Funding the Navy Chaplain Corps and its associated programs and activities involves a substantial expenditure of federal tax funds.
77. The Establishment Clause of the Constitution's First Amendment specifically limits the taxing and spending power conferred by Article 1 Section 8.
78. Congress' use of tax funds, including those collected from the non-liturgical chaplains, Navy personnel and faith groups, or the Navy's use of such funds to support the establishment or endorsement of a preferred religious tradition in the Navy Chaplain Corps violates the Establishment's Clause specific prohibition on such funding or support. Neither the taxes paid nor the funds expended are insubstantial.

COUNT 9

I. THE NAVY'S MANIFEST HOSTILITY TO NON-LITURGICAL CHRISTIAN RELIGIOUS TRADITIONS VIOLATES THE FIRST AND FIFTH AMENDMENTS.

79. The allegations of paragraphs 1 through 78 above are incorporated herein by reference as though pleaded in full.
80. The Navy's illegal religious preference system and its resulting discrimination against non-liturgical Christian chaplains is one aspect of manifest Navy hostility toward non-liturgical Christian religious beliefs in violation of the First Amendment.
81. Comparison of the DMDC with the Corps' chaplain allocations provides irrefutable evidence of the Navy's religious bias and hostility against non-liturgical Christian traditions and faith groups. Although the Navy (and National) membership of

non-liturgical Christian traditions and faith groups exceeds that of liturgical Protestant denominations by a factor of four, the Navy allocates chaplain positions on an irrational and arbitrary basis designed to hinder non-liturgical Christian faith groups.

82. On information and belief, Navy senior chaplains have denied or restricted non-liturgical chaplains' access to Navy facilities for conducting non-liturgical services or have removed them from preaching or conducting religious services solely because they were non-liturgical chaplains.
83. Non-liturgical chaplains have also been criticized and berated for preaching and teaching on truths of the Christian faith and their specific religious tradition.
84. On information and belief, senior Catholic and Protestant liturgical chaplains have attempted to force the general Protestant service, and all Protestant services into a liturgical Protestant mold. Non-liturgical Christian chaplains are required to be able to officiate at liturgical Protestant services, but liturgical Protestant chaplains are not required to know how to or to conduct non-liturgical services.
85. On information and belief, liturgical Protestant and Catholic senior chaplains have purposely given some non-liturgical Christian chaplains lower performance ratings than similarly situated subordinate liturgical Protestant and Catholic chaplains solely on the basis of their religious identification and beliefs and despite evidence of the non-liturgical chaplain's superior performance.
86. The Navy has established two systems of discipline and administration, one for liturgical traditions, and one for non-liturgical traditions. For example, a Catholic priest accused of adultery was referred to the Military Ordinate of his church for investigation and discipline, and then returned to active duty while a non-liturgical Christian chaplain who was accused of child abuse in a divorce proceeding was not allowed back on active duty even though he was found not guilty in a civil trial.
87. The Navy has routinely provided information necessary for chaplain career planning such as post graduate education opportunities to liturgical chaplains while routinely denying the same type of information to non-liturgical Christian chaplains.
88. On information and belief, the Chaplain Corps has retaliated against non-liturgical Christian chaplains who have complained about the "second class" treatment.
89. The fact that the above incidents have taken place and have involved senior Navy chaplains is the logical extension of the Navy Chaplain Corps' institutionalized bias against non-liturgical Christian denominations and faith groups.
90. The Navy's hostility violates the Establishment, Free Exercise and Free Speech Clauses of the Constitution's First Amendment and the equal protection component of the Fifth Amendment's Due Process Clause.

COUNT 10

J. FRAUDULENT CONCEALMENT OF THE EVIDENCE OF PLAINTIFFS' CAUSE OF ACTION

91. The allegations in paragraphs 1 through 90 above are incorporated herein by reference as though pleaded in full.
92. All promotion board members and support personnel take an oath not to divulge the board proceedings unless he or she is released from that oath by the Secretary of the Navy or "higher authority". This secrecy is reinforced by regulations and the Uniform Code of Military Justice.

93. The records of personnel being considered by promotion boards are protected from disclosure or exposure. A chaplain who is not selected by a board for promotion cannot compare his personnel file with other chaplains who have been selected nor know for certain which selectees meet promotion considerations or criteria.
94. The causes of action for a violation of Plaintiffs' rights in and through the chaplain promotion process are "self concealing." The secretive and restrictive nature of the Navy promotion system ensures that misconduct or illegality in the chaplain selection board process is easily concealed from the victims and other outsiders. This is shown by the DOD and Navy Inspector General investigations into the FY 97 and 98 chaplain Commander promotion boards.
95. The ability of the Chief of Chaplains to approve all chaplain members of a chaplain promotion board and his power to retaliate or stifle dissent minimizes the probability that misconduct will be brought to light, such as when the board president becomes overbearing or champions certain candidates for reasons other than the candidate's records, when faith group becomes a promotion consideration, or improper criteria are considered. The DOD and Navy Inspector General investigations into the FY 97 and 98 chaplain Commander promotion boards provide evidence of all of these improprieties and that they remained concealed by the system.
96. The Navy, and the Navy Chaplain Corps in particular, has lied to, misrepresented to, or otherwise misled Plaintiffs and others who have raised questions about the appearance of quotas, faith group prejudice, and/or the fairness or objectivity of the chaplain promotion and SERB processes.
97. Senior Chaplain Corps' officials have consistently maintained that faith group has no part in chaplain promotions and promotions are based solely on military merit. They have said that all chaplains regardless of their faith group, compete for promotions on a level, merit based, playing field when in fact these senior Chaplains have known that faith group was a promotion factor; that the Chaplain Corps promotions were based on faith group quotas; that personal knowledge of the candidate or other non-merit based criteria was more important than military performance for Chaplain Corps promotions; and that the chaplain promotion and accession process was manipulated to ensure liturgical domination of the Chaplain Corps.
98. On information and belief, for religious reasons, including faith group prejudice and promotion of their own faith group and its members, these same senior Chaplain Corps officials have conspired among themselves and others to deny or suppress the rights of Plaintiffs and other non-liturgical Christian chaplains by depriving them of full Navy careers and career opportunities. To accomplish this, these senior chaplains, and other Navy officials, have concealed and denied the prejudice and bias in the promotion process against Plaintiffs, including the Navy's faith group quotas. *See e.g.*, ¶¶ 3.h, i, and I (inquiries met with lies and deception).
99. These same senior Chaplain Corps officials conspired among themselves and others to suppress the rights and limit the influence of non-liturgical Christian chaplains and did so by concealing and denying the prejudicial and biased nature of the Chaplain Corps Selective Early Retirement Boards and the purpose of those boards, i.e., minimize non-liturgical Christian influence while maintaining liturgical control over the Chaplain Corps.
100. Senior Navy Chaplain Corps officials have had a duty to reveal to Plaintiffs and all other class members who have raised questions about the fairness and equity of the promotion process, the true nature of and prejudice in the Navy's promotion and other career related systems. These Chaplain Corps officials have breached that duty.
101. The above actions by the Navy constitute fraudulent concealment which has prevented Plaintiffs and the class from discovering the Navy's illegal prejudice and actions which form the basis for these Plaintiffs' causes of action.⁷ The self concealing nature of the promotion system and/or the Navy's fraudulent concealment has precluded Plaintiffs and their class from seeking timely redress.
102. Plaintiffs have exercised due diligence in attempting to protect their legal rights. The Navy's deception and actions in concealing its prejudice and other illegalities, and the self-concealing nature of the Navy's board processes have prevented Plaintiffs from gaining the necessary information and evidence to bring their claims until the Stafford Report and its

subsequent investigations breached the chaplain promotion system's walls of secrecy and deceit. Since then, Plaintiffs have acted in a timely manner.

103. The Navy's above deception and concealment of its violation of regulatory, statutory and constitutional violations equitably tolls any statute of limitations for claims covered by said concealment until Plaintiffs' discovery of the Navy's wrong and/or, acts as an equitable estoppel against the Navy from arguing that a statute of limitation applies.

COUNT 11

K. Illegal Retaliation

104. The allegations in paragraphs 1 through 103 above are incorporated herein by reference as though pleaded in full.
105. In response to Plaintiffs' exercise of their rights in bringing this lawsuit and/or previously exposing the prejudice, bias, illegality and duplicity in the Chaplain Corps, the Navy has sought to illegally retaliate, punish, harm or otherwise deprive some of these Plaintiffs of their rights and career opportunities.

COUNT 12

L. CONSTRUCTIVE DISCHARGE OF CERTAIN PLAINTIFFS

106. The allegations in paragraphs 1 through 105 above are incorporated herein by reference as though pleaded in full.
107. The Navy has used the realities of the promotion and separation process to make working conditions intolerable for many of these Plaintiffs and other non-liturgical chaplains who have not been selected for promotion so that they would be driven out of the Navy or otherwise be left with no reasonable choice except to leave the active Navy or retire.

COUNT 13

M. VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT

108. The allegations in paragraphs 1 through 107 above are incorporated herein by reference as though pleaded in full.
109. The Navy's above challenged actions illegally burden the religious rights of non-liturgical Christian chaplains and Naval personnel without a substantial government purpose in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000-bb, *et seq.*

COUNT 14

N. DECLARATORY RELIEF PURSUANT TO 28 U.S.C. §§ 2201 AND 2202

110. The allegations in paragraphs 1 through 109 above are incorporated herein by reference as though pleaded in full.
111. There is a bona fide dispute between the Plaintiffs and the Navy concerning whether the above challenged Navy policies violate the Constitution's First Amendment's Establishment, Free Exercise and Free Speech clauses and the Fifth

Amendment's due process (equal protection) clause, the Civil Rights Act, the Religious Freedom Restoration Act, and the DOD and Navy's own regulations.

112. Pursuant to 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights of a party in an actual case and controversy. Plaintiffs seek such a declaration.

COUNT 15

O. A PERMANENT INJUNCTION IS APPROPRIATE UNDER THE CIRCUMSTANCES

113. The allegations in paragraphs 1 through 112 above are incorporated herein-by reference as though pleaded in full.

114. The Plaintiffs have suffered, are suffering and will continue to suffer immediate, severe, and irreparable injury by virtue of the Navy's acts, policies and practices as set forth herein.

115. Unless restrained by this Court, the Navy's future violation of the Plaintiffs' fundamental rights guaranteed by the Constitution's First and Fifth Amendments, the Civil Rights Act, the Religious Freedom Restoration Act and the Navy's own regulations is an absolute certainty based on the Navy's long record and pattern of abuse.

116. The Plaintiffs and the class have no plain; adequate, or complete remedy at law to address the Navy's violations of Plaintiffs' constitutional and statutory rights and the Navy's failure to follow its own and DOD promotion policies. This suit for Injunctive and Declaratory relief is their only means of securing complete and adequate relief. No other remedy would offer the Plaintiffs and the class substantial and complete protection from continuation of the Navy's unlawful and unconstitutional acts, policies and practices.

117. As Plaintiffs do not have an adequate remedy at law, they and on behalf of the class seek injunctive relief against the Navy, ordering it and its personnel to do the following, as detailed below in the prayer for relief.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays for a declaration, injunction and judgment against the Defendants as follows:

A. DECLARATORY RELIEF

Plaintiffs requests that this Court render a Declaratory Judgment that:

1. The following Navy policies and practices are unconstitutional as applied and suppress the Plaintiffs' and the class' fundamental rights secured by the First and Fifth Amendments to the United States Constitution, and that these policies also violate federal Civil Rights laws, the Religious Freedom Restoration Act, and DOD and Navy regulations:

a. The "Third's Policy" and its subsequent evolution or Rules which distribute chaplain allocations between select faith groups or denominations without regard to the Navy's religious needs as evidenced by its religious demographics.

b. The Navy's policies of: i) placing more than one chaplain on chaplain promotion selection board and, ii) allowing the Chief of Chaplains to determine chaplain promotion board or Selective Early Retirement Board members.

c. The Navy's policy of identifying the faith group of each chaplain being considered by a promotion board or Selective Early Retirement Board.

- d. The Navy's hostility to and suppression of non-liturgical alternatives to a liturgical General Protestant service and/or other religious education services, e.g., Sunday School, and the Navy's concomitant endorsement and establishment of an official liturgical General Protestant service and religious education.
 - e. The establishment of systems and rating chains in which chaplains normally rate other chaplains of the same or different faith groups and which have no independent safeguards or provisions to: i) insure religious neutrality in ratings or assignments; or, ii) established criteria to insure denominational considerations or prejudice do not enter into the evaluation.
2. The Navy's policy of treating liturgical chaplains differently than non-liturgical, chaplains in matters of discipline and career opportunity, e.g., unequal opportunity for civil education constitutes unconstitutional government endorsement on one hand and hostility to the Plaintiffs and their class on the other.
 3. The dominance of the Navy's senior ranks and key billets by liturgical Protestant chaplains, out of all proportion to their actual percentages in the Navy, and the concomitant absence of appropriate numbers of non-liturgical Protestant chaplains in those same ranks and billets is:
 - a. The result of the Navy's illegal religious discrimination and bias.
 - b. An illegal endorsement of the liturgical Protestant tradition.
 - c. A violation of the First Amendment.
 - d. An unconstitutional religious patronage system
 4. The Navy's policy and practice of favoring certain religious denominations and discriminating against others in promotion, retention and key billeting decisions, has resulted in an unconstitutional religious test and endorsement of religion, and illegal discrimination in violation of the First and Fifth Amendments, 42 U.S.C. § 1981 and 42 U.S.C. § 2000-bb.
 5. The Navy chaplain selection boards for Lt. Commander through Captain for FYs 1992 through 2001 have been improperly biased with religious discrimination, and that Plaintiffs and members of the class have been unlawfully denied a fair opportunity for promotion in violation of the Constitution, federal statutes, and DOD and Navy regulations; and that the results of such promotion boards are void and the Navy's personnel actions in response to those boards are *ultra vires*.
 6. The Navy's Selective Early Retirement Boards for chaplains have been permeated by religious bias and/or conducted and administered in an unconstitutional manner in violation of the First and Fifth Amendments and the Religious Freedom Restoration Act.
 7. The Navy's policy of bringing former Navy line or Marine officers into the Chaplain Corps after they have met the educational and other requirements for chaplains and then not considering their prior fitness reports as indicative of their past performance and future potential, thus subjecting them to being passed over as non-competitive with their chaplain peers is without any rational basis and a cover for religious discrimination.

B. Injunctive Relief

Plaintiffs do not have an adequate remedy at law, so they and on behalf of the class seek injunctive relief against the Navy, ordering the Defendants, their agents and employees be enjoined from:

1. Further and future discrimination in promotion, career development and duty assignment decisions against non-liturgical Christian chaplains based on their faith group and religious beliefs.

2. Considering or displaying a chaplain's denomination or faith group when he or she is being considered by chaplain promotion selection boards.
3. Applying illegal quotas to chaplains being considered for promotion, retention, career development and duty assignment decisions in violation of the Fifth Amendment's Due Process and Equal Protection provisions.
4. Further and future interference in any manner with the fundamental right to Free Exercise of religion by non-liturgical Christian chaplains and Navy personnel, including access to chapel and other religious and religious education facilities.
5. Further and future interfering in any manner with non-liturgical Christian chaplains' fundamental Free Speech rights including the religious content and viewpoint of their speech.⁸
6. Having more than one chaplain participate on chaplain promotion boards or Selective Early Retirement Boards and allowing the Chief of Chaplains to have a role in deciding who that chaplain is, and having the Chief or the Deputy Chief serve as president of a chaplain promotion board.
7. Identifying the faith group of any chaplain being considered for the Selective Early Retirement Program or other personnel management or career development program except where such identification is needed to further the Free Exercise interests of Navy personnel based on actual and relevant Navy demographics.
8. Limiting Protestant services to a "*liturgical* General Protestant" service when non-liturgical Christians are a majority of the relevant community.
9. Restricting or denying Navy facilities for non-liturgical services or other religious activities where a non-liturgical chaplain (or authorized Lay Leader) is present and there are non-liturgical Navy personnel also present.
10. Having chaplains rate other chaplains, except in exceptional cases based on operational necessity, and only then where there are safeguards to insure that denominational or religious neutrality is maintained and there are established objective criteria for evaluation.
11. Treating non-liturgical chaplains differently than liturgical chaplains in matters of administration, military justice or discipline.
12. Bringing reservists to active duty without a recorded justification as to need based on meeting religious free exercise needs as reflected in the Navy's religious demographics.
13. Subjecting former Navy line and Marine officers to non-selection for promotion by failure to consider their prior records and experience as indicators of past performance and future potential for selection for promotion.

C. AN ORDER

Plaintiffs request that the Court issue and order requiring the Navy to:

1. Eliminate all vestiges of its past religious bias and discrimination in selecting chaplains for promotion and career assignments. For chaplain promotion selection boards, this includes:
 - a. Removal of all reference to a chaplain's faith group or denomination in the selection process unless required to remedy past discrimination or insure that the free exercise needs of the Navy are met.
 - b. Allow only one chaplain to participate on such boards.

- c. Insure that the one chaplain board member is chosen by a neutral system in a religiously neutral manner by Navy officials other than chaplains.
 - d. Provide a system of checks and balances to insure that religion, faith group or denomination does not affect the promotion or career process except to the extent necessary to insure that the Navy's free exercise needs are met.
2. Eliminate all vestiges of religious quotas or categories in the promotion process and establish procedures to ensure that faith group is not a factor unless linked to remedying past discrimination or meeting free exercise needs.
 3. Take all necessary and affirmative actions to immediately:
 - a. Bring the Navy Chaplain Corps, including its current rank structure, into line with the Navy's religious demographics and;
 - b. Adjust and fill Navy Chaplain Corps' key billets in a manner that is religiously non-discriminatory but corrects the current disparity between Chaplain Corps and actual Navy religious demographics and insures that chaplain career assignments are made in a non-discriminatory manner that meets the religious needs of the service.
 4. Energetically and effectively investigate all allegations of religious prejudice by senior chaplains in rating non-liturgical Christian chaplains. Where actual prejudice is found or bias demonstrated, correct the records and remove the prejudice from the affected non-liturgical Christian chaplain's official career file.
 5. Develop new policies and guidelines that:
 - a. Provide approval and support for alternative non-liturgical services that meet the needs of the Navy's non-liturgical religious community at Navy installations, posts, ships and facilities and;
 - b. Insure that such services receive priority or become the General Protestant service where non-liturgicals constitute a majority at the installation, base or facility.
 - c. Correct the Chaplains Corps bias against non-liturgical worship, beliefs and chaplains.
 6. Develop a system to insure that the above reforms are working and effective.
 7. Develop a system to officially record the religious preference of all Navy personnel (The Navy does not now record the religious preference of its officers nor does it recognize Charismatics as a faith group or tradition).
 8. Issue the necessary orders voiding all adverse personnel actions flowing from the Thirds Policy and its progeny and the unconstitutional promotion and Selective Early Retirement Boards described herein, including but not limited to separations, and take other action to remedy the results of the Navy's illegal activities described herein.
 9. Provide instructions to promotion boards that in considering former Navy, Marine or other military officers who have been commissioned in the Chaplain Corps after such service, their prior service and fitness reports shall be considered positively in the promotion process and that they shall not be penalized in the selection process because of such prior service.

D. Attorneys' Fees and Other Relief

1. That this Court award Plaintiffs the reasonable costs and expenses of this action, including attorneys' fees in accordance with the Equal Access to Justice Act, 28 U.S.C. § 2412; the Civil Rights Act, 42 U.S.C. § 1988; the Religious Freedom Restoration Act, 42 U.S.C. § 2000-bb; class action case law and/or any other applicable statute or rule of law or equity.
2. That this Court:

- a. Retain jurisdiction of this matter for the purposes of enforcing the Court's orders;
- b. Appoint a monitor or special master to monitor the Navy's compliance until such time as the Court is satisfied that the violations and injuries challenged herein have been satisfactorily remedied and;
- c. Require the Navy to provide periodic progress reports as to its progress in complying with B and C above.

DATED: September 5, 2000

Respectfully submitted,

<<signature>>

Arthur A. Schulcz, Sr.

Counsel for the Plaintiffs

D.C. Bar No. 453502

2521 Drexel Street

Vienna, VA 22180

703-645-4010

Footnotes

- ¹ Definitions are provided in Section IV, paragraph 7 *infra*.
- ² "Read into every federal statute of limitations *** is the equitable doctrine that in the case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers or by reasonable diligence could have discovered, the basis of the lawsuit." *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977).
- ³ The Navy uses the term "Special Worship" to categorize and denote a small number of Christian and non-Christian faith groups which have unique or special needs for their worship and religious practices. This includes, Jewish, Seventh Day Adventists, Christian Science, Later Day Saints (Mormons), Moslems, Hindu and other religions.
- ⁴ Almost every church has some "order" to its worship, but for these Protestant denominations there is no worship service without the prescribed liturgy. There may be other liturgical denominations, but the ones identified here commonly recognized as such by the Navy, are the largest and most well known.
- ⁵ The Navy supplies chaplains to both the Navy and Marine Corps.
- ⁶ It would be understandable if the Navy's reservation of a promotion board seat for a large denomination was based on a policy to make sure that the religious needs of that denomination were respected. However, the largest Protestant faith group is Baptist, close to the population of the Catholics, *see* Exhibit 3, but no seat is reserved for a Baptist, a low church, non-liturgical denomination.
- ⁷ *See* note 2 *supra*.

8 Plaintiffs recognize that all rights have limits and the First Amendment does not protect religious practices that are hostile to the Constitution or the rule of law. *E.g.*, *United States v. Reynolds*, 98 U.S. 145, 25 L.Ed. 244 (1878); and *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890) (First Amendment did not allow Mormon's to practice polygamy or shield them from prosecution for violation of anti-polygamy laws). These are not issues in this case.