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These Dishonored Dead: Veteran Memorials and Religious Preferences

David Rittgers* †

SOLDIER DEAD

At this moment, two members of the United States Army's 3rd Infantry, The Old Guard, keep watch over the Tomb of the Unknowns in Arlington National Cemetery. These Sentinels pace silently back and forth, marching solemnly at a constant cadence for a distance of twenty-one paces. They stop to turn and face the Tomb for twenty-one seconds, then reverse their course with rigid precision. A ceremonial change of the guard occurs, but the eternal watch never falters, as another pair of stoic Sentinels takes their place. Day and night, rain or shine, they keep a constant vigil as a sharp, biting wind sweeps in from the Potomac. Such is how we honor our dead.

In Soldier Dead, Michael Sledge outlines the burial of soldiers and the efforts to recover their remains decades after the war in which they had fought has ended. On the battlefield, soldiers may bury their

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† Editor's Note: As this issue goes to press, the Department of Veterans Affairs has settled a lawsuit that is a major focus of this Note. As part of the settlement agreement, the Department has added a Wiccan Pentacle to its list of approved symbols for memorial markers. See Neela Banerjee, Use of Wiccan Symbol on Veterans' Headstones Is Approved, N.Y. TIMES, Apr. 24, 2007, at A21. Although the controversy surrounding the specific headstone markers discussed in this note has now been resolved, the legal analysis herein remains relevant as to service members who may seek the Department's approval of additional religious headstone symbols in the future.
2. Id.
3. Id.
dead out of necessity due to hygiene concerns for the surviving members of the unit.\(^5\) However, the motivation for burials at the front line often goes beyond practical concerns, where soldiers have either buried or refused to leave the bodies of their fallen comrades behind at the risk of their own lives.\(^6\) Marines did this at Iwo Jima, working to bury their dead during battle.\(^7\) Army Rangers and Delta Force Operators in Somalia likewise refused to leave the bodies of helicopter pilots behind while fighting a pitched battle in an urban area against overwhelming numbers of local militiamen.\(^8\) The moral obligation that soldiers feel to recover and honor their fallen comrades is linked to the morale of the survivors, to remove the randomness of death on the battlefield and restore order to chaos, even if in a limited sense.\(^9\) Author Barbara Ehrenreich has suggested that the instinct to bury the dead goes back 150,000 years, and may be rooted in an effort to deny our corpses to our natural predators, a remnant of a time when humans were not at the top of the food chain.\(^10\) "[T]o bury the human dead is to cheat the beasts: to refuse, even in death, to accept the status of prey."\(^11\) Long after battles and wars have ended, Americans have sought to recover and honor the dead for other reasons. In pursuit of forensic analyses of the causes of death, to provide closure for the families of the fallen, and as a matter of national pride, to this day we continue recovery of World War II, Korean War, and Vietnam veterans’ remains.\(^12\)

Soldier Dead is not always unknown, and not all receive the same honors. Sergeant Patrick Stewart, 35, of the Army National Guard’s 113th Aviation Regiment, was killed in action with four other soldiers when their CH-47 Chinook transport helicopter crashed on September 25th, 2005 southwest of Deh Chophan, Afghanistan, in support

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7. \textit{Id.} at 17.
11. \textit{Id.} at 79 (alteration added).
12. See Sledge \textit{supra} note 4, at 8-29, 268-296.
of Operation ENDURING FREEDOM. Sergeant Stewart made his final sacrifice at the "tip of the spear," in a hostile region of Afghanistan that has been hotly contested almost since the Taliban's initial defeat. He is one of thousands of American service members killed in action during military operations in Iraq and Afghanistan, but he was not treated the same as his fellow soldiers. Sergeant Stewart was a Wiccan, an adherent of the nature-focused "modern witchcraft" known as Wicca. His wife, Roberta, requested a distinctive Wiccan symbol for his marker on the memorial wall at the Northern Nevada Veterans Memorial Cemetery, but the Department of Veterans Affairs denied that request. Nearly a year after Sergeant Stewart's death, the Nevada Attorney General's office determined that the Nevada Office of Veterans Services, and not the federal government, had the authority to grant a plaque that recognized the Wiccan religion. This Nevada action provided Sergeant Stewart with a Pentacle, an upright five-pointed star within a circle.

Federal regulations currently provide for eligible veterans to receive a headstone or memorial marker at the government's expense. Only those who died in active service, their surviving spouses or minor children, or those whose service entitles them to retirement pay are eligible for burial in National Cemeteries and receipt of a government-supplied headstone. The Department of Veterans Affairs controls veterans' memorial markers through its subordinate National Cemetery Administration, overseen by the Under Secretary for Memorial Affairs.

15. Sean Whaley, Sergeant's Space Left Blank, LAS VEGAS REVIEW-JOURNAL, Mar. 2, 2006, at 1A.
17. Id.
19. 38 C.F.R. § 38.620.
20. 38 C.F.R. § 2.6(f).
Inscriptions on headstones or markers must be in accordance with the Under Secretary for Memorial Affairs' policies. The entitlement is not without limits, and only some religions have representative symbols available. To receive such a symbol, the family of a fallen veteran must request it through a standardized government form. This form offers thirty-eight different religious markers for different faiths, accommodating Christians, Buddhists, Jews, Muslims, Sikhs, and Hindus. Wiccans have no symbol that is recognized by the Department of Veterans Affairs, though the National Cemetery Administration has approved symbols to represent atheists and humanists.

Though Sergeant Stewart received his Pentacle, the pursuit of his cause endures. It was a state, not federal, action that granted him a Wiccan religious symbol for his marker on the memorial wall. No federal action has been taken that would grant future Wiccan service members memorial recognition of their faith in the current federal veterans' entitlements.

Thus, the First Amendment controversy implicit in federal refusal to honor Wiccan soldiers with distinctive memorial markers is still very much alive. Americans United for the Separation of Church and State, along with two Wiccan groups, Circle Sanctuary and the Isis Invicta Military Mission, recently filed a complaint in the United States District Court for the Western District of Wisconsin. The American Civil Liberties Union has also filed a complaint in the United States Court of Appeals for Veterans on behalf of three similarly-situated Wiccan petitioners. The ACLU brief alleges unwarranted procedural delays in approving a 1997 application for Wiccan memorial markers, pointing out that several other religions have recently been awarded

21. 38 C.F.R. § 38.630(b).
23. See id. at 4.
24. See id.
25. See id.
emblems to represent their faiths while Wiccans have received neither approval nor disapproval of the Pentacle.  

“Wicca” refers to “an initiatory Pagan religion developed by Gerald B. Gardner” or “[a]ny new Pagan religion inspired by, similar to, or developed from ‘Gardnerian’ Wicca, generally including invocation of a male and female deity in a ritual circle marked by four quarter points, and following a ritual calendar with eight holy days (‘Sabbats’).”

Gardner was a British civil servant who published the seminal works *Witchcraft Today* in 1954 and *The Meaning of Witchcraft* in 1959. Wicca has been recognized as a religion in federal courts.

Department of Defense statistics indicate that there are more than 1,800 self-identified Wiccans currently serving in our armed forces. The religion is sufficiently popular with soldiers that Wiccan services are included in chaplain-published worship schedules at Army troop installations such as Fort Bragg, North Carolina, Fort Hood, Texas, and Fort Polk, Louisiana. The Department of Defense mentions Wicca in its support literature for chaplains, including special guidelines for accommodating the religion.

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This Note analyzes the potential First Amendment claims of members of Wiccan or other religious minority groups. Part I asks

35. This Note does not address Free Speech claims because they are unlikely to succeed. Generally, religious speakers can pursue a claim under Free Speech rights. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (holding religious speech may be as protected under Free Speech standards as secular private expression). The application to government-provided headstones for veterans is less promising. If viewed in a military environment, the need for discipline in a military setting has consistently defeated Free Speech claims by service members. See generally Parker v. Levy, 417 U.S. 733 (1974) (holding that an army officer’s conviction for criticism of the Vietnam conflict and encouraging African-American soldiers to refuse assignments there did not impermissibly burden his Free Speech rights); United States v. New, 55 M.J. 95, 124 (2001) (holding proper a soldier’s conviction for disobeying an order to wear his uniform with United Nations accoutrements); United States v. Wilson, 33 M.J. 797 (1991) (holding that disciplining a military policeman for blowing his nose on the American flag did not violate his Free Speech rights).


The “limited public forum” class of cases may seem attractive to petitioners, on the theory that headstones and memorial plaques, taken collectively, are limited public forums, forums that are non-public except for specified uses. Under this theory, the Supreme Court has invalidated measures in educational settings that excluded parties that intended to express a religiously-guided viewpoint. See, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school district could not bar a Bible-study class for children when it allowed access to its facilities for secular civic groups); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that a public university could not deny funds for a student journal because the viewpoint expressed was religious in nature); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that a school district could not bar a church from showing films on child-rearing on school property when secular groups met there for parallel civic purposes). A federal district court has found that cemeteries are not limited public forums. See Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999) (holding that a city
whether the denial of a distinctive symbol on memorial plaques accord with the Free Exercise rights of Wiccan soldiers. Part II identifies the Establishment Clause issues raised when the government recognizes some religions and specified sects for memorial markers but not others. This Note finds that the current denial of a distinctive marker to Wiccan service members violates both the Free Exercise and Establishment Clauses.

I. FREE EXERCISE OF RELIGION FOR WICCAN SOLDIERS

The claim of a Wiccan petitioner is at heart a Free Exercise issue: recognition of a service member's chosen religious faith, after the soldier's passing. But as with other First Amendment claims, Free Exercise has a different standard in the military context as opposed to the civilian context. This section first explores the standard applied to Free Exercise claims in the military. Finding the underlying rationale for this standard inapplicable to headstone engravings, this Note then explores the claim of Wiccan petitioners under mainstream Free Exercise jurisprudence.

A. Goldman v. Weinberger and Deference to Military Regulations

There is considerable precedent establishing the proper balance between the rights of service members to practice their religions and the need for military chains of command to maintain discipline within their ordinance mandating ground-level headstones for ease of grounds-keeping did not violate Free Speech or Free Exercise rights, and that no relief was available under limited public forum doctrine).

A court reviewing Free Speech claims will find that memorial symbols on government-provided headstones—many placed in National Cemeteries owned and operated by the federal government—are not limited public forums. The display of a religious symbol on stone, meant to weather the elements for centuries, is not analogous to temporary after-school access to a classroom. This is a private forum that has traditionally been used to accommodate religious beliefs of deceased veterans, and a Free Speech claim will likely fail.

36. This Note assumes that the family members of the fallen soldiers have standing to bring First Amendment challenges. While lack of standing may present a barrier for litigation, this Note focuses on the merits of potential First Amendment claims. A full exploration of standing is beyond its scope.
ranks. As former Supreme Court Chief Justice Earl Warren once noted, “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.”37 On the other hand, military court decisions have consistently held that service members sacrifice certain individual liberties during active service.38 A World War II-era Supreme Court case affirmed the latter principle, pointing out: “those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.”39

In the modern landmark case, Goldman v. Weinberger,40 the Supreme Court further affirmed that service in the military restricts the Free Exercise rights of service members. Goldman, an Orthodox Jew and ordained rabbi who was then serving as an Air Force psychologist, refused to remove his religious head covering while working at a military hospital in violation of regulations that required most service members to remove hats or head coverings indoors.41

At the time,42 a restriction on wearing religious apparel normally would have been evaluated under the strict scrutiny standard in Sherbert v. Verner.43 Goldman argued for such an analysis, but the Supreme Court refused, distinguishing military service members’ rights from those of the general public:44

38. See, e.g., United States v. Burry, 36 C.M.R. 829 (1966) (holding that a member of the Coast Guard may be compelled to work on his Saturday Sabbath in contravention of his religious beliefs); United States v. Chadwell, 36 C.M.R. 741 (1965) (holding a marine could be disciplined for refusing to receive inoculations, pursuant to his religious convictions).
40. 475 U.S. 503 (1986).
41. Id. at 505.
42. A claim of this type would be analyzed under a different standard today. See Employment Div. v. Smith, 494 U.S. 872 (1990); infra notes 72-80 and accompanying text.
43. 374 U.S. 398 (1963) (holding that a Seventh-Day Adventist who was fired for her refusal to work on Saturday could not be denied unemployment compensation because this would unfairly burden her ability to practice her religion).
44. Goldman, 475 U.S. at 506-07.
Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster distinctive obedience, unity, commitment, and esprit de corps.\(^\text{45}\)

The Goldman Court then affirmed the decision barring Goldman from wearing his yarmulke while on-duty.\(^\text{46}\) The Goldman precedent has since been used to affirm command decisions curtailing various individual freedoms of service members—religious and otherwise.\(^\text{47}\) Congress responded to Goldman by revising federal statutes, which now allow members of the armed forces to wear an item of religious apparel while wearing their uniforms unless “the wearing of the item would interfere with the performance of . . . military duties or . . . the item of apparel is not neat and conservative.”\(^\text{48}\)

More recently, military courts have imposed reasonable restrictions on the practice of Wicca in certain circumstances. In United States v. Phillips,\(^\text{49}\) a military court heard the case of a Wiccan soldier who claimed to be the victim of unconstitutional Free Exercise restrictions while incarcerated. Army Specialist Phillips was denied access to religious paraphernalia during a pre-trial confinement for drug charges.\(^\text{50}\) Because the case involved a soldier stationed at Fort Bragg, North Carolina, the court looked to a Fourth Circuit ruling, Dettmer v.

\(^{45}\) Id. at 507.  
\(^{46}\) Id. at 510.  
\(^{47}\) See, e.g., United States v. Lugo, 54 M.J. 558 (2000) (holding prohibition of male military members wearing earrings was a “lawful general order”); United States v. McDaniels, 50 M.J. 407 (1999) (holding a commander’s order to a narcoleptic marine not to drive his personal vehicle was proper).  
\(^{48}\) 10 U.S.C. § 774(a)-(b) (2000).  
\(^{49}\) 42 M.J. 346 (1995).  
\(^{50}\) Id. at 347
Landon, for precedent on the Free Exercise rights of Wiccans in a confinement setting. Herbert Dettmer, an inmate at the Powhatan Correctional Center, had requested a robe, candles, incense, a kitchen timer to wake him from meditation, a hollow statue of a deity to "store spiritual power called down during meditation," and sulfur or sea salt to "draw a protective circle on the floor around him." Dettmer also requested a lockbox so that prison officials could secure the items when not in use. The government argued that Wicca was not a religion, and that even if it was, Dettmer's rites were "more akin to meditation" rather than religious practices. The Fourth Circuit disagreed, ruling that Wicca occupied a place in the lives of its practitioners "parallel to that of more conventional religions." The court held that accommodations that took into account legitimate security concerns were required. It further ruled that while security concerns regarding candles, incense, and salt provided a basis for exclusion, all prisoners had access to bathrobes or boxing robes, watches, and clocks. Thus, accommodating these requests posed no legitimate security concerns.

Following Dettmer, the Phillips court held that Wicca was a religion recognized by both the Department of Defense and the Court of Appeals for the Fourth Circuit, but that the petitioner's access to certain religious paraphernalia, such as a ceremonial knife, could properly be denied in a confinement setting. This approach to restrictions on confined persons puts Wicca in the same stead as other religions: it is a recognized and permitted religion that is subject to reasonable security restrictions.

The request for memorial recognition on behalf of deceased Wiccan service members can be distinguished from both Goldman and

52. Id. at 930.
53. Id.
54. Id. at 932.
55. Id.
56. Id. at 933.
57. Id. at 933-34. The prison officials feared that sulfur or its substitutes could be used to make an explosive, that candles could be used as timing devices and to make impressions of keys, and that incense could be used to mask the odor of marijuana. Id.
The petitioners would not be asking for an exception to a rule of general applicability based on their religious convictions; rather they would be asking for their religious convictions to be treated the same as those of other religions or denominations. Specifically, any petitioner would be asking for the equivalent memorial recognition that is already afforded other service members.

The practice of honoring Soldier Dead is as old as organized warfare itself. Many American formalities find their origins in Greek and Roman practices. Thucydides gave an account of the treatment of fallen soldiers involving a three-day wake for the dead, and a funeral procession where the bones of the fallen moved from a public display tent to burial sites, with an additional empty coffin in the procession to represent the bodies that could not be recovered. A visitor to Arlington National Cemetery can find a similar display at the Tomb of the Unknowns. Traditional honors at military funerals consist of uniformed pall bearers, a firing party, a bugler, and a chaplain to provide rites. The custom of firing three volleys over the grave of a fallen warrior comes from Roman funeral rites that called for the casting of dirt across the body three times, calling the dead by name three times, and bidding the deceased farewell aloud three times. More recently, the firing of three musket volleys announced that the burying of the dead was complete and the burial detail was ready to return to duty. Congress’s desire to provide traditional symbolism for all deceased veterans prompted a pilot program for the Ceremonial Bugle, an audio

59. See SLEDGE supra note 4, at 233-34.
60. See GEORGE W. DODGE, ARLINGTON NATIONAL CEMETERY: IMAGES OF AMERICA 71-73 (2006). The Tomb of the Unknown Soldier was initially filled with the remains of a man killed in France in World War I. Sergeant Edward F. Younger, a Distinguished Service Cross recipient, was given the honor of choosing the remains that would be interred. Four sets of remains retrieved from military cemeteries in France were gathered in a chapel, and Sergeant Younger selected the remains by placing a bouquet of roses atop one of the coffins. Sergeant Younger is interred at Arlington National Cemetery, Section 18, Lot 1918-B, Grid LM-12/13. See id. at 128.
61. See U.S. DEP’T OF DEF., REPORT TO CONGRESS ON MILITARY FUNERAL HONORS FOR VETERANS FOR FISCAL YEAR 1999 at 9.
62. Id. at 2.
63. Id.
device placed in the bell of a trumpet.\textsuperscript{64} Considered more dignified than a cassette player, it is programmed to play taps and obviates the need for trained buglers at all military funerals.\textsuperscript{65} Since 1918, the coffins of Army veterans have been covered with American flags that are ceremonially folded and given to the soldiers’ next of kin following the funeral service.\textsuperscript{66}

Given the history and nature of a military funeral and the symbolism fundamental to it, it is difficult to evaluate the refusal of a memorial marker to Wiccan veterans in the same light as requests to wear religious clothing while serving on \textit{active duty} or requests for access to ceremonial knives in a \textit{detention setting}. It seems clear that the governmental interest is not to enforce a rule of general applicability that maintains discipline at the expense of individual liberties, but instead to accommodate as many religions as practicable to encourage sacrifice for the nation and valor in battle. The discipline required to maintain an operational military or a secure prison is simply not required in the graveyard. Therefore, judicial review of this selective denial of religious markers to Wiccan veterans warrants consideration under mainstream Free Exercise Clause standards.

\textit{B. Review Under Mainstream Free Exercise Standards}

Rules of general applicability are also applied in mainstream First Amendment jurisprudence, and the government would likely argue that the current Veterans Administration requirements for religious symbols on memorial markers are such rules. In response, Wiccan petitioners have three potential arguments. First, if the government has established a rule of general applicability, then the petitioners have complied with it and there is no reason to bar their approval. Second, the revisions of Veterans Administration requirements for approval of a new symbol are aimed at excluding Wiccans and thus render this governmental practice facially neutral but discriminatory in nature. Third, the provision of religious symbols recognizing specified sects is

\textsuperscript{64} See \textsc{U.S. Dep't of Def., Report to Congress on Military Funeral Honors for Veterans for Fiscal Year 2004} at 13.

\textsuperscript{65} Id.

\textsuperscript{66} See \textsc{1999 Report to Congress, supra note 61} at 3.
not a rule of general applicability, and this case should be decided on Establishment Clause grounds.

1. Arguing Within the Rule of General Applicability Framework

Assuming arguendo that the current system of selecting a symbol for a memorial marker is a rule of general applicability, the current petitioners may still prevail. The history of Free Exercise jurisprudence is predominantly one of a plaintiff asking for a religious exemption from blanket laws or regulations. In *Sherbert v. Verner*, the Supreme Court held that a Seventh-Day Adventist who was fired for her refusal to work on Saturday could not be denied unemployment compensation because such an action would unfairly burden her ability to practice her religion.\(^{67}\) The plaintiff in *Goldman v. Weinberger* sought, but did not obtain, such an analysis to authorize his yarmulke.\(^{68}\) Under the Supreme Court’s holding in *Wisconsin v. Yoder*,\(^{69}\) analysis of a Free Exercise claim is a balance of the plaintiff’s and the government’s interests. The *Yoder* plaintiffs were Amish and Mennonite parents who sought an exception to a state statute mandating high school attendance until the age of sixteen.\(^{70}\) The *Yoder* analysis balances the burden placed on a plaintiff’s sincere Free Exercise claim against the government’s claim that its interest outweighs the plaintiff’s interests, and that allowing an exception undermines the governmental policy.\(^{71}\)

The dominant modern case governing a rule of general applicability in conflict with a Free Exercise claim is *Employment Division, Dept. of Human Resources of Oregon v. Smith*.\(^{72}\) The plaintiffs in *Smith* were fired from their jobs at a private drug rehabilitation facility because they ceremonially ingested peyote in conjunction with the sacraments of the Native American Church, of which both were members.\(^{73}\) The plaintiffs were subsequently denied unemployment compensation by the defendant state administration because they had

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68. See supra notes 40-46 and accompanying text.
70. Id. at 207
71. Id. at 214-29.
73. Id. at 874.
been terminated for work-related misconduct. 74 Oregon courts held that the denial of benefits violated the Free Exercise Clause. 75 The United States Supreme Court reversed. It held that generally applicable laws enacted pursuant to state police powers to not offend the First Amendment, and that invalidation of a law hinges on whether the law’s object is to burden or prohibit the exercise of the religion. 76 Allowing citizens to assert religious beliefs as valid excuses to disobey the laws of the state would ultimately “permit every citizen to become a law unto himself.” 77 Smith also required a hybrid constitutional claim to defeat a rule of general applicability—the intertwining of a Free Exercise claim with another fundamental right. 78 Thus, claims such as those asserted by the Amish parents in Yoder—a right to raise their children, coupled with a Free Exercise claim—could trump a rule of general applicability. 79 It must be noted, however, that the requirement of a hybrid Free Exercise claim may limit the usefulness of Smith in the instant case. Federal courts have already ruled that there is no fundamental right to serve in the military. 80

The current rule of general applicability regarding memorial markers states that “[n]o graphics (logos, symbols, etc.) are permitted on Government-furnished headstones or markers other than the approved emblems of belief, the Civil War Union Shield, the Civil War Confederate Southern Cross of Honor, and the Medal of Honor insignias.” 81 This rule already allows for stars (Star of David, Emblem #03; Bahai nine-pointed star, Emblem #15; Muslim Crescent and Star, Emblem #17) and specifically five-pointed stars (Islamic Five-Pointed Star, Emblem #98). 82 Presumably, the Wiccan Pentacle is not so

74. Id.
75. Id. at 874-75.
76. Id. at 877-79.
77. Id. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).
78. Id. at 881.
79. Id.
80. See, e.g., Mack v. Rumsfeld, 784 F.2d 438 (2d Cir. 1986) (holding that an Army and Air Force policy barring the enlistment of single mothers was constitutional because of the logistical impediment to deployment for combat).
82. See id.
different from existing emblems that it cannot be reviewed for approval or disapproval by governing authorities. If there is a reason to disapprove the Wiccan Pentacle for use on headstones and memorial markers, it must be due to a failure to fulfill the religious and denominational requirements for recognition.

The plaintiffs’ briefs in both the Veterans Claims and Wisconsin courts\(^83\) allege that previous applications by Wiccan groups worked to meet every requirement for entry into the Veterans Administration pantheon. The Veterans Claims plaintiffs include the Aquarian Tabernacle Church (ATC).\(^84\) ATC, through its Archpriest, the Right Reverend Pierre C. Davis, a/k/a Pete Pathfinder Davis, first applied for admission of the Wiccan emblem of belief on August 27, 1997.\(^85\) Rev. Davis alleges that he received no feedback on his application until November 27, 2001, when the Secretary of Veterans Affairs wrote to inform him that the Veterans Administration was currently revising its regulations regarding new emblems of belief.\(^86\) The plaintiffs’ brief in the Wisconsin case includes the Isis Invicta Military Mission as plaintiffs, a group that caters specifically to Wiccans serving on active duty.\(^87\) Rev. Rona Coomer-Russell, the priestess of Isis Invicta, applied for an emblem in September 1998.\(^88\) Rev. Coomer-Russell received messages from Veterans Administration officials promising future feedback on the application and revisions of the rules regarding memorial emblems. She filed a total of three separate applications as revisions were announced.\(^89\)

The Wisconsin plaintiffs’ brief tracks the revisions of Veterans Administration regulations in 2001 and 2005.\(^90\) The 2001 revision allowed for the Department of Veterans Affairs to consider requests for emblems of belief not on the approved list. To be considered, requests

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83. *See supra* notes 26-28 and accompanying text.
85. *Id.* at 8.
86. *Id.* at 9.
87. Complaint, Circle Sanctuary et al. v. Nicholson at 6, No. 06-C-00600 (W.D. Wis., Nov. 13, 2006).
88. *Id.* at 14.
89. *Id.* at 14-16.
90. *Id.* at 11-14.
must be in writing, be accompanied by a letter approving of the symbol signed by the recognized head of an affiliated congregation, and include a copy of the requested emblem.91 The 2005 revision took into account the need to process an application for a recently-deceased eligible veteran.92 This revision also included requirements that the belief or faith system be comprehensive in nature, address the fundamental and ultimate questions of life and man’s purpose, have an organized group of substantial membership, have ceremonial functions, holidays, clergy, and other outward characteristics of religion, and not promote activity that is illegal or contrary to public policy.93

The current plaintiffs can satisfy all of these requirements. Recall that the Fourth Circuit ruled in Dettmer v. Landon that the Church of Wicca occupied a place in the lives of its members parallel to more conventional religions, answered questions concerning the ultimate nature of existence and man’s role in it, and had practitioners who worshipped separately and in group ceremonies of some formality.94 The requirement for a substantial group of followers is met by Circle Sanctuary, which claims to have more than 54,000 members in the United States and publishes a religious periodical that provides readers with spiritual guidance. Its founder, Rev. Selena Fox, advised the Army to include in its updated Chaplain’s Handbook information on the Wiccan faith and accommodations that Wiccan soldiers might require.95 Rev. Selena Fox is not only the recognized head of a Wiccan congregation, but is also a religious leader that the Army itself has sought out for guidance on accommodating Wicca. The mandate for holidays is met by Wicca’s ritual calendar and its eight Sabbats.96 The requirement that the religion not promote activity that is illegal or contrary to public policy seems handily met by the fact that the military allows Wiccans to serve in combat and has attempted to accommodate their faith while on active duty here and abroad.

Wiccan compliance with the guidelines for approval of an emblem of belief as detailed above requires governmental recognition on

91. Id. at 12.
92. Id.
93. Id. at 13.
94. See Dettmer v. Landon, 799 F.2d 929, 931-33 (4th Cir. 1986).
96. See CLIFTON, supra note 29, at 172.
memorial markers. 97 Short of a judicial finding that Wicca does not constitute a religion—contrary to what other reviewing courts have found—the Wiccan applicants make a solid case that they have complied with the requirements for an emblem of belief. The timing of the changes raises the question of whether they were directed at excluding Wicca, a topic addressed in the next section.

2. Facially Neutral Discrimination and Procedural Barriers to Wiccan Recognition

Not all rules of general applicability are given the same amount of deference by a reviewing court. Laws or ordinances that are facially neutral but directed at impacting a specific religious group may be more easily overturned. The Supreme Court dealt with such a measure when it invalidated a municipal ordinance in Lukumi Babalu v. City of Hialeah. 98 The plaintiffs in Lukumi Babalu were practitioners of Santeria, a fusion of traditional African and Roman Catholic beliefs. Upon hearing that the church intended to move to Hialeah, the defendant Florida municipality enacted an ordinance that banned the killing of an animal in a ritual, regardless of whether or not the animal was subsequently consumed, with an express exemption for the commercial slaughter of hogs or

97. It should be noted that the above discussion assumes a direct denial of Wiccan groups’ applications. However, the Wiccan plaintiffs do not allege an outright denial of their application. The Wiccan plaintiffs may have to prevail on a claim of denial of process in the continued Veterans Administration revision of its regulations and failure to provide a response to Wiccan applicants. Such an analysis is outside of the intended focus of this Note, but unreasonable delay has compelled federal courts to order an administrative decision in the past. See Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (holding that the D.C. Circuit Court had exclusive jurisdiction over the Civil Aeronautics Board and compelled unreasonably delayed agency findings). But see Air Line Pilots Ass’n Int’l v. CAB, 750 F.2d 81 (D.C. Cir. 1984) (holding that while the court had the power to review a final agency action, the action was not final and the court accepted agency’s assurances that it was moving to resolve the matter in question). Also note that as a matter of procedure, the Federal District Court for the Western District of Wisconsin may find that exclusive jurisdiction to resolve the matter properly resides in the Court of Veterans Appeals and combine the action with the set of plaintiffs in that court by virtue of the All Writs Act. See 28 U.S.C. § 1651 (2000).

THESE DISHONORED DEAD

The Court found that the ordinance, though ostensibly aimed at public health and safety concerns and facially neutral, intended to discriminate against Santeria worshippers and thus violated the Free Exercise Clause.\footnote{Id. at 526-27.}

The efforts by Wiccan parties over a nine-year period to comply with the Department of Veterans Affairs requirements for a symbol, while other symbols have been approved, can move analysis of this issue out of the category of a rule of general applicability and into that of a facially neutral but discriminatory measure. While Wiccan applicants have received no response, the Veterans Administration has approved six emblems of belief since the implementation of the 2001 revisions. According to a letter from Under Secretary for Memorial Affairs William F. Tuerk, emblems for Christian, Humanist, Presbyterian, Izumo Taishakyo, Soka Gakkai, and Sikh veterans have been approved since 2002.\footnote{Id. at 546-47.} The Sikh emblem was approved on an expedited basis for a soldier recently killed in combat.\footnote{Complaint, Circle Sanctuary v. Nicholson, supra note 87, at 25-26} Meanwhile, requests for expedited process on Wiccan applications for three pending funerals, including the funeral of Sergeant Stewart, have proven unsuccessful.\footnote{Id. at 18-21.}

To win on a challenge under \textit{Lukumi Babalu}, Wiccan plaintiffs will be required to substantiate that the 2001 and 2005 revisions to the Veterans Administration guidelines for emblems of faith were specifically intended to exclude Wiccan applicants. The timing of the revisions, while Wiccan applications for a memorial symbol waited in limbo, may give a court reason to believe that this new set of hurdles was emplaced specifically to prevent the approval of a Wiccan symbol. The 2005 revision’s requirement for an organized group of substantial membership may have been aimed at Wicca’s relatively small number of followers and the customary limitation of thirteen adherents for each Wiccan coven. As stated previously, the addition of the Circle Sanctuary group to the application process undermines this objection on its face.

In light of Veterans Administration revisions that may be aimed at excluding previous Wiccan applicants, a court may find that those

\footnote{Id. at 526-27.} \footnote{Id. at 546-47.} \footnote{Complaint, Circle Sanctuary v. Nicholson, supra note 87, at 25-26} \footnote{Id.} \footnote{Id. at 18-21.}
revisions are facially neutral but discriminatory measures. The Wiccan plaintiffs' single most persuasive argument is that easy and expedited approval of other religions has occurred while Wiccans have waited. Unfortunately, there is no extrinsic evidence of such a motivation as there would be with the legislative history of a suspect statute. In this category of argument, a victory for Wiccan plaintiffs can only come through the discovery of prejudicial motives within the Veterans Administration and thus cannot be determined within this Note.

3. Not a Rule of General Applicability

Petitioners can argue that the process that next of kin go through to request a religious symbol from the Veterans Administration is not a rule of general applicability. In contrast to a law or regulation that speaks without regard to religion—such as a requirement to send children to public schools or obey state narcotics statutes—this is a unique practice where the state is in contact with religious congregation and sect leaders for the purpose of providing symbolic recognition at taxpayer expense. In *Katcoff v. Marsh*, 104 the Second Circuit faced such a taxpayer challenge to the Army Chaplaincy, another institution that explicitly recognizes religions and sects, on the basis that it created an establishment of religion. The court cited the Supreme Court's recognition that barring the presence of military chaplains would create a Free Exercise Clause problem.105 The *Katcoff* court further held that the raising of an Army creates an affirmative obligation "to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them."106 If a reviewing court determines that this is a special category of Free Exercise accommodation that mandates actions that would be unconstitutional establishments of religion in nearly any other context, then analysis could be constrained to Establishment Clause holdings. Thus it is necessary for this Note to consider the Establishment Clause.

104. 755 F.2d 223 (2d Cir. 1985).
105. *Id.* at 234-35 (discussing Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963)).
106. *Id.* at 234.
II. THE ESTABLISHMENT CLAUSE AND EMBLEMS OF BELIEF

The broad range of Establishment Clause rulings provides a virtual grab bag of holdings, many of them context-specific and a great number of them gaining and losing favor over time with the Supreme Court. As Professor Steven Gey points out, there are no less than ten different standards floating in the stream of Establishment Clause jurisprudence. This section first explores the propriety of using government funds to provide religious symbols on headstones, then it looks at the issues presented by allowing recognition of some symbols but not others.

A. Is Providing Religious Symbols on Headstones an Establishment of Religion?

How does the practice of providing, at taxpayers’ expense, headstones emblazoned with religious symbols etched in stone fare under the Establishment Clause? This question may be answered by analogy. Before any Army veteran is honored with a headstone or memorial plaque, he or she may receive funeral rites from one of the government-employed clergy serving as chaplains to American soldiers stationed at home and abroad. The institution of military chaplains provides a unique tool to analyze the issue at hand, in that it recognizes religious and denominational beliefs and affiliations in a military setting and has been subjected to significant judicial scrutiny in federal courts. Congress has specifically authorized this activity by statute, describing a corps of religiously-trained officers composed of a Chief of Chaplains and subordinate officers. Chaplains provide religious services for the commands to which they are assigned and perform burial services for soldiers who die while serving under that command.

It is fair to question how the military can employ clergymen without violating the Establishment Clause. Traditionally, such Establishment Clause claims have been subject to the three-prong test

enumerated by the Supreme Court in *Lemon v. Kurtzman.*110 “First, the statute must have a secular legislative purpose; second, the principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”111 At issue in *Lemon* were Pennsylvania and Rhode Island statutes that subsidized teacher salaries at private religious schools.112 If subsidized parochial education is unconstitutional, how can employing active-duty military clergy be permissible?

In *Marsh v. Chambers,*113 the Supreme Court distinguished government chaplains from other areas of Establishment Clause analysis. The plaintiff in *Marsh v. Chambers* challenged the Nebraska unicameral legislature’s practice of employing a chaplain to open each legislative session with a prayer.114 The Eighth Circuit Court of Appeals had strictly applied the *Lemon* test, finding that the chaplaincy practice violated all three prongs of the test.115 The Supreme Court reversed, stating that efforts “[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”116 In rejecting arguments that several Founding Fathers would not approve of the practice, the Court stated:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each house and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.117

110. 403 U.S. 602 (1971).
111. *Id.* at 612-13 (internal citations omitted).
112. *Id.* at 606-11.
114. *Id.* at 784.
115. See *Chambers v. Marsh,* 675 F.2d 228, 234-35 (8th Cir. 1982).
116. *Marsh,* 463 U.S. at 792 (alteration added).
117. *Id.* at 790.
Military chaplains have also enjoyed explicit exemption from mainstream Establishment Clause standards. In *School District of Abington Township v. Schempp*, the Supreme Court held devotional Bible readings in public schools impermissible but expressly limited its ruling:

> We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.

Because of this express exemption, fundamental accommodations of religious expression in the military—such as worship services for members of the armed forces and burials that chaplains are required to consecrate—are not viewed in the same light as other questioned practices.

The Second Circuit explored a challenge to the Army's chaplaincy in *Katcoff v. Marsh*. In *Katcoff*, plaintiff taxpayers filed suit claiming that the Army's chaplaincy program fostered excessive entanglement with religion and therefore violated the Establishment Clause. The *Katcoff* court recognized that, viewed in isolation, the Army's chaplaincy would fail a challenge under the standards put forth in *Lemon*. However, the court rejected strict application of the *Lemon* standards, reasoning that the Establishment Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Citing *Marsh v. Chambers*, the *Katcoff* court found the Army's Chaplains Corps permissible. The Second Circuit also viewed the

119. Id. at 226 n.10.
120. 755 F.2d 223 (2d Cir. 1985).
121. Id.
122. Id. at 232.
123. Id. at 233 (quoting Lynch v. Donnelly, 465 U.S. 668 (1984)).
124. Id. at 232.
Army's chaplaincy as a proper exercise of Congress's power to raise armies. Paralleling the Supreme Court's review of early congressional actions, the Katcoff court viewed the establishment of the military chaplaincy both before and contemporaneous with the adoption of the Establishment Clause as "weighty evidence" that the drafters of the Constitution did not see military religious activities as impermissible state establishments of religion.

Further supporting its holding, the Katcoff court pointed out that the denominational allocations of Army Chaplains are determined by the entire civilian church population and not the current military religious population. Therefore, in the event of a large-scale war or total mobilization, the distribution of chaplains by denomination would reflect the newly-mobilized force. This practice has been in place since the Army established the Chief of Chaplains' office in the wake of World War I, and the distributions of chaplains by denomination have been updated on the basis of the latest census.

The Katcoff court further found that denying soldiers access to chaplains and the religious support they provide would damage "the morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for our national defense." This presents a unique situation where utilitarian concerns demand accommodations of Free Exercise rights that might otherwise be impermissible under the Establishment Clause.

Under the first prong of the Lemon test—the requirement for a secular legislative purpose—a court could look at the provision of headstones in either a religious or secular light. The act of providing the headstones, as they were decorated predominantly with Christian crosses to begin with, might be seen as religiously motivated. However, the availability of both atheist and humanist symbols likely advantages a more secular view of the practice: that this is merely a measure to

125. Id. (citing U.S. CONST. art. I, § 8).
126. Id.
127. Id. at 225-26.
128. Id.
130. Katcoff, 755 F.2d at 237.
remember and honor fallen veterans according to their beliefs. This view is bolstered by the reasoning in *Katcoff* that the provision of certain religious accommodations, regardless of viewpoint, motivates service members to risk their lives in defense of the nation and creates a more effective military. Ultimately, the act of excluding Wiccan service members would clearly fail the first prong of the *Lemon* test—not as a promotion of religion but as animosity toward a disfavored religion.

The second prong of the *Lemon* test requires the principal or primary effect of the practice to be one that neither advances nor inhibits religion. Again, the availability of atheist and humanist symbols leaves the effect of each headstone or memorial marker as an individual choice, and service members are neither encouraged nor prohibited from choosing a symbol from any recognized religion or no religion at all. However, the exclusion of Wiccan symbols makes the practice problematic under the second prong as well. It would clearly advance members of other religions while suppressing Wiccans.

Finally, the practice must not foster “an excessive government entanglement with religion.” The practice of engaging worshippers and denominations who ask for the reproduction of their religious (or non-religious) symbols on government-provided headstones is a clear entanglement with religion. Certainly, the practice of accommodating all but Wiccans would be seen as excessive entanglement with all other parties, but the *Lemon* test is primarily concerned with separating state and religion as wholesale entities, and is not particularly instructive with regard to inter-sect rivalries.

Taking *Katcoff* as a guide can support this use of government monies in spite of the *Lemon* test. If provision of religious support to service members stationed here and abroad is permissible under the Establishment Clause, then honoring the fallen with memorial recognition of their faith follows a parallel logic.

The *Katcoff* nexus of Free Exercise and national defense is persuasive in allowing continued federal funding to recognize the faiths and denominations of fallen soldiers. Military service is one of the few

131. *Id.*


activities in which the government may call upon its citizens to lay down their lives for their country. Support for the religious practices of soldiers gives them additional incentive to fight, and possibly die, in support of the nation, knowing that their sacrifice will be remembered and honored in a manner they would have wanted. How would armed forces recruiting fare if those enlisting had to do so knowing that if they were to die in the line of duty, their loved ones would have to pay out of their own pockets for a headstone that recognized their faith?

The long-standing tradition of providing memorial markers for casualties of our wars reinforces the propriety of the practice. Similar to the long-standing tradition of military chaplains, Congress has been appropriating funds to bury veterans of American wars for over a century and a half. As early as 1850, Congress approved funds for a permanent cemetery in Mexico City for Mexican-American War casualties. The site most commonly associated with veterans' graves is Arlington National Cemetery in Virginia. American soldiers have been interred in Arlington since 1864, initially accommodating the casualties of the Virginia campaigns of the Civil War. In 1927, Congress approved a measure to place headstones over the graves of Confederate soldiers, paralleling the recognition for deceased Union soldiers. Objections raised at the time were not based on an alleged violation of church and state, but on continuing enmity toward the Confederacy.

In sum, providing headstones with religious symbols is recognition by the government of each deceased veteran's beliefs that is uniquely permissible because of Free Exercise concerns, and national defense reasons, and a long-standing, unquestioned history. It falls

134. SLEDGE, supra note 4, at 200.
135. See DODGE, supra note 60, at 8-9. The site of Arlington National Cemetery was once the home of Confederate General Robert E. Lee and was occupied by Union troops soon after Lee resigned from the Union Army to command Virginian Confederate forces. At the order of Union Quartermaster General Montgomery Meigs, the land was turned into a cemetery for Union soldiers. Id.
137. See SLEDGE, supra note 4, at 201-02.
within the logic of the Katcoff court that we owe a special obligation to those willing to lay down their lives for the nation, and we excuse any establishment that occurs because of these unique circumstances.

B. Check Box Below to Indicate Religious Preference (Wiccans Need Not Apply)

Assuming that a court has determined that the use of religious symbols on veteran headstones is permissible, this section examines the acceptance of more popular religions by the Veterans Administration and the failure to award a symbol to Wiccan petitioners. There are numerous Establishment Clause precedents that can be used, but only a few are truly instructive. The strict scrutiny standard employed in Larson v. Valente is the most fitting for an inter-sect rivalry such as this, but analysis under Lynch v. Donnelly is also worthwhile. The institution of military chaplains again provides a useful analogy.

1. Inter-Sect Rivalry in the Navy Chaplaincy

In Adair v. England, a group of current and former Navy chaplains recently filed suit in a case concerning denominational preference in a military setting. The plaintiffs alleged that the allocation of slots in the Navy Chaplains Corps by religion and denomination violated the Establishment Clause. Starting in the late 1980s, the Navy departed from the practice of allocating chaplain positions according to the denominational distribution of the total American population (a policy still followed by the Army and Air Force) and moved to a more subjective “needs of the service” policy, which the plaintiffs alleged had become known as the “thirds policy.” This distributed one-third of slots in the Navy Chaplains Corps for Catholics, one-third for liturgical Christians, and one-third for non-liturgical Christians and all other religions. “Liturgical Christians” included Methodist, Lutheran,

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138. 456 U.S. 228 (1982).
141. Id. at 42-44.
142. Id. at 40.
143. Id.
Episcopal and Reformed Episcopal, Methodist Episcopal, Reformed, and Orthodox Christians. The plaintiffs alleged that while Catholics and liturgical Christians comprised less than one-third of the Navy's total personnel when combined, clergy for those denominations were allotted two-thirds of the chaplain slots—an unconstitutional preference of some sects over others.

The District Court for the District of Columbia held that the strict-scrutiny test put forth in *Larson v. Valente*, rather than the *Lemon* standard, should apply to the Establishment Clause claim. In *Larson*, the Supreme Court evaluated the Minnesota Charitable Solicitations Act and its disparate impact on different denominations. While the Unification Church received more than fifty percent of its funds from non-members and was subsequently required to report on its fundraising solicitations, the legislative history of the statute revealed that the law was designed to have no impact on the activities of another sect: a Roman Catholic archdiocese. The Court raised concerns about the "risk of politicizing religion" and found the law unconstitutional. The *Larson* Court, citing *Abington* and related Establishment Clause holdings, declared that a state law granting denominational preference will be treated as suspect and will garner strict scrutiny. In a strict-scrutiny analysis, the governmental action "must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest."

144. *Id.* at 40-41.
145. *Id.*
146. *Id.* at 47-50.
148. *Id.* at 232.
149. *Id.* at 254.
150. *Id.* at 254-55.
151. *Id.* at 246. See Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.").
The Adair case remains in litigation, with the Navy and plaintiffs struggling over whether the proceedings of the Navy Chaplaincy officer selection board members are discoverable or not. The most recent rulings have allowed for the plaintiffs’ discovery.

While the Adair proceedings continue, its use of the Larson strict-scrutiny standard instead of the Lemon test is in keeping with current Supreme Court jurisprudence. “Larson indicates that laws discriminating among religions are subject to strict scrutiny, and that laws ‘affording a benefit to all religions’ should be analyzed under Lemon.”

In a strict-scrutiny analysis, Wiccan petitioners and defendant administrators will likely have competing definitions of the relevant governmental interest. The government might argue that its interest lies in maintaining a solemn and uniform appearance in its National Cemeteries and memorial markers. Petitioners can counter that a more fundamental governmental interest is national defense and, by extension, encouraging religious people of all sects and denominations to serve.

The likely argument from the government is that the National Cemetery Administration’s governmental purpose is to provide a dignified appearance in all its grave sites and cemeteries. Accordingly, it must limit the symbols displayed on headstones and memorial markers to recognized religious symbols, and need not dilute the range of symbols to accommodate every possible religious viewpoint or allow expansion beyond symbols of military service and a service member’s religion. In pursuit of this allegedly compelling governmental interest, the National Cemetery Administration has promulgated guidelines for the approval of religious symbols. The government may further claim that Wiccan petitioners have not met the burden of proving that their religious symbol represents a comprehensive belief or faith system that has all the indicia of more commonly-practiced religions.

Petitioners will be best served by arguing that the compelling governmental rationale for providing emblems of belief on headstones

parallels that of establishing a chaplaincy, and is an outgrowth of Congress’s express authority to provide for the nation’s defense—authority that includes supporting the religious convictions and practices of active and prospective American service members in order to encourage valorous actions in combat and sacrifice for the nation. Though the government has not used an involuntary draft program in decades, all able-bodied male citizens, or those who have made a declaration of intent to become citizens, from ages seventeen to forty-five, and women who are members of the National Guard are eligible for a draft. 156 Indeed, the selection of Army Chaplains has traditionally been to provide “satisfactory services of worship and other religious observances for the greatest possible number of military personnel.” 157 Though Wiccan beliefs are not uniform, the treatment of death within Wicca is substantially similar to that of other religions. Like most faiths, Wiccans hold a funeral or memorial service for the deceased with a graveside prayer. 158 Preparation for burial may include washing the body with spring water while making an accompanying prayer, then wrapping it in a shroud. 159 This practice parallels traditional Jewish and Muslim practices. 160 Wiccans may prefer to be cremated, and a specific prayer may be used for such an occasion. 161 This is the dominant practice used by both Hindus and Buddhists. 162 The argument becomes one of fundamental purposes—before there can be veterans to be honored and a National Cemetery Administration that approves religious symbols, there must be an army and other services engaged in the conflicts of the nation.

Congress has raised an army and allowed Wiccans to serve in that army, and federal courts have recognized Wicca as a religion that occupies a position in the lives of its practitioners parallel to Christianity, Judaism, or Islam. Wiccan petitioners are not asking for a symbol representing political party affiliation, criticizing a national draft policy,

157. See GUSHWA, supra note 129, at 16.  
159. Id. at 151-53.  
161. See STARHAWK & NIGHTMARE, supra note 158, at 187.  
162. See, e.g., LEMING & DICKINSON, supra note 160, at 155-57.
or anything else that might lessen the memorial nature of a headstone or memorial plaque. While Wicca is not a dominant religious sect, it seems disingenuous to claim that it is so dissimilar in practice that it does not occupy a parallel place in the lives of its practitioners to that of more commonly-practiced religions.

Ultimately, petitioners arguing under Larson will likely win. Unless a persuasive argument can be provided for the exclusion of Wiccans from the military as a whole, the exclusion of their faith from recognition on memorial markers clearly fails a strict scrutiny analysis.

2. Lynch v. Donnelly and Endorsement/Disapproval

A court analyzing the bar to Wiccan memorial markers could also look to Lynch v. Donnelly. In Lynch, the Supreme Court considered a holiday crèche displayed during the Christmas holiday season to determine whether it impermissibly advanced or endorsed religion. The Court ultimately decided that it did not. Specifically, the Court held that “the Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” A court may reasonably conclude that accommodation of a broad spectrum of religions for its veterans—with thirty-eight religious symbols, but none for Wiccans—constitutes “hostility” and is thus unconstitutional.

A possible response to the use of Lynch is that in the subsequent County of Allegheny v. ACLU case, the display of a crèche was held to impermissibly advance approval of Christian religious beliefs. However, the application of Allegheny is strained in this instance. The use of a menorah in Allegheny was upheld because it was viewed as sufficiently secular and could be distinguished from the more inherently religious display of a nativity scene. The display of a Christian Cross, Star of David, or Wiccan Pentacle is inherently religious and permissible under the language in the Lynch decision of accommodation for all religions.

164. Id. at 687.
165. Id. at 673.
167. Id. at 620-621.
The display of atheist and humanist symbols also reduces the impact of *Allegheny* here, because the inclusion of these two secular totems shows a broader spectrum of viewpoints to include the non-religious belief on the same footing as religious ones.

Justice O'Connor, concurring in *Lynch*, proposed looking at the first two prongs of the *Lemon* test with regard to the impact of questioned practices, noting that “[t]he effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.” 168 Wiccan plaintiffs can claim that the Army’s policy, though facially neutral and accommodating of religious and non-religious viewpoints excluding their faith. Under Justice O’Connor’s analysis, this clearly conveys a message of disapproval with regard to the Wiccan faith and may be adjudged unconstitutional.

3. Establishment Clause Conclusions

The Establishment Clause claim represents the Wiccan petitioners’ best chance to prevail. The standing requirements are not as stringent as Free Exercise claims, so a court may more readily reach judgment on the merits. 169 As demonstrated above, the petitioners’ strongest Establishment Clause argument arises from application of the *Larson* standard. Arguing that the *Larson* standard is appropriate, and that national defense is the governmental rationale for action in this field, clearly invalidates refusal of a Wiccan symbol.

CONCLUSION

The denial of an emblem of belief for Wiccan veterans will likely fail scrutiny under the First Amendment. The clearest invalidation can come from violation of the Establishment Clause under the strict scrutiny standard of *Larson v. Valente*. A reviewing court may also find

169. See, e.g., Sch. Dist. v. Shempp, 374 U.S. 203, 224 n. 9 (1963) (“[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed.” (alteration added)).
Free Exercise concerns with the addition of distinctive religious emblems for other faiths while Wiccan applicants have waited—this may constitute a facially neutral but discriminatory measure intended to forestall approval of a Wiccan symbol. The Establishment Clause provides the easiest way to satisfy standing requirements, and it may be the Wiccan petitioners’ most compelling claim.

Our nation is currently engaged in combat operations in Iraq and Afghanistan. Many of the forces fighting against us are motivated by deep-seated religious and cultural animosity toward the values that the United States and free Western democracies represent. Sergeant Stewart represents one of thousands of casualties from the combined weight of these operations. One need not be a Wiccan nor endorse Wiccan beliefs to come to the conclusion that all those who serve in this struggle deserve recognition that is respectful of their faiths.

President Abraham Lincoln gave the most persuasive case for honoring those who have fallen while defending our freedoms in the Gettysburg Address in 1863.

[I]n a larger sense, we cannot dedicate—we cannot consecrate—we cannot hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it far above our poor power to add or detract . . . . It is for us, the living, rather, to be dedicated to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion; that we here highly resolve that these dead shall not have died in vain; that this nation, under God, shall have a new birth of freedom; and that government

of the people, by the people, for the people, shall not perish from the earth.\textsuperscript{171}

Wiccan veterans have served in and become casualties of our nation's wars. They should be afforded the same recognition as fallen warriors of other faiths. Certainly, this is within our poor power to add to the consecration of their sacrifices and their memories.