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Should God Spy for the CIA: A Look at whether The First Amendment Bans the Government's Use of Clergy in Intelligence Operations

INTRODUCTION

The September 11th attacks opened the public's eyes to the threat posed by terrorist groups. The attacks also revealed the shortcomings of the United States' intelligence community.¹ Organizational defects prevented different branches of the intelligence community from properly communicating and analyzing relevant information. The lack of adequate human intelligence sources (i.e. spies and informants) also contributed to the nation's relative insecurity.² Since the attacks, Congress and the Executive implemented a number of reforms to address these, and other, shortcomings. Predictably, the government did not reveal any changes to the way the CIA and FBI recruit human intelligence sources. This silence does not mean that no changes occurred. In the intelligence community silence and secrecy are old stalwarts.

Judging from the increased focus on monitoring religious communities, particularly mosques,³ even a casual observer can conclude that some changes in human intelligence sources might center on gaining access to religious groups. Since al Qaeda is, at least in part, an extremist Islamic group, infiltrating fundamentalist and extremist mosques will open up streams of information that might prevent future terrorist attacks. However, in 1976 the CIA imposed a policy not to recruit clergy or missionaries as clandestine intelligence sources.⁴ Recently, some commentators have argued for a relaxation of these rules, for "letting the CIA be the CIA."⁵

Religion is no stranger to intrigue. Throughout history members of religious groups used deception, trickery, and violence to gain an advantage against

1 See generally 9/11 COMMISSION, 9/11 COMMISSION REPORT (2004).

2 See Brian H. Potts, *Adnan Awad: The Forgotten Informant*, 7 CAL. CRIM. LAW REV. 2, text at n. 12 (2004).

3 See Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004).

4 See CIA, Policy Statement of CIA, Open Letter dated Feb. 11, 1976, quoted in Eugene R. Scheiman, *Obtaining Information from Religious Bodies by Compulsory Process*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 141, 148 (Dean M. Kelley ed., 1982).

5 Fredrick P. Hitz, *Responses to the September 11 Attacks: Unleashing the Rogue Elephant: September 11 and Letting the CIA be the CIA*, 25 HARV. J.L. & PUB. POL'Y 765, 777-80 (2002); Timothy W. Maier and Sean Paige, *Nation: Federal Intelligence*, Insight, Aug. 17, 1998 (reporting former national security advisor Zbigniew Brzezinski's view that the CIA is too narrow in its mind-set because it does not use journalists or clergy as spies).

enemies and leverage with allies. In Biblical times the Jews, both a tribe and a church, made use of clandestine tactics to fight Romans, Greeks, and Egyptians.⁶ Throughout its history the Catholic Church embroiled itself in political intrigue. During the Middle Ages, and to a slightly lesser extent the Renaissance, the Church held political sway over most of Europe. Even in modern times the Church remains embroiled in political intrigue.⁷

The Founders of the United States wanted to break from the European tradition that saw an established church intertwined with the state. Enlightenment philosophy influenced the Founding Fathers' thought on the proper roles of church and state in a representative or democratic political system.⁸ Freedom of thought and conscience ruled philosophical thought and encouraged respect and allowance for religious pluralism.⁹ The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁰ Through this provision the drafters hoped to preserve religious freedom and pluralism.

However, not everyone in the world shares in this Enlightenment philosophy. Many religious people believe that religion deserves a bigger role in the public arena. Some current examples in the United States include prayer in school, the teaching of creationism, the display of the Ten Commandments in schools and courthouses, and adoption of religious viewpoints on topics such as abortion and the political situation in the Middle East. These views are by no means inherently wrong, rather they stem from a different epistemological starting point, one that directly conflicts with the Enlightenment reliance on human reason and observation.¹¹

Some Middle Eastern governments, in particular, choose not to separate religion from politics. Instead they operate under Sharia law and use the Qu'ran to help make decisions. Of course, critics might argue that this corrupts both the government and the religion, but this paper does not seek to comment on the wisdom or correctness of such a system. Rather, it wants to show that religion remains embroiled in politics and intrigue. Islamic terrorist groups, in particular, combine religious infrastructures, themes, and rhetoric with political goals and action to create dangerous results. National security agencies clearly need to obtain intelligence on the operations and capabilities of these groups to protect

6 See generally ROSE MARY SHELDON, *SPIES OF THE BIBLE: ESPIONAGE IN ISRAEL FROM THE EXODUS TO THE BAR KOKHBA REVOLT* (2007).

7 See generally DAVID ALVAREZ, *SPIES IN THE VATICAN: ESPIONAGE & INTRIGUE FROM NAPOLEON TO THE HOLOCAUST* (2002); see also Catharine A. Henningsen, *Luminous Fallibility: Spies, Spooks and The Catholic Church?*, *THE AMERICAN CATHOLIC*, April 2001, <http://taconline.org/2001/2001-04/Henningsen401.htm>.

8 See FOREST CHURCH, *THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS* x (2004).

9 See generally, *id.* See also JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (1690).

10 U.S. CONST. amend. I.

11 STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 175-76 (1993) ("There is no way to disprove, for example, the old creationist claim that physical evidence that appears to run against the biblical account is only a trap set by the devil for the unwary.").

the nation. To obtain this intelligence the CIA, FBI and NSA must therefore, to some degree, monitor the activities of religious communities.

This paper focuses primarily on the question of whether the CIA or the FBI should make use of clergy (and missionaries) in its intelligence operations.¹² This paper will consider both the use of actual clergy as spies and the placing of CIA or FBI agents undercover to pose as members of the clergy. While the intelligence community might potentially stand to gain from using clergy, such an arrangement makes the clergy vulnerable to substantial risk, both physical and spiritual. Additionally, such arrangements create a significant risk of the entanglement of church and state, with both church and state exerting influence and power over the other.

Part I of this paper provides some background about the government's use of clergy in intelligence operations. Sub-section B discusses the use of clergy in intelligence operations by other governments, most notably the Soviet Union. Part II analyzes the constitutionality of such a practice from the perspective of the current establishment and free exercise jurisprudence and considers whether the Court should take a different approach for church & state cases, which involve a national security element. Part III examines the obstacles standing in the way of raising a constitutional challenge to the government's use of clergy in intelligence operations; including jurisdictional problems, standing, the *Totten* doctrine, and the political question doctrine. Part IV lists and analyzes possible ways of addressing this issue and the difficulties associated with each approach.¹³

I. BACKGROUND

The United States has made use of clergy and religious workers to further intelligence operations. Nikolas Gvosdev wrote that clergy provide four different types of services for intelligence agencies: 1) gathering information, 2) "influence" and disinformation operations, 3) as couriers of funds, personnel, and goods, and 4) active measures.¹⁴ The benefits of using clergy and religious workers is counterbalanced by the suspicion and threat facing those religious workers who have nothing to do with the CIA and go to foreign countries to perform

12 The NSA does not make use of human intelligence sources.

13 Some of the arguments and conclusions in this paper might seem far-fetched and most likely these issue will never be litigated inside a court room. Hopefully, though, this topic will serve as an interesting way to contribute to the discussion about both the development of constitutional doctrine and national security law.

14 Nikolas K. Gvosdev, *Espionage and the Ecclesia*, 4 (42) J. CHURCH & STATE 803 (2000). Mr. Gvosdev's article does a good job of presenting the modern history of how governments use clergy for intelligence purposes and the dangers that this practice entails. His article also explores whether religious doctrine justifies the use of clergy as sources. While Mr. Gvosdev adroitly weighs the important policy and religious considerations, he does not spend much time discussing the constitutional issues. *Id.* at 8-9 (The Lexis version of this article did not include the page numbers so I am just using the page numbers that would appear if the article was printed from Lexis.). This paper analyzes the important constitutional issues (i.e. the free exercise and establishment clause, jurisdiction, standing, and the *Totten* doctrine) in greater depth and links them to the relevant policy considerations and possible solutions.

missionary work.¹⁵ The CIA's use of clergy endangers those who volunteer their time and energy to go on missions and entangles the CIA within religious activities, arguably making it more difficult for them to carry out their religious duties.

One prominent example of the CIA's use of clergy in intelligence operations occurred in Chile during the early 1970s. In 1970, Salvador Allende, a Marxist socialist, became the democratically elected president of Chile.¹⁶ Allende's policies, including the nationalization of large chunks of property, conflicted with United States' interests.¹⁷ The CIA actively supported groups opposed to President Allende by funneling money into Chile and trying to force an end to his presidency through political means.¹⁸ A secret, alternative plan, coined "Track II," involved plans to stage an armed coup should political avenues fail to get Allende out of power.¹⁹ In 1973, General Pinochet overthrew Allende's government with a military coup and began a wave of terror using CIA trained secret police.²⁰

Ex-Chilean Ambassador Korey, isolated from the "Track II" planning,²¹ stated that "with the full knowledge of Chile and the United States, millions in CIA ... funds were allocated to Roman Catholic groups to fight against the threat posed by 'laicism, protestantism and communism.'"²² More specifically, the former ambassador stated that he knew of three clergymen that had been "funnels and instruments of important CIA programs."²³ The secret relationship between the CIA and the Catholic Church began during the Kennedy years, when Jack Kennedy "secretly ordered the CIA to begin operations with the Jesuits in Latin America, especially Chile."²⁴ Under Gvosdev's framework, the Catholic Church "influenced" public opinion against Allende, couriered CIA funds, and possibly assisted active measures in resistance to Allende's government.

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- 15 See *CIA's Use of Journalists and Clergy in Intelligence Operations: Hearing Before the Select Comm. on Intelligence*, 104th Cong. 1, at 29-36 (1996) [hereinafter *CIA's Use of Journalists and Clergy*]
- 16 JOHN PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS FROM WORLD WAR II THROUGH THE PERSIAN GULF* 315-18 (1996).
- 17 *Id.* at 316 ("The common thread that links the action in Chile with many other covert operations is the threat of nationalization of American-owned local subsidiaries of multinational corporations.").
- 18 *Id.* at 320 ("American money fueled a drum roll of Chilean press criticism, and made possible the coalescing of right-wing opposition groups ... which spearheaded the anti-Allende forces.").
- 19 JOSEPH J. TRENTO, *THE SECRET HISTORY OF THE CIA* 378 (2001).
- 20 *Id.* at 394-395.
- 21 PRADOS, *supra* note 16, at 318.
- 22 Scheiman, *supra* note 4, at 147 (quoting Mr. Korey's statements in Seymour M. Hersh, *New Evidence Backs Ex-Envoy on His Role in Chile*, N.Y. TIMES, Feb. 9, 1981, at A1 and A12).
- 23 *Id.*
- 24 TRENTO, *supra* note 19, at 205 (citing statements made by James Angleton, Ralph Dungan and others). For more examples of the CIA's collaboration with the Catholic Church see Gvosdev, *supra* note 14. For a conspiracy theory claiming that the CIA's original mission was to look after Vatican interests see Posting of Greg Szymanski to Dark-Truth.org, <http://dark-truth.blogspot.com/2007/02/almanac-of-evil.html> (Feb. 23, 2007) (discussing a list of accusations leveled against the Vatican posted on www.one-faith-of-god.org; #46 on the list discusses the formation of the CIA).

After the coup Senator Frank Church held Senate committee meetings to investigate covert actions by the CIA in Chile and elsewhere.²⁵ The Church Committee's 1976 final report questioned much about the CIA's covert action programs, including its use of clergy for intelligence operations.²⁶ This report precipitated changes in CIA policy. On February 11, 1976 the CIA issued a policy statement concerning its use of clergy in intelligence operations:

Genuine concern has recently been expressed about CIA relations with newsmen and churchmen. The agency does not believe there has been any impropriety on its part in the limited use made of persons connected in some way with American media, church and missionary organizations. Nonetheless, the CIA recognizes the special status afforded these institutions under our constitution and in order to avoid any appearance of improper use by the agency, the Director of Central Intelligence has decided on a revised policy to govern agency relations with these groups. [The] CIA has no secret, paid, or contractual relationship, with any American clergyman or missionary. This practice will be continued as a matter of policy. The CIA recognizes that members of these groups may wish to provide information to the CIA on matters of foreign intelligence of interest to the United States Government. The CIA will continue to welcome information volunteered by such individuals.²⁷

However, this policy comes with a sizeable loophole: the CIA reserves the right to use clergy intelligence operations or to pose as clergy if "exceptional circumstances" call for such tactics.²⁸

During the Government Intervention in Religious Affairs Conference held in 1981, William P. Thompson listed seventeen troubling practices by the government.²⁹ Number eleven on his list was "use by intelligence agencies of clergy as informants."³⁰ Even William Lee Miller, who generally believed that the problem lay in religious intervention in government and not the other way around, agreed that "the use of clergy as informants for intelligence operations ... is a clear-cut danger."³¹ The issue did not get raised again in the public discourse until more than ten years later.

25 PRADOS, *supra* note 16, at 336.

26 *Id.*

27 CIA, Policy Statement of CIA, Open Letter dated Feb. 11, 1976, *quoted in* Scheiman, *supra* note 4, at 148. Mr. Scheiman noted that "[t]he Reagan Administration ... [sought] to nullify most such self-restrictions of the federal intelligence agencies." Scheiman, *supra* note 4, at 148. However, in 1996, then acting director of the CIA, John M. Deutsch, said that the policy remained in place and that he had not used the clergy while acting as Director. *CIA's Use of Journalists and Clergy*, *supra* note 14, at 6-7 (statement by John M. Deutsch, then director of the CIA). Mr. Deutsch's comments to the Senate will be discussed in more detail in sub-section A.

28 *CIA's Use of Journalists and Clergy*, *supra* note 15, at 6-7 (statement by John M. Deutsch, then director of the CIA).

29 William P. Thompson, *Opening Statement of the Chairperson*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS* 16, 17-18 (Dean M. Kelley ed., 1982).

30 *Id.* at 18.

31 William Lee Miller, *Responsible Government, Not Religion, Is the Endangered Species*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS* 41, 44 (Dean M. Kelley ed., 1982). Miller's views differed sharply from others' at the conference. See Martin E. Marty, *Presentation: the Widening Gyres of Religion and Law*, 45 *DePaul L. Rev.* 651, 669 (1996) ("Miller was alone in expressing such sentiments, at the symposium and in the anthology by Kelley.").

A. The Hearing before the Senate Select Committee on Intelligence

On July 17, 1996, the Senate Select Committee on Intelligence held a hearing to discuss the CIA's use of journalists, Peace Corps volunteers, and clergy in intelligence operations.³² The committee met to discuss the policy implications of the CIA's use of these three professions for intelligence purposes.³³ The committee also wanted to discuss the House of Representatives proposal, which would prohibit the use of journalists by the CIA unless the President made an express waiver.³⁴ The committee invited individuals from the CIA and from all of these different groups to express their thoughts on the policy situation.³⁵ Though this paper focuses exclusively on the government's use of clergy in intelligence operations, this section of the paper will discuss concerns raised by members of the other professions, namely the concern that the CIA's policy encourages suspicion, because these concerns apply equally to clergy.

John M. Deutsch, then acting director of the CIA, testified that the CIA's official policy since 1976 has been "not to use journalists ... American clergy or the Peace Corps for intelligence purposes. This includes any use of such organizations for cover."³⁶ However, Mr. Deutsch qualified his statement by adding

32 See *CIA's Use of Journalists and Clergy*, *supra* note 15.

33 *Id.*

34 H.R. 3259, 104th Cong. § 311 (1996). Interestingly the provision did not mention either clergy or Peace Corps members. The fiscal bill passed into law with one noticeable change to § 311: now the waiver can be made by either the President or the Director of the CIA:

§ 403-7. Prohibition on using journalists as agents or assets

(a) Policy. It is the policy of the United States that an element of the Intelligence Community may not use as an agent or asset for the purposes of collecting intelligence any individual who--

(1) is authorized by contract or by the issuance of press credentials to represent himself or herself, either in the United States or abroad, as a correspondent of a United States news media organization; or

(2) is officially recognized by a foreign government as a representative of a United States media organization.

(b) Waiver. Pursuant to such procedures as the President may prescribe, the President or the Director of Central Intelligence may waive subsection (a) in the case of an individual if the President or the Director, as the case may be, makes a written determination that the waiver is necessary to address the overriding national security interest of the United States. The Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate shall be notified of any waiver under this subsection.

(c) Voluntary cooperation. Subsection (a) shall not be construed to prohibit the voluntary cooperation of any person who is aware that the cooperation is being provided to an element of the United States Intelligence Community.

50 U.S.C. § 403-7 (2007).

35 Congress invited then acting CIA director John M. Deutsch, former director of the Peace Corps Paul Coverdell, syndicated columnist Kenneth Adelman, journalist Terry Anderson, ABC news anchor Ted Koppel, Editor and Chief of the U.S. News and World Report Mortimer Zuckerman, President of the National Association of Evangelicals Don Argue, Executive Director of the International Foreign Mission Association Dr. John Orme, President of the Maryknoll Sisters Congregation Sister Claudette LaVerdiere, and Deputy General Secretary of the National Council of Churches Dr. Rodney Page. *CIA's Use of Journalists and Clergy*, *supra* note 20.

36 *Id.* at 6.

that, "the Agency should not be prohibited from considering the use of American journalists or clergy in exceptional circumstances."³⁷ Mr. Deutsch offered the situation of "a terrorist group attempting to use a weapon of mass destruction in a crowded urban area" as an example of such exceptional circumstances.³⁸ To assuage some of Congresses concerns the CIA issued new policy guidelines for waiver of the official policy, but the classified nature of the guidelines prevented discussion in open session.³⁹

When asked whether he approved of the House's determination that the authority to waive the official policy should reside with the President, Mr. Deutsch responded that the authority should rest with the Director of the CIA and his Deputy Director for two reasons: First, the director of the CIA is responsible for the operational management of the United States' human intelligence activities and if the President has doubts about the Director's judgment then the Director should be replaced.⁴⁰ Second, the President's oversight role should not involve him in the day-to-day operational matters of the intelligence community.⁴¹ Senator Specter pressed Mr. Deutsch on the second point, by arguing that according to Mr. Deutsch's own statements the use of clergy "would hardly be day-to-day ... [and] doesn't place too high a burden on the President or too high a cost on operations" ⁴² Mr. Deutsch maintained that Congress should leave the "initial judgment" to the "professional organization" with immediate notification to the President and the Congressional oversight committees.⁴³

Most of the other speakers, however, strongly opposed any type of waiver provision. Senator Paul Coverdell, a former director of the Peace Corps, opposed any type of exception to the general policy because "once you establish the exception, it is in the mind of the host country from that point forward."⁴⁴ According to Senator Coverdell any association of the Peace Corps with the intelligence community puts the Corps at risk; for the volunteers it "is a life and death matter."⁴⁵

President of the National Association of Evangelicals Don Argue, Executive Director of the Foreign Mission Association John Orme, President of the Maryknoll Sisters Congregation Sister Claudette LaVerdiere and Deputy General Secretary of the National Council of Churches Dr. Rodney Page all expressed that the

37 *Id.* at 7. Though Mr. Deutsch never admitted to authorizing the use of journalists, clergy or Peace Corpsman, *id.*, former Director of Central Intelligence Stansfield Turner authorized the use of journalists on at least three occasions. Hitz, *supra* note 4, at n.46 (2002) (citing Walter Pincus, *Turner: CIA Nearly Used a Journalist in Teheran*, WASH POST, Mar. 1, 1996, at A15).

38 *CIA's Use of Journalists and Clergy*, *supra* note 15, at 7.

39 *Id.*

40 *Id.* at 9-10.

41 *Id.* at 10.

42 *CIA's Use of Journalists and Clergy*, *supra* note 15, at 10.

43 *Id.*

44 *Id.*, at 5.

45 *Id.* at 4. As an example, Senator Coverdell related the story of a Peace Corp volunteer in Bolivia who was killed under the mistaken belief that she was associated with the DEA. *Id.*

"exception" puts clergy and missionaries in the same kind of risk.⁴⁶ Dr. Page spoke of religious workers being taken hostage or getting killed in high volatility areas because of the suspicion that the workers are associated with the U.S. government.⁴⁷ All of the speakers from religious organizations opposed any type of exception to the CIA's policy, even one limited to the President's determination.⁴⁸ "The suspicion created by CIA involvement with even one overseas member of [a] U.S. based religious organization puts the welfare of all in jeopardy. Therefore, allowing a waiver of this policy is tantamount to declaring no policy at all."⁴⁹

Instead, they asked for a "public blanket statement" that they hoped would send the message to people in foreign countries *that U.S. religious workers are not spies for the CIA*.⁵⁰ Similarly, Ted Koppel spoke of how it helps instill trust in people in foreign countries when he can point to the law to show that he would be acting illegally by working simultaneously as a journalist and as a spy.⁵¹ However, syndicated columnist Kenneth Adelman stated that "no matter what your committee does or what the President ... does in denying that any journalist or clergy or Peace Corpsman will ever be in the CIA or affiliated with the CIA, all those denials will be laughed off ignored, or discounted, especially by the bad guys of the world."⁵² According to Mr. Adelman members of these professions will always be in danger and therefore Congress has no real reason to limit their ability to cooperate with the CIA, especially when that cooperation might save American lives.⁵³

In the end Mr. Deutsch's view prevailed and Congress decided that both the President and the Director of the CIA had the authority to issue a waiver.⁵⁴ However, the legislation only applies to the CIA's use of journalists and makes no reference to either Peace Corpsman or clergy. Part IV of this paper discusses whether Congress should pass similar legislation for clergy, or whether the

46 *CIA's Use of Journalists and Clergy*, *supra* note 15, at 29-37.

47 *Id.* at 35. See also Gvosdev, *Espionage and the Ecclesia*, *supra* note 14, at 5 (citing James Mann, *Clergy Caught in Latin American Cross Fire*, U.S. NEWS & WORLD REPORT, Apr. 20, 1981, at 59) (Leftist guerrillas in Colombia killed a Bible translator and mission worker on the suspicion that he worked for the CIA.); Betel Miarom, *Chad says U.S. Missionary Kidnapped by Rebels*, REUTERS, Oct. 18, 2007, available at <http://www.alertnet.org/thenews/newsdesk/L18482222.htm> (A non-governmental armed group in Chad seized Steve Gobold, a U.S. evangelical missionary, on suspicion that he was working for Chadian intelligence)

48 *CIA's Use of Journalists and Clergy*, *supra* note 15, at 30-37.

49 *Id.* at 37 (Dr. Argue relating a statement made by Senator Hatfield to Mr. Deutsch). Unfortunately, even this paper places clergy and missionaries in danger, to the extent that it might convince someone in a foreign country that the CIA uses clergy.

50 *Id.* at 35 (statement by Dr. Orme).

51 *Id.* at 16-17.

52 *Id.* at 13-14.

53 *CIA's Use of Journalists and Clergy*, *supra* note 15, at 14. See also Gvosdev, *Espionage and the Ecclesia*, *supra* note 14, at 9-10 (discussing whether "the genie is out of the bottle" and arguing that this creates a "vicious circle" in which governments assume that since public perception has compromised members of the clergy anyway, there is no harm in using them as spies).

54 50 U.S.C. § 403-7.

country should take a different approach in dealing with the issue of the CIA's use of clergy in intelligence operations.

B. Other Countries' Intelligence Services Make Use of Clergy

The exploits of the KGB and other communist, secret police agencies provide plentiful examples of government use of clergy for intelligence purposes. One of the most prominent examples is the KGB's recruitment of George Tromfimoff, a U.S. intelligence officer in the military.⁵⁵ Igor Susemihl, a Russian Orthodox clergyman who worked for the KGB, recruited George Trofimoff to spy for the Soviets.⁵⁶ Susemihl delivered payments to Tromfimoff and received secret information that Tromfimoff provided.⁵⁷ According to former Russian intelligence officer Konstantin Preobrazhensky, the KGB's practice of using the Orthodox Church as a means to carry out spying operations did not change with the fall of the Soviet Union.⁵⁸ Russia continues to use the Orthodox Church as a method of targeting members of the Russian diaspora and getting them to provide intelligence.⁵⁹

The recent scandal surrounding Catholic priests in Poland provides another example of a government's use of clergy as intelligence sources. On January 7, 2007, archbishop Stanislaw Wielgus resigned because of his involvement with the Soviet-backed communist regime.⁶⁰ Wielgus and other Polish priests (including Janusz Bielanski) informed on their fellow clergy to the Polish secret police.⁶¹ Allegations have even surfaced that a Polish priest working at the Vatican spied for the communist, Polish government.⁶² The Polish spy scandal shows how governments' use of clergy for intelligence purposes can erode public trust and cause deep, psychic scars within religious communities. As a result, the Catholic

55 See also *No Comments in Moscow on Detention of Retired U.S. Officer on Spy Charges*, INTERFAX RUSSIAN NEWS, June 15, 2000; Gvosdev, *supra* note 14, at 1. Gvosdev also wrote about the KGB's plans to infiltrate the Vatican in order to gain access to the Catholic Church's information sources and to get better publicity for communism. *Id.* at 2-3.

56 *No Comments in Moscow on Detention of Retired U.S. Officer on Spy Charges*, INTERFAX RUSSIAN NEWS, June 15, 2000.

57 Gvosdev, *supra* note 14, at fn. 2.

58 Neil Mackay, *Russia's New Cold War*, *The Sunday Herald*, Nov. 26, 2006.

59 *Id.*

60 *Spy Scandal Rocks Poland's Catholic Church: Another Priest Steps Down After Archbishop Resigns for Communist-era Ties*, MSNBC, Jan. 8, 2007, available at <http://www.msnbc.msn.com/id/16524325/>. See also Rob Cameron, *Polish Priest Spy Scandal Sends Shockwaves through Catholic Central Europe*, RADIO PRAHA, Jan. 1, 2007, <http://www.radio.cz/en/article/87006> (last visited Mar. 24, 2007).

61 *Id.*; see also *Polish Priest Admits Spy Claims*, BBC News, July 12, 2006, available at <http://news.bbc.co.uk/2/hi/europe/5172148.stm>.

62 *Polish Cardinal Rejects Spy Charges against Priest*, Catholic World News, May 2, 2005, available at <http://www.cwnews.com/news/viewstory.cfm?recnum=36892>. See also Gvosdev, *Espionage and the Ecclesia*, *supra* note 14, at 2-3 (Gvosdev wrote about the KGB's plans to infiltrate the Vatican in order to gain access to the Catholic Church's information sources and to get better publicity for communism.).

Church, though by no means new to controversy, must deal with increased skepticism and scrutiny. This Soviet-era backlash might serve as a warning to those advocating unrestrained access to clergy for use in intelligence operations.⁶³

When governments encourage clergy to conflate governmental and religious duties it breeds a great sense of mistrust in others. In America, the backlash against Muslims after 9/11 partly stems from the view that Muslims do not separate political and religious duties; that all of them have an allegiance to a religious warlord. Take the recent example of James Yee, a Muslim, army chaplain, who went to Guantanamo to perform his duties as a cleric only to be harassed, mistreated, and falsely accused of espionage by the U.S. government.⁶⁴ Yee believes that an institutionalized mistrust of all Muslims led to his arrest and detainment on charges that were never brought.⁶⁵ Use of clergy by other governments puts clergy within the United States at risk because it gives the U.S. intelligence agencies an excuse/pretext to monitor and detain controversial figures. For instance, J. Edgar Hoover's FBI monitored Martin Luther King, Jr. on pretext that he was a communist, while in reality they merely wanted to discredit him.⁶⁶ These events show the dangers to freedom of religion posed by the intelligence community. In order to protect religious freedom, the U.S. government would need to place safeguards on both the use of clergy in intelligence operations and the surveillance of clergy. Though the two are closely linked, this paper focuses primarily on the constitutional limits of using clergy as intelligence agents or using the profession as a cover for intelligence officers.⁶⁷

II. CONSTITUTIONAL ANALYSIS

So far the debate over whether the government should use clergy in intelligence operations has been framed in terms of a free exercise question. The speakers at the Government Intervention in Religious Affairs Conference spoke of the "clear-cut danger" posed by "the use of clergy for intelligence operations" to clergy and missionaries traveling abroad.⁶⁸ The 1996 Senate Hearings focused almost exclusively on the question of how dangerous the CIA's policy is to clergy and missionaries and whether it significantly interferes with their ability to carry

63 Cf. Maier and Paige, *supra* note 5 (reporting former national security advisor Zbigniew Brzezinski's view that the CIA is too narrow in its mind-set because it does not use journalists or clergy as spies).

64 Ray Rivera, *A Chaplain's Test of Faith: As the Army's Case Against Muslim James Yee Collapsed, His Own World Was Crumbling, Too*, WASH. POST, Oct. 9, 2005, at D1.

65 Deborah Young, *Ex-Army Chaplain, Accused as Spy, Says His Civil Rights Were Violated*, STATEN ISLAND ADVANCE, Feb. 13, 2007.

66 Lininger, *supra* note 3, at 1210-14.

67 For a discussion of the appropriate safeguards needed to protect religious groups from improper monitoring and surveillance see Lininger, *supra* note 3.

68 Thompson, *supra* note 29, at 18; Miller, *supra* note 10, at 44; and Scheiman, *supra* note 4, at 148.

out their religious missions.⁶⁹ However, the government's use of clergy as intelligence sources also implicates the establishment clause.

The First Amendment to the Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷⁰ In a simplistic sense, the establishment clause prevents the government from providing benefits to religion, while the free exercise clause prevents the government from putting burdens on religion; the application of this doctrine, however, proves to be much more complicated.⁷¹ In a way the establishment clause and the free exercise clause seem to occupy the same doctrinal space; battling each other for superiority. For instance, while the establishment clause doctrine does deal predominantly with government aid to religion, even thinkers in revolutionary times recognized that the establishment of one religion is a burden on other religions.⁷² Additionally, what appears to be government support of religion might actually devalue and contaminate the sacredness of the religion's spiritual purpose by mixing it with secular and economic objectives.⁷³

The two clauses are so closely linked that resolving an issue one way often presents an establishment clause problem while resolving it another way runs afoul of the free exercise clause.⁷⁴ The CIA's use of clergy as sources of information presents just such an issue. This part of the paper briefly lays out the history and framework of the First Amendment jurisprudence dealing with the freedom of religion and then proceeds to analyze the government's use of clergy in intelligence operations under this framework and considers whether the Establishment Clause

69 See *CIA's Use of Journalists and Clergy*, *supra* note 15, at 33-37.

70 U.S. CONST. amend. I.

71 David E. Steinberg, *Alternatives to Entanglement*, 80 Ky. L.J. 691, 703 (1992) ("The Supreme Court has adopted an artificial dichotomy between Free Exercise Clause and Establishment Clause cases. The Court has assessed cases involving a burden imposed on religions under the Free Exercise Clause, and has assessed cases involving a benefit conferred on religions under the Establishment Clause.").

72 CHURCH, *supra* note 8, at 43 (2004) (quoting Caleb Wallace, a Presbyterian Reverend) ("We ask no ecclesiastical establishments for ourselves, neither can we approve of them when granted to others. This indeed would be giving exclusive or separate emoluments to one set (or sect) of men without any special public services to the common reproach and injury of every other denomination.").

73 See *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting).

The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory -- but it is a Pyrrhic one indeed. The import of the Court's decision is to encourage use of the creche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol.

Id.

74 See *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."). However, there are instances in which the two clauses do not conflict at all: the free exercise clause does not compel an accommodation and the accommodation does not offend the establishment clause. See *Zorach v. Clauson*, 343 U.S. 306 (1952).

framework, in particular, should be altered for cases involving national security concerns. Additionally, Part II engages in a normative analysis in an attempt to consider solutions outside of the current constitutional framework.

A. Background – Free Exercise Clause and Establishment Clause

In America, religious liberty and the separation between church and state grew out of two very different cultural movements: eighteenth century Enlightenment thought and the Great Awakening.⁷⁵ "The former movement, emphasizing freedom of conscience as both a political and a philosophical virtue, stressed freedom *from* the dictates of organized religion. The latter, stemming from a devout reading of the gospels ... demanded freedom *for* religion."⁷⁶ Together these movements lead to the enactment of the establishment clause and the free exercise clause in the U.S. Constitution. In the now famous quote, Thomas Jefferson declared that these two clauses have built "a wall of separation between church and state."⁷⁷

In *Everson v. Board of Education of the Township of Ewing*, the Supreme Court interpreted Jefferson's words to mean that the Establishment Clause requires the government to maintain neutrality toward religion.⁷⁸ However, not everyone shares this conceptualization of the constitutional provisions. According to Justice Rehnquist, James Madison envisioned the Establishment Clause as a way to protect against the establishment of a *national* religion.⁷⁹ Therefore, "the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another."⁸⁰ One commentator quipped that at one period (around the time of the Court's decision in *Engel v. Vitale*⁸¹) Jefferson's wall of separation "began to take the shape of an altar, i.e. a type of government established anti-religion."⁸² However, this alternative to Jefferson's "wall of separation" ignores the threat posed by government aid to religion. The dissent written by Justice Brennan in *Lynch v. Donnelly* eloquently conveys this concern:

75 CHURCH, *supra* note 8, at x.

76 *Id.* Cf. CARTER, *supra* note 11, at 115-20 (Carter argues that the Founders intended the Establishment Clause to protect religions from the state, not the other way around.).

77 *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Thomas Jefferson, Reply to Danbury Baptist Association).

78 *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 18 (1947).

79 *Wallace v. Jaffree*, 472 U.S. 38, 93-98 (1984) (Rehnquist, J., dissenting) (discussing Madison's views).

80 *Id.* at 98. See also E. Thomas Ryder, *God, Man, and Law: Of Rights and Responsibilities*, 22 N. ILL. U. L. REV. 113, 121-132.

81 370 U.S. 421 (1962) (holding that a voluntary daily prayer in public schools is inconsistent with the establishment clause).

82 Ryder, *supra* note 80, at 127. Cf. CARTER, *supra* note 11, at 109 ("The trouble is that in order to make the Founder's vision compatible with the structure and needs of modern society, the wall has to have a few doors in it.").

Under our constitutional scheme, the role of safeguarding our "religious heritage" and of promoting religious beliefs is reserved as the exclusive prerogative of our Nation's churches, religious institutions, and spiritual leaders. Because the Framers of the Establishment Clause understood that "religion is too personal, too sacred, too holy to permit its 'unhallowed perversion' by civil [authorities]," the Clause demands that government play no role in this effort.⁸³

1. Modern Establishment Clause jurisprudence

The Court's modern Establishment Clause doctrine took its shape in *Lemon v. Kurtzman*.⁸⁴ In *Lemon*, the Court synthesized its previous Establishment Clause decisions and laid out a three-pronged test: the government act must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion.⁸⁵ These prongs sought to combat the three primary evils that the Court laid out in *Walz v. Tax Commission*: "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁸⁶ Though the test seems simple enough on its face, the courts have had some difficulty applying it with consistency.⁸⁷

The first prong seeks to make sure that the government has a legitimate purpose separate from religion. In most cases, the government should not have much trouble providing a secular purpose for its action. For instance, if a law provides funding for religious schools the secular purpose is to enhance education. However, as Stephen Carter points out, the Court sometimes looks beyond the stated secular reason and examines the underlying motivations of the governmental body.⁸⁸ For instance, in *Edwards v. Aguillard*, the Supreme Court invalidated a law requiring schools to teach scientific creationism on the ground that the state legislator acted with the primary intent of promoting religion.⁸⁹

The second prong of the test seems to best exemplify the "wall of separation" metaphor because it prevents the government from having a big effect on religion, one way or the other. Though the second prong can be used to invalidate

83 *Lynch v. Donnelly*, 465 U.S. 668, 725 (1984) (J. Brennan dissenting) (quoting *Engel v. Vitale*, 370 U.S. 421, 432 [1962]). This quote does not exactly fit this particular situation because the government's use of clergy in intelligence operations is not really an attempt by the government to involve itself in spiritual affairs; rather, it's the exact opposite: an attempt by the government to involve religion in secular affairs.

84 403 U.S. 602 (1972).

85 *Id.* at 612-13.

86 *Id.* at 612 (quoting *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 668 [1970]).

87 See CARTER, *supra* note 11, at 109-115 (discussing questionable decisions arising out of the *Lemon* test).

88 *Id.* at 111. Carter criticizes the Courts propensity to look into the motivations and intent of the government actors. *Id.* ("For the religiously devout citizen, faith may be so intertwined with personality that it is impossible to tell when one is acting, or not acting, from religious motive. ...").

89 482 U.S. 578, 587 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

government actions with the primary effect of inhibiting religion; almost all of the Establishment Clause cases focus on whether the government provided an impermissible benefit to religion. The wall, though, contains some sizeable openings because the Court infused this prong with a "private choice" safe harbor, especially in cases involving funding for private schools.⁹⁰ If the government gives out funds in a neutral manner and private citizens make the choice to support religious institutions then the government action is constitutional.⁹¹ In essence, the Court seeks to make sure that government distributes benefits neutrally.

An additional consideration under the primary effects prong asks whether the government action creates a symbolic union between church and state.⁹² The symbolic union consideration could also fit under Justice O'Connor's endorsement test⁹³ or even under *Lemon's* entanglement prong. Symbolic union of church and state could be considered as a synonym for establishment, because what is establishment if not the merging together of church and state?

The entanglement prong seeks to ensure the independence of religious institutions and also to prevent them from assuming the governmental function.⁹⁴ This prong serves to prevent "a fusion of governmental and religious functions."⁹⁵ Since some entanglement between government and religious institutions is inevitable, the entanglement must rise to the level of being "excessive."⁹⁶

The Court identifies two specific types of entanglement that might indicate such a fusion of functions: administrative entanglement and political entanglement. The first occurs when the government must monitor the affairs of the religious institution to ensure that the institution only uses the government funds for a secular purpose.⁹⁷ The second occurs when the government action fosters the

90 See e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986).

91 *Zelman*, 536 U.S. at 650.

92 *Agostini v. Felton*, 521 U.S. 203, 220, 227 (1997).

93 Justice O'Connor proposed a test that would invalidate government actions seen as official endorsement of religion in terms of public perception. See *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring).

94 *Lynch v. Donnelly*, 465 U.S. 668, 687-688 (1984) (O'Connor, J., concurring) ("[E]xcessive entanglement with religious institutions ... may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines.").

95 *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (quoting *Abington School District v. Schempp*, 374 U.S. 203, 222 [1963]) (holding that law giving churches and schools the power to veto applications for liquor licenses within a 500-foot radius of the church or school, violated the Establishment Clause).

96 See *Lemon v. Kurtzman*, 403 U.S. 603, 614 (1971); *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 676 (1970).

97 *Lemon v. Kurtzman*, 403 U.S. 603, 614 (1971)

"The surveillance or supervision of the States needed to police grants involved in these three cases, if performed, puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities. Yet if that

creation of political constituencies along religious lines.⁹⁸ Some more recent cases show that the threshold for what constitutes "pervasive monitoring" and "excessive entanglement" has risen and political entanglement is given less weight.⁹⁹

The Court has also, over the years, applied other tests and considered other factors. These include the aforementioned "endorsement test,"¹⁰⁰ Justice Kennedy's proposed "coercion" test,¹⁰¹ and a "direct/indirect" distinction.¹⁰² Like the *Lemon* test these tests have their analytical limitations.¹⁰³ Establishment Clause cases do not lend themselves to clear cut solutions. The tests grope for consistency in adjudicating the border cases, but at best they just approximate the underlying philosophical debate about the proper role of church and state in American society. The tests reflect the different, and at times conflicting, concerns over the interactions between church and state. This paper uses these tests and considerations to evaluate the dangers associated with the government's use of clergy in intelligence operations.

Before getting to the analysis it is important to quickly outline free exercise clause jurisprudence because it also plays an important role in evaluating the use of clergy in intelligence operations and provides for an important distinction with Establishment Clause jurisprudence. Under the Free Exercise Clause, courts must weigh the infringement on free exercise against the importance of the government interest. The Establishment Clause tests, however, do not contain an apparatus to weigh government interests against the harms posed to society and to other religious institutions. However, the majority in *Zelman v. Simmons-*

surveillance or supervision does not occur the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause."

Id. at 627.

- 98 See *Larson v. Valente*, 456 U.S. 228, 253 (1982) ("By their "very nature," the distinctions drawn by [the Minnesota statute] and its fifty per cent rule 'engender a risk of politicizing religion. ...'"); *Lemon*, 403 U.S. at 622 ("Political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.") (citing Freund, Comment, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1692 [1969]). See also David R. Scheidemantle, note, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 Fordham L. Rev. 1209 (1984) (arguing that political entanglement should be an independent prong instead of just a warning signal for further scrutiny).
- 99 See *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 [1985]). See also *Helms v. Picard*, 151 F.3d 347, 356-60 (1998) (explaining the changes *Agostini* made to the Establishment Clause landscape).
- 100 See e.g., *Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring); *Board of Educ. v. Mergens*, 496 U.S. 226, 248-49 (1990). See also Walter C. Somol, comment, *Entangled in the Establishment Clause, the Supreme Court Seeks Enlightenment – Agostini v. Felton*, 117 S. Ct. 1997 (1997), 31 Suffolk U. L. Rev. 1033, 1037, n. 30 (1998).
- 101 Justice Kennedy's proposed "coercion" test, asks whether the government action carries the risk of psychologically coercing people into participating in a religious ceremony. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).
- 102 This distinction has since been overruled. See *Mitchell v. Helms*, 530 U.S. at 818 ("[D]irect or indirect is a rather arbitrary choice, one that does not further constitutional analysis.").
- 103 See *Ryder*, *supra* note 80, at 137-39 (discussing the limitations of other tests used by the Supreme Court).

Harris may have performed an implicit government interest analysis to overturn a lower court's decision to invalidate Ohio's school voucher program.¹⁰⁴

2. Modern Free Exercise Clause jurisprudence

The Free Exercise Clause deals almost exclusively with the burdens that the government places on people's ability to practice their religion. These burdens range from specifically targeted legislation aimed at discriminating against one particular religious group,¹⁰⁵ to general and neutral government programs and regulations that nevertheless hamper a person's ability to practice religion.¹⁰⁶ Since the passage of the Religious Freedom Restoration Act of 1993 the Court must apply the strict scrutiny standard to both the specifically targeted laws and the generally applicable laws.¹⁰⁷ However, the Court's holding in *City of Boerne v. Flores*,¹⁰⁸ limits RFRA's reach to actions taken by the federal government; the RFRA does not apply to the states.¹⁰⁹ The strict scrutiny standard requires the government to show a compelling state interest for the action and that there was no less restrictive alternative that did not burden the free exercise of religion.

B. Analysis – Applying Constitutional Doctrine to Government's Use of Clergy in Intelligence Operations

The government's use of clergy in intelligence operations places burdens on religious institutions and fuses the functions of church and state. This section of

104 See *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Souter, J., dissenting) (quoting *Agostini v. Felton*, 521 U.S. 203, 254 [1997] [Souter, J., dissenting])

If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. "Constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government."

Id. See also Jill Goldenziel, note, *Administratively Quirky, Constitutionally Murky: The Bush Faith-Based Initiative*, 8 N.Y.U. J. Legis. & Pub. Pol'y 359, 382 (2004) ("The [*Zelman*] opinion can be interpreted to mean that policies that effectively cure great societal ills may be excused from the Establishment Clause's requirements.")

105 *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (adjudicating the constitutionality of an ordinance prohibiting animal sacrifice rituals in the Santeria religion).

106 *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (ruling on the constitutionality of the federal government's general prohibition psychotropic substances, which Native Americans use in religious ceremonies).

107 42 U.S.C. § 2000bb, 1-4 (2007); See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that applying the Controlled Substances Act to the church's sacramental hoasca plant violated the Religious Freedom Restoration Act of 1993 because the government could not show a compelling interest and no less restrictive alternatives).

108 521 U.S. 507 (1997).

109 See *Centro Espirita*, 546 U.S. at n. 1 ("In *City of Boerne v. Flores*, we held the application to States to be beyond Congress' legislative authority under § 5 of the 14th Amendment.")

the paper explores the ways in which the government's use of clergy in intelligence operations might violate the Free Exercise Clause and the Establishment Clause. Most of the concerns posed focus on the burdens and dangers that the government's practice imposes on religious institutions. However, the use of clergy in intelligence operations might also provide religious institutions with hidden benefits and power.

1. Free Exercise Clause analysis

The Free Exercise Clause analysis is fairly straightforward. The analysis goes through three main questions to determine whether the government's use of clergy in intelligence operations violates the Free Exercise Clause. First, does the government policy of using clergy in intelligence operations place a burden on religious practice? Second, does the government have a compelling interest in being able to use clergy in intelligence operations? Finally, are the means used no more burdensome than necessary?

a. Burden on free exercise

Going by the testimony given at the 1996 Senate hearing, it seems that the government policy does in fact place a burden on religious institutions and practitioners.¹¹⁰ Though the CIA will only use clergy under exceptional circumstances,¹¹¹ even the very possibility that the CIA might use *one* member of the clergy places *all* others under suspicion and at risk.¹¹² Furthermore, when Deutsch listed examples of "exceptional circumstances" he specifically mentioned terrorists using weapons of mass destruction.¹¹³ In the post 9/11 climate the administration has used this threat as a justification for a number of actions including waging war in Iraq. Since the CIA can easily conclude that the current situation qualifies as an "exceptional circumstance" the use of clergy as intelligence sources is not farfetched. This possibility endangers the lives of missionaries working abroad. Additionally, the CIA's use of clergy disproportionately affects those religious institutions that send missionaries abroad or require missionary work as a basic tenet of religious practice. Those religions that do not send missions do not face the same burdens to the free exercise of their religions as those who do.

However, the government's use of clergy in intelligence operations within the United States might pose Free Exercise Clause problems for all religious institutions. Such a practice can have a chilling effect on religious practice. For example, if the FBI uses clergy as undercover informants (or places undercover agents into churches under the guise of the clerical garb) then people will be

110 See generally *CIA's Use of Journalists and Clergy*, *supra* note 14.

111 *Id.* at 7.

112 *Id.* at 37.

113 *Id.* at 7.

more hesitant to perform the sacred rites of confession, in the case of Catholics,¹¹⁴ or they will simply cease attending religious services. One counter-argument might be that if they are undercover then no one will be the wiser and people will continue to practice their religions without any fear or suspicion. However, this logic breaks down as soon as word of even one instance of spying leaks out to the public, because then every clergy falls under suspicion. Moreover, religious institutions already see a chilling effect from the FBI's increased monitoring of religious groups (through electronic surveillance and undercover informants that infiltrate the religious institution, though presumably not as members of the clergy) since 9/11.¹¹⁵ At this point there is no direct evidence that clergy have been used as informants,¹¹⁶ but the testimony before the Senate Select Committee on Intelligence shows that the very possibility of such use places a shroud of suspicion over religious workers, burdens their ability to perform religious duties, and poses severe risks to religious practice.

b. Strict scrutiny analysis

With the passage of the RFRA, a government policy of using clergy in intelligence operations must pass the strict scrutiny standard even if the policy does not directly target religion.¹¹⁷ On one hand, the government's practice of gathering intelligence information through human agents (spies and informants) is one of general applicability; the CIA and the FBI will use whoever they feel will provide the best and most relevant information, regardless of creed. On the other hand, the CIA chooses agents based on specific criteria and in this case it would presumably choose them based on religion. However, the CIA might target a missionary or priest, not because of his religion, but because he will be traveling to a particular foreign country. Whether the government targets clergy because of their religion or merely because they happen to fit other desirable factors does not matter under the RFRA framework because either way the practice of using clergy in intelligence operations places a significant burden on religion. Therefore, the government practice must pass strict scrutiny. The government will most likely be able to meet this burden.

The CIA's current policy¹¹⁸ generally exempts clergy from being used in intelligence operations, except under exceptional circumstances that require the use of clergy to prevent a national security disaster. This means two things: that

114 See Anthony Merlino, comment, *Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655, 699 (2002).

115 See generally Tom Lininger, *supra* note 2.

116 Maybe such evidence exists, but I have not been able to find it.

117 42 U.S.C. § 2000bb, 1-4.

118 I have been unable to find much information about the FBI's policy on the use of clergy in domestic intelligence operations. However, the Department of Justice guidelines on the use of informants state that an agent must get permission from the supervisor to use an informant that has access to privileged communication (i.e. a member of the clergy). OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2005), available at <http://www.usdoj.gov/olp/dojguidelines.pdf>.

the government can claim national security as a compelling interest, and that the policy is no more restrictive than necessary because it only allows the use of clergy under the most extreme circumstances. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."¹¹⁹ Since the Court generally gives the executive branch great deference in determining what constitutes a national security concern,¹²⁰ the government should easily meet its burden and satisfy the statutory requirements of the RFRA.¹²¹

2. Establishment Clause analysis

The question of whether the government's use of clergy in intelligence operations violates the Establishment Clause proves to be more complicated because Establishment Clause jurisprudence is not nearly as straightforward and linear as that of the Free Exercise Clause. Establishment Clause issues that arise out of the government's use of clergy in intelligence operations do not fit neatly within the *Lemon* prongs. Instead, they call into question the overarching purposes behind the Establishment Clause. Since these purposes, at times, conflict and confuse, this section will go through the different problems and analyze how the problems relate to the overarching purposes and whether the problems pose complications under the primary effects prong, the entanglement prong, or both. There will be no need to spend time discussing the secular purpose prong because the government has a clear (and compelling) interest in obtaining intelligence information to prevent terrorist attacks and the like. Unless the conspiracy theory is true and the CIA really was formed to protect the interests of the Catholic Church,¹²² the secular purpose prong does not pose any problems for the government.

119 *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S., 500, [1964]). See also *Richmond Newspapers v. Virginia*, 448 U.S. 555, n. 24 (1980) (noting that national security concerns can justify closing court proceedings to the public and thereby abridging First Amendment rights); *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1027 (7th Cir. 2002) (holding that stopping terrorism is a compelling state interest); *Farrakhan v. Reagan*, 669 F. Supp. 506, 511 (1987) (holding that the Free Exercise Clause did not require the government to grant a religious group an exemption from the general ban on giving subsidies to Libya because of the overriding national security interest in stopping terrorism).

120 See *CIA v. Sims*, 471 U.S. 159 (1985) (holding that the Court must give great deference to decisions made by the director of the CIA as to what constitutes confidential information for purposes of national security). See also *Korematsu v. United States*, 323 U.S. 214 (1944).

121 Religious institutions might be able to prevail on some as applied challenges if the facts clearly show that exceptional circumstances do not exist. Again, the Court gives great deference to determinations of the executive branch, so the facts would have to be rather favorable. Moreover, the religious institution could face significant problems getting to trial due to the *Totten* and states secrets doctrines, discussed, *infra*, part III.

122 Posting of Greg Szymanski to Dark-Truth.org, <http://dark-truth.blogspot.com/2007/02/almanac-of-evil.html> (Feb. 23, 2007) (posting a list of accusations leveled against the Vatican; #46 on the list states that the CIA was formed to protect and uphold Vatican interests).

One of the over-arching concerns behind the Establishment Clause has been the concern that government and religious functions will become fused. This concern, while not shared by all of the founding fathers or current scholars,¹²³ focuses on preventing the government from "openly or secretly, participat[ing] in the affairs of any religious organizations or groups and *vice versa*."¹²⁴ In a sense, the fusion of governmental and religious functions is the very epitome of an establishment of religion.¹²⁵ This concept fits within the analysis of both the primary effects prong and the entanglement prong of the *Lemon* test. On the one hand, providing religious institutions with the ability to make use of the state's coercive power grants a great benefit on religion. On the other hand, allowing the state to participate in and direct religious affairs imposes a significant burden on a religious institution's ability to make decisions based on spiritual, instead of material, dictates. Either way, though, government and religion entangle themselves in the affairs of the other.

The use of clergy in intelligence operations threatens to fuse governmental and religious functions on several levels. Using clergy as informants in intelligence operations, especially in those affecting national security, places a great deal of governmental power in the hands of religious institutions. Informants hold sway over the use of government resources because "a single piece of information from an informant has the power to set off a wave of action by law enforcement officials, especially when there is a potential national security threat."¹²⁶ Additionally, FBI agents and CIA case officers sometimes become too close to their informants and begin aiding them in improper ways.¹²⁷ In organized crime investigations, this could involve the agent becoming entranced by the criminal lifestyle to the point where the agent begins to participate in "underworld activities."¹²⁸ Translating this to the church and state context, a particular agent or case officer, especially if she is religious, might become attached to a particular clergy informant/spy and become convinced that she should aid the church by employing government resources to further church ends. In the domestic, criminal context the courts provide an extra check before law enforcement can conduct searches and seizures. In national security investigations, though, the executive has much more freedom to do what it considers necessary, especially if the

123 As Justice Rehnquist and some others point out, Madison did not share the same views about the separation of church and state, as Thomas Jefferson, for instance.

124 *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

125 *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 [1971]).

126 Daniel V. Ward, *Confidential Informants in National Security Investigations*, 47 B.C. L. Rev 627, 655 (2006). Cf. *Larkin*, 459 U.S. 116 (holding that a law giving churches and schools the power to veto applications for liquor licenses within a 500-foot radius of the church or school, violated the Establishment Clause).

127 Ward, *supra* note 126, at 655.

128 *Id.* ("This kind of behavior was revealed in the Boston FBI scandal, when it was discovered that FBI agents had protected Whitey Bulger and Stephen Flemmi for decades because of their value as informants against the Italian Mafia.") (citing *United States v. Salemme*, 91 F. Supp. 2d 141, 175-316 [D. Mass. 1999]).

investigation focuses on agents of foreign powers.¹²⁹ Therefore, the possibility that a religion might receive an excessive and improper benefit rises.

The mere possibility of an improper relationship between an agent and a member of the clergy, on its own, does not rise to the level of an establishment. Such a relationship cannot be considered a true government action because it is clearly improper and outside the scope of the agent's duties. Moreover, even anonymous informants have the power to direct the use of government resources.¹³⁰ However, the nature of case officer-spy dealings creates a real danger for improper relationships to arise.¹³¹ This is similar to the danger the Court discussed in *Aguilar v. Felton*, in which it held that the possibility that teachers sent to parochial schools will proselytize necessitates a pervasive scheme of monitoring to prevent the improper conduct, thereby, creating an excessive entanglement of church and state.¹³² In *Agostini v. Felton*, the Court overruled *Aguilar* by holding that there is no longer a presumption "that public employees will inculcate religion simply because they happen to be in a sectarian environment" and, therefore, there is no longer a need for the pervasive monitoring scheme.¹³³ It is unclear whether the Court would adopt a presumption of improper conduct in the case of government agents and clergy. Other factors, though, point to an even more pervasive problem of the fusion of governmental and religious functions.

The CIA often makes deals with people to get them to provide information and act as spies.¹³⁴ In some instances, the CIA case officer plays the role of a "skillful con artist ... in recruiting and handling [spies]."¹³⁵ While this poses some significant problems in its own right,¹³⁶ there are times when the CIA runs into a strong bargaining partner. For instance, the use of the Catholic Church in Chile was not so much a con game but rather a marriage of mutual benefit.¹³⁷ In these situations, the religious institution not only carries out the military duties of the government to protect national security,¹³⁸ but it also receives unknown benefits and concessions. While it is unknown what kinds of concessions the CIA made to members of the church, it is not difficult to hypothesize of situations in which the CIA agrees to exchange favors in order to gain access to the information

129 Ward, *supra* note 126, at 655-56. Also see 50 U.S.C. §§ 1801-1805 (2003). Moreover, the CIA does not have to check in with the judiciary when carrying out operations abroad.

130 *Id.* at 655 (discussing how an anonymous informant set off a government investigation with a false tip).

131 Cf. WILLIAM E. ODOM, *FIXING INTELLIGENCE: FOR A MORE SECURE AMERICA* 153 (2003) (discussing how case officers sometimes become too attached to their agents and lose objectivity).

132 *Aguilar v. Felton*, 473 U.S. 402, 410-11 (1985).

133 *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

134 See *Tenet v. Doe*, 544 U.S. 1 (2005) (holding that spies cannot sue the CIA for claims arising out of any secret agreements, in this case, the CIA agreed to provide the spy with U.S. citizenship and financial support for life).

135 ODOM, *supra* note 131, at 152.

136 Discussed *infra*.

137 The Catholic church also opposed Allende's government and wanted to see a change. See

138 Compare to Faith Based Initiatives. Cf. Goldenziel, *supra* note 103.

networks and connections of a particular religious institution.¹³⁹ Moreover, it will mainly be the powerful religious institutions, with vast information and operational networks, which will benefit from these arrangements; seeing as the CIA will have no use in making deals with minor religious institutions, which hold no influence abroad. This fact has the effect of establishing one or two powerful religious institutions to the exclusion of others. Even the staunchest supporter of a restricted reading of the Establishment Clause would have to agree that such a situation would qualify as a violation.¹⁴⁰

In addition to religious institutions assuming the governmental function, the use of clergy for intelligence operations might have the effect of the government assuming the religious function. Since one of the 1st Amendment's primary purposes is to protect religion *from* government intrusion, this possibility should cause great concern.¹⁴¹ As mentioned earlier, the skills of a CIA case officer, in many ways, resemble those of a professional con artist.¹⁴² This means that a CIA case officer has the psychological power, whether through cajoling or threats, to convince a particular cleric, whom she recruited as an intelligence operative, to change the way he performs his religious duties so as to serve some ulterior, secular purpose. For instance, the case officer might direct the cleric to insert certain phrases within a sermon so as to provide secret information to clandestine agents in the community. In an even more likely possibility the case officer might tell the cleric to transmit disinformation or propaganda against the local government or a local group.¹⁴³ Such a speech might put the cleric in danger with the local authorities or it might cause him to forego giving a sermon more geared to a particular issue that concerns the soul. In that sense this example overlaps with concerns more usually associated with the Free Exercise Clause.

More importantly, such actions constitute an "unhallowed perversion by civil authorities" of a sacred religious practice.¹⁴⁴ In terms of the *Lemon* test, such intrusion by the government would not only have the effect of burdening religion but also entangling the government in the affairs of the religion, enabling it to make decisions that affect the spirituality of the religion's followers. Such actions might also violate a modified version of Justice Kennedy's coercion test. For instance, if a case officer attempts to strong-arm or blackmail a cleric to do one of these acts then government, in effect, coerces the religious institution to

139 Though this example assumes a level of bad faith on the part of religious institutions, it is not altogether unthinkable that a religious group would agree to provide a CIA agent cover as a missionary in exchange for private or confidential information about a political enemy, such as a pro-choice group.

140 *Wallace v. Jaffree*, 472 U.S. 38, 98 (1984) (Rehnquist, J., dissenting) ("[T]he First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.").

141 This is both an establishment and a free exercise concern.

142 ODOM, *supra* 131, at 152.

143 See Gvosdev, *supra* note 14, at 3.

144 *Lynch v. Donnelly*, 465 U.S. 668, 725 (1984) (J. Brennan dissenting) (quoting *Engel v. Vitale*, 370 U.S. 421, 432 [1962]).

participate in a form of religious ceremony that it would not choose to participate in absent the coercive pressures.¹⁴⁵

The government also assumes control of the religious function if CIA operatives or FBI agents go undercover as members of the clergy or as missionaries. In such a case, the government official takes on the duty of indoctrinating the public. While the Supreme Court "no longer presume[s] that public employees will inculcate religion simply because they happen to be in a sectarian environment," the very nature of the situation requires the public employee to indoctrinate.¹⁴⁶ If the government operative stays undercover then, at least, the symbolic union concern does not really come into play because the public will not know that a government operative indoctrinated them.¹⁴⁷ However, the larger concern of the government taking on the religious function remains: the government's intrusion might have the effect of desecrating the sacredness of the religious office.¹⁴⁸

As a general matter, the use of clergy in intelligence operations creates a significant risk of fusing the functions of church and state, thus causing potential burdens for both. The secret nature of these arrangements exacerbates this risk because little oversight exists to ensure against abuses.¹⁴⁹ Therefore, as a general policy, the use of clergy in intelligence operations seems to violate the Establishment Clause. However, two factors might suggest a different outcome. First, the preceding analysis deals in hypothetical possibilities. It is possible that an individual, isolated and short-term use of clergy by the CIA or FBI might not have the primary effect of either benefiting or burdening religion, or result in excessive entanglement or fusion of the governmental and religious functions. A single instance of the CIA or FBI asking a cleric to help them figure out who in the congregation has access to an atomic weapon might not violate the Establishment Clause. In a way, this example tries to draw a distinction between an "informant" and a "spy." For instance, should a crime occur during services or on church grounds then the government has the right and the responsibility to find out what, if anything, the clergy knows. However, asking the clergy to spy on the congregation to find out if any of them engage in illegal activity seems to cross the line.

Second, national security considerations might force courts to alter the Establishment Clause doctrine. The courts have not considered a case in which the government felt compelled to establish religion due to national security

145 Presumably such conduct would be improper, but using some piece of information about someone to gain leverage over them seems to fall within the CIA's modus operandi.

146 *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

147 However, the public might know that such undercover operatives exist in general and that in itself creates the beginnings of a symbolic union.

148 However, a government operative going undercover into a religious institution to protect the congregation from a threat might provide a counter-example to the desecration argument.

149 Compare this to situations in which the CIA wants to use journalists in intelligence operations: the agent must obtain authorization from the director of the CIA or the President and then they must report back to the congressional oversight committee. See 50 U.S.C. § 403-7.

concerns. However, the Court's decision in *Zelman*¹⁵⁰ raises the possibility that significant social problems raise the Constitution's toleration of a higher level of entanglement, primary effects, and endorsement. While the majority hinged the decision on the doctrine of "private choice,"¹⁵¹ the dissent railed against what it saw as a break with the "wall of separation" framework and the introduction of an implicit cost-benefit analysis into the Establishment Clause doctrine.¹⁵² Should the Establishment Clause doctrine change to accommodate national security threats?

In *Goldman v. Weinberger*, the Court held that "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."¹⁵³ Though *Goldman* dealt with a free exercise challenge by an Orthodox Jew to an Air Force's regulation prohibiting headwear, it shows the deference the Court generally gives to the executive in matters of national security and defense.¹⁵⁴ Such deference can be dangerous when the integrity of the Constitution is at stake. The historical moment might urge the Court to give greater weight to national security, but history moves on while Supreme Court precedents hang around to haunt future fact patterns.¹⁵⁵ Introducing a balancing test into Establishment Clause doctrine, coupled with the deference the Court usually gives to executive decisions, will give the government a great tool with which to oppress religion; to use religious institutions for non-sacred ends. The Constitution might be able to tolerate isolated use of clergy in intelligence operations; however those involved might feel that the government overstated national security concerns and therefore the use was unjustified. The secret nature of intelligence operations will prevent close scrutiny by the public and Establishment Clause concerns will grow and fester under the radar.

C. Normative Analysis

Maybe the inherent point behind *Zelman* is that Establishment Clause concerns are, as a general matter, overblown. Maybe some fusion of the governmental and religious functions does not pose a significant danger to civil society, religious

150 536 U.S. 639.

151 *Id.* at 655.

152 *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Souter, J., dissenting).

153 475 U.S. 503, 507 (1986) (superseded by statute 10 U.S.C. § 774(a)-(b): "a member of the armed forces may wear an item of religious apparel while wearing the uniform," unless "the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative").

154 *But see* Mark A. Graber, *Counter-stories: Maintaining and Expanding Civil Liberties in Wartime*, in *THE CONSTITUTION IN WARTIME* 95, 103-6 (Mark Tushnet ed. 2003) (arguing that the flag-salute cases during World War II provide a "counter-story" in which religious freedom actually expanded during a national security crisis) (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624).

155 *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (arguing that the *Korematsu* decision will "lie about like a loaded weapon").

freedom, or the well-being of the government; if some benefits flow to religion neither church or state will be the worse for wear. In *Lemon*, the Court nearly said as much by admitting that in modern society there is bound to be some entanglement between church and state.¹⁵⁶ However, in the context of espionage even a little entanglement might prove too much. While it is tempting to give the judiciary some breathing room so that it can take account of extraordinary situations, such leeway might prove ultimately destructive.

The use of clergy in intelligence operations has the potential to be a great boon for the CIA and the FBI. Clergy and other privileged professions (i.e. journalists) have special access to important locales and information. In recent years, the threat of fundamentalist, Islamic terrorism created a greater need for information about fundamentalist Islamic groups and communities. Clergy might be able to gain access to these communities and help provide information relevant to preventing terrorist attacks. Finally, clergy have a unique ability to influence people's hearts and minds, an ability of some importance in the intelligence world.

However, these benefits might seem speculative and slight when weighed against the damage that such a policy can inflict. First, situations in which *only* clergy can provide the information needed are going to be rare, while the waiver policy endangers all clergy. Though clergy might be privileged in society, this privilege also sets them apart from regular people and limits their access to many types of information.¹⁵⁷ A cleric who goes snooping around might attract suspicion, endangering his life and the lives of clergy who come to the area in the future.

Furthermore, clergy thrust into the world of espionage might have problems with dual allegiances. What is good for the United States might not always be good for a particular religious group. This inherent problem decreases the usefulness of clergy as intelligence assets. Of course, the CIA always has to deal with the possibility of counter-intelligence. Spymasters trained to question everything and everyone will have a difficult time trusting these potential double agents.¹⁵⁸ A suspicious spymaster might be inclined to address the risk, and the ways in which the intelligence community solves its problems might not comport with society's sense of how clergy should be respected.

In addition to the purely corporeal dangers facing clergy, involvement in the cloak and dagger world of espionage threatens to damage religion as a whole. The general public conceives of the intelligence community as a dog-eat-dog environment where suspicion runs on all sides. By most accounts the popular conception is not far from the truth.¹⁵⁹ Religious institutions, on the other hand, generally rely on the virtues of trust and love (though scandal and intrigue do sometimes find their ways into the hallowed halls of religious institutions). Bringing religious institutions and their clergy into the world of espionage might

156 *Lemon v. Kurtzman*, 403 U.S. 603, 614 (1971); *Waltz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 676 (1970).

157 See Hitz, *supra* note 5 (discussing the difference between "dirty" and "angel" assets).

158 See ODOM, *supra* note 131, at 152-76. For an example of a suspicious spy-master see James Jesus Angleton, the head of CIA counter-intelligence from 1954-1974.

159 See *generally*, PRADOS, *supra* note 15, and TRENTO, *supra* note 18.

erode the public's trust in religion. Unable to separate fact from fiction, people might assume that clergy participate in the same activities as the fictional CIA agents who appear in Hollywood movies. This perceived duplicity is likely to harm religion's public image and further take away the privileged post that clergy hold in society.

Part IV of this paper discusses additional policy aspects of the debate over whether to completely ban the use of clergy in intelligence operations. Part III examines whether the judiciary has the authority, under the current constitutional framework, to adjudicate cases involving the government's use of clergy in intelligence operations. Later in Part III, this paper discusses whether, as a normative matter, the courts should interject themselves into this sort of national security dilemma.

III. CAN THE COURTS RESOLVE DISPUTES OVER WHETHER THE GOVERNMENT CAN USE CLERGY IN INTELLIGENCE OPERATIONS?

The federal courts do not have unlimited power to resolve disputes. They are limited by their jurisdiction and Article III of the Constitution requires that the courts only commit themselves to resolve a "case" or "controversy." These two words expand to determine whether a case is justiciable. The relevant justiciability doctrines for the purposes of this paper are standing and the political question doctrine. Moreover, the *Totten*¹⁶⁰ doctrine acts as a bar by foreclosing the courts ability to hear cases involving disputes arising out of secret espionage agreements. These considerations limit the courts ability to hear cases dealing with the use of clergy in intelligence operations, though some suits might be possible under favorable circumstances and if the claimants meet the proper requirements.

A. To What Extent Do First Amendment Rights Extend Beyond U.S. Borders?

The CIA generally conducts its operations outside the territorial boundaries of the United States. Therefore, the question becomes whether the First Amendment applies beyond U.S. borders. The relevant Free Exercise Clause questions are: 1) whether U.S. citizens have the right to practice their religion while abroad without U.S. government interference, and 2) whether non-U.S. citizens have the right to be free from the U.S. government interfering with their right to practice religion.¹⁶¹ The Establishment Clause also presents an extraterritorial issue: whether the U.S. government's connections with a non-U.S. based religious institution can violate the Establishment Clause. The last two questions are of

160 See *Totten Adm'r v. United States*, 92 U.S. 105 (1875) and *Tenet v. Doe*, 544 U.S. 1 (2005).

161 See John Crewdson and Tom Hundley, *Abducted Imam Aided CIA Ally*, CHICAGO TRIBUNE, July 3, 2005 ("Last month, Italian authorities charged 13 CIA operatives with kidnapping an Islamic cleric known as Abu Omar. Now former Albanian intelligence officials reveal that the imam was once an informant valued by the CIA.").

particular importance because religious institutions increasingly draw their missionaries from the indigenous population.¹⁶²

The most analogous legal authority comes from Supreme Court decisions involving the applicability of constitutional due process rights beyond U.S. borders. Professor Tung Yin synthesizes the Supreme Court cases dealing with extraterritorial due process claims and describes different theoretical conceptions of dealing with the issue.¹⁶³ Supreme Court precedent seems to easily answer the first question of whether U.S. citizens have constitutional rights outside of the United States. According to *Reid v. Covert*,¹⁶⁴ the Bill of Rights continues to limit the government's ability to act against U.S. citizens even when they live abroad.¹⁶⁵ However, the holding from *Covert* has a somewhat limited precedential value because it is only a plurality opinion.

The second question, dealing with non-citizens, presents a more complicated dilemma. A line of Supreme Court cases seems to suggest that non-citizens outside of U.S. borders do not possess any constitutional rights.¹⁶⁶ While this conclusion proves unsatisfactory from a normative perspective¹⁶⁷ and a theoretical one,¹⁶⁸ the opposite approach proves highly unworkable because it would allow foreigners to bring a "panoply" of claims against the U.S. government forcing the courts to second-guess political determinations; worse yet it might force the courts to hear thousands, if not millions, of habeas corpus petitions from POWs and the like.¹⁶⁹

Professor Yin considers the viability of an "action-inaction" distinction, which would grant non-citizens due process rights when the claimant asks for relief from U.S. government detention (an affirmative action) as opposed to when a

162 Gvosdev, *supra* note 14, at 10.

163 Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 Tenn. L. Rev. 351 (2006).

164 354 U.S. 1 (1957) (plurality opinion).

165 *Id.* at 5-6 ("At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."). Also, see *Burns v. Wilson*, 346 U.S. 137 (1953) (adjudicating the due process rights of U.S. citizens who were tried and convicted by a military court in Guam) in which the Court seems to implicitly assume that U.S. citizens held outside of the United States have a constitutional right to habeas corpus.

166 See *e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); see *also* *Zadvydas v. Davis*, 533 U.S. 678 (2001) (distinguishing between rights afforded aliens who have entered U.S. territory and those who have not).

167 Professor Yin lists some of the possible consequences of concluding that the non-citizens possess no due process rights. Yin, *supra* note 163, at 369. In the First Amendment context an example of unsatisfactory consequences might involve the executive branch forcing captured (Muslim) enemy combatants to eat pork and drink alcohol. However, international law and international pressures might provide a check and balance against these types of abuses. See *id.* (discussing Peter J. Spiro's argument that international law plays a role in shaping executive branch policy).

168 *Id.* at 387-88 (discussing Kermit Roosevelt's view that territoriality makes little theoretical sense).

169 *Id.* at 377.

claimant asks the U.S. government for help (the United States has not acted when under the Constitution it should have).¹⁷⁰ Transferring this dichotomy to the Free Exercise Clause seems to pose a slight problem. On the one hand, the claimants sue because a government action interferes with their religious freedom. On the other hand, the claimants ask the government to do something, in that they want the government to provide them with an exemption from the general policy. However, in substance the exemption is really a plea for the government to stop taking actions that harm religious freedom. Therefore, the "action-inaction" distinction does apply to non-citizen clergy who want to be left alone. One additional problem arises, though, when the religious institution acts more like a partner than an agent (i.e. the Catholic Church in Chile). In that situation, the religious institution and the clergy did not seem to mind the millions of dollars flowing into their coffers, which they used to oppose mutual enemies. The Establishment Clause is meant for just these types of situations.

However, the question of whether the Establishment Clause applies to situations dealing with non-U.S. based religious organizations presents a complex dilemma. On the one hand, the establishment of a foreign church through the use of clergy creates similar concerns as the establishment of a U.S. church: religious control of government resources, benefits flowing to religious organizations, entanglement, and the desecration of the sacred. On the other hand, taking this argument to its logical conclusion means that the U.S. government cannot provide aid to a country that does not separate church and state. However, that example might not qualify as an establishment because it falls under *Agostini's* "private choice" rule: the United States is merely sending aid to foreign countries that need it and those countries choose to support a particular religion through their own private choice, therefore the United States is not endorsing religion.

These questions are in the deep end of uncharted constitutional waters and this paper in no way claims to have fully examined their depths. Moreover, these issues overlap with other constitutional doctrines such as standing and the political question doctrine. The following sub-sections discuss the applicability of these doctrines and further explore the question of whether the federal courts even have the power to adjudicate cases dealing with the use of clergy in intelligence operations.

B. Standing

The basic requirements of the standing doctrine are fairly simple: the plaintiff must allege 1) an injury in fact 2) traceable to the defendant's allegedly unlawful conduct and 3) likely to be redressed by the requested relief.¹⁷¹ Clergy who have been targeted by the CIA or the FBI have likely suffered an injury in fact caused by the government; the same goes for the religious institutions that employ those clergy. However, past injuries do not qualify for injunctive relief; they only count as evidence that the perceived threat of future injury is sufficiently real

170 *Id.* at 381-83.

171 *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006).

and immediate to show an existing controversy.¹⁷² Therefore, a church could sue the CIA using past incidents to show the current threat facing the church and ask the court for an injunction to prevent the CIA from recruiting any more clergy.

A tougher question is whether a church has standing if it cannot prove that the government used its clergy in intelligence operations. The church can argue that the government's current policy places all clergy in danger. The government's past use of clergy from other churches creates a significant danger that the government will target their clergy or, at the very least, that their clergy will be suspected of collaborating with the government, thereby endangering the clergy's lives and the success of the church's religious mission. This seems to qualify as an injury in fact, though, it might be difficult to raise an Establishment Clause claim because the injury in fact must be traceable to the allegedly unlawful conduct; and this particular injury is stated in the language of a Free Exercise Clause violation. The church could make the argument, though, that perceived entanglement with the CIA causes churches problems when they try to complete their religious missions; such entanglement being a violation of the Establishment Clause.

In *Flast v Cohen*, the Court held that a taxpayer has standing to challenge Congress's use of its taxing and spending power when that use amounts to an establishment of religion.¹⁷³ Since churches do not pay taxes this type of standing offers them little consolation. Other concerned citizens without a particularized injury are also unlikely to have standing. In *Hein v. Freedom of Religion, Inc.*, the Supreme Court severely limited *Flast's* reach by distinguishing between programs undertaken pursuant to a specific congressional appropriation and an express congressional mandate versus those undertaken by the executive using general discretionary funds.¹⁷⁴ In the current controversy, Congress did not pass a law that specifically concerns the use of clergy in intelligence operations. Rather, Congress allocates funding through its yearly spending bills to the CIA and the FBI, agencies that sometimes make use of clergy in intelligence operations. Therefore, a taxpayer group would likely not have standing to challenge this practice on Establishment grounds.¹⁷⁵

Additionally, a suit brought by a regular taxpayer might raise prudential standing concerns. The courts do not want to hear suits brought by people who do not have a real stake in the matter apart from a general injury suffered by all citizens.¹⁷⁶ The injury should be peculiar to the party or to a distinct group to which she belongs.¹⁷⁷ A church definitely satisfies this requirement because the

172 *O'Shea v Littleton*, 414 U.S. 488, 495-96 (1974).

173 392 U.S. 83 (1968).

174 127 S.Ct. 2553 (1987).

175 A taxpayer could argue that Congress should have placed limits on the use of the funds, as it did in the case of journalists, and that through this inaction it has directly allowed for the use of clergy in intelligence operations. See 50 U.S.C. § 403-7 (2007). Such an argument will likely prove ineffective because congressional non-action, even when it is consciously performed, is probably not enough to meet the requirements imposed by *Hein*.

176 See *Valley Forge*, 454 U.S. at 483.

177 *Warth v Seldin*, 422 U.S. 490 (1975).

threats posed by the government's use of clergy in intelligence operations affect religious institutions as a group. Clergy also satisfy this requirement. It is unlikely that church-goers (who are also tax-payers) are distinct enough or suffer enough of an individualized injury to satisfy the prudential standing requirements. Perhaps a churchgoer who attended a church infiltrated by the CIA might have an individualized injury.

C. The Totten Doctrine

Recently, in *Tenet v. Doe*,¹⁷⁸ the Supreme Court upheld a Civil War era decision, *Totten Adm'r v. United States*,¹⁷⁹ prohibiting judicial resolution of claims arising out of secret agreements. The decision means that all suits brought by former spies against the CIA will be dismissed at the outset; it means that when the plaintiff's must establish that the CIA entered into a spy agreement the suit must be dismissed. This doctrine poses a problem for churches and priests who want to sue the government for using clergy in intelligence operations. These claimants find themselves in a catch-22 situation because in order to prevail they must show that the government enters into espionage agreements with clergy, but proving such a fact runs them smack into the *Totten* doctrine. This section discusses whether the *Totten* doctrine bars these suits.

In *Totten* the administrators of Totten's estate sued the United States to recover wages promised to Totten by President Lincoln for a spying mission, which Totten conducted during the Civil War.¹⁸⁰ The Court's decision in *Totten* included three relevant holdings.¹⁸¹ First, the Court held that the President's commander-in-chief power authorizes him to enter into espionage contracts during times of war.¹⁸² Second, the Court held that a term of secrecy is implied in all espionage agreements and therefore "the publicity produced by an action [on the contract] would itself be a breach of a contract of that kind, and thus defeat a recovery."¹⁸³ Third, the Court pronounced a broad and sweeping rule, holding that "as a general principle ... public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."¹⁸⁴

More than one hundred years later a new spy suit reached the Supreme Court. This time a former diplomat from an Eastern European country wanted the CIA to honor its promise to support his family, which it made in exchange for his

178 544 U.S. 1 (2005).

179 92 U.S. 105 (1875).

180 *Id.*

181 However, the last two holdings overlap and in *Tenet v. Doe* the Court collapses the last two holdings into one. *Tenet*, 544 U.S. at 9.

182 *Totten*, 92 U.S. at 106.

183 *Id.* at 107.

184 *Id.*

agreement to spy.¹⁸⁵ "The appeals [to the CIA] were all closed-door and did not include the Does or their legal counsel."¹⁸⁶ In fact, the Does could not even obtain a copy of the regulations or rules governing the appeals process.¹⁸⁷ The Does sued under a pseudonym to prevent compromising national security and only asked that the Court require the CIA to give them due process in considering their claim.¹⁸⁸ The Court rejected the argument that *Totten* merely stood as a decision of contract law and held that *Totten's* "more sweeping holding" acts as an absolute bar prohibiting suits against the government based on covert espionage agreements.¹⁸⁹ The Court's reasoning consisted of two main arguments. First, the Court cited *Totten* in holding that the existence of espionage contracts is a "matter which the law itself regards as confidential."¹⁹⁰ Second, the Court relied on several national security concerns, including the possibility of a lawsuit "compromis[ing] a source's identity" or "undermin[ing] ongoing covert operations."¹⁹¹

The Supreme Court considered the national security concerns so high as to hold that "the state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule."¹⁹² However, several commentators argue that the Supreme Court's concerns are somewhat overblown and *in camera* procedures and the state secret's doctrine can safeguard national security without necessitating the complete foreclosure of relief for constitutional violations.¹⁹³ Instead of reducing *Totten's* scope, the courts have used the doctrine to deny constitutional claims to employees of the CIA. Recently, the Fourth Circuit relied on *Tenet v. Doe* in denying an African American's Title VII discrimination claim because litigation would force the disclosure of classified information including the nature and location of his employment and the identity of other secret employees.¹⁹⁴

185 *Tenet v. Doe*, 544 U.S. 1, 4-5 (2005).

186 John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 Iowa L. Rev. 1259, 1288 (2006) (citing Brief for the Respondents, *Tenet v. Doe*, 544 U.S. 1 (2005) (No. 03-1395), 2004 WL 2671306. at *6-7) [hereinafter *Doe's Brief*].

187 *Doe's Brief*, *supra* note 186, at *6-7.

188 *Id.*

189 *Tenet*, 541 U.S. at 8-10 (citing *Totten*, 92 U.S. at 107). The Court distinguished suits brought by acknowledged, though secret, employees of the CIA and alleged former spies; the former being able to bring colorable constitutional claims of discrimination because while their identity might be secret their relationship with the CIA is not. *Tenet*, 541 U.S. at 10 (distinguishing *Webster v. Doe*, 486 U.S. 592 [1988]). Clergy fall into the latter category.

190 *Tenet*, at 8 (quoting *Totten*, 92 U.S. at 107).

191 *Id.* at 11.

192 *Id.*

193 See generally, Radsan, *supra* note 186; Holly L. McPherson, Comment, *Tenet v. Doe: Balancing National Security and Contracts to Spy*, 28 U. Haw. L. Rev. 201 (2005); Ann Hetherwick Pumphrey, Case Comment, *Constitutional Law – Spies Barred From Enforcing Espionage Agreements With the United States – Tenet v. Doe*, 125 S. Ct. 1230 (2005), 29 SUFFOLK TRANSNAT'L L. REV. 371 (2006); Sean C. Flynn, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793 (2001).

194 *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005).

From this perspective, it seems as though the *Totten* doctrine bars claims raised by clergy and religious institutions. However, an argument concerning Presidential authority might allow the religious institutions to argue the Constitutional questions without having to get into the particular factual situations, which pose so much concern for the Court. In *Totten* the Court held that the President has the authority to enter into espionage agreements during a time of war.¹⁹⁵ Neither *Totten* nor *Tenet* explicitly held that the President has authority to enter into espionage agreements during peacetime. However, a simple reasoning from the "commander and chief" clause should affirm this implicit assumption.

The "commander and chief" clause of the Constitution gives the President the authority and the duty to defend the nation from attack.¹⁹⁶ To effectively repel attacks, the President needs the best available intelligence about the plans and capabilities of other nations.¹⁹⁷ Spies provide that information.¹⁹⁸ Therefore, the Constitution authorizes the President to employ spies to protect the nation during peacetime. At its core, a claim arguing that the use of clergy in intelligence operations offends the Establishment Clause and the Free Exercise Clause inherently argues that the government lacks the authority to use clergy. Therefore, a court would not need to consider confidential facts (except maybe in the pleadings depending on how the courts choose to resolve the standing issues) but merely pass on the legal question of whether the government's use of clergy amounts to an establishment of religion. If yes, then the government did not have authority to enter into the secret agreement and the *Totten* doctrine does not apply. If no, then the facts no longer matter and the claim will fail.

D. Political Question Doctrine

Finally, the Court sometimes chooses to avoid deciding certain cases because they present political questions. This doctrine prevents the courts from deciding questions best left to the political branches of the government and it helps protect the courts from second guessing political decisions already made. The Court uses six independent criteria to test for the existence of a political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning

195 *Totten Adm'r v. United States*, 92 U.S. 105, 106 (1875).

196 *Massachusetts v. Laird*, 400 U.S. 886, 893 n.1 (1970).

197 Brief for the Petitioners at *13, 24, *Tenet v. Doe*, 544 U.S. 1 (2005) (No. 03-1395), 2004 WL 1950641, ("The necessity of procuring good intelligence is apparent and need not be further urged.") (quoting a letter written by General Washington on July 26, 1777 in *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 478-479* (John C. Fitzpatrick ed., [1933])).

198 See e.g., Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 *DENV. J. INT'L L. & POL'Y* 321, 342 (1996).

adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹⁹

The criteria descend in terms of importance and certainty.²⁰⁰ Therefore, the Court does not give as much weight to the latter criteria as it does to the former. Starting with the first two criteria, the Constitution gives the Court authority to resolve violations of the Establishment Clause and the Free Exercise Clause, and the Court often does just that by applying long-held standards and tests. The Court might be concerned with having to pass judgment upon national security matters, but the Court has adjudicated issues involving national security in the past.

In fact, it would seem odd that the Court should refuse a challenge to the Establishment Clause on political question grounds when the Framers drafted the Establishment Clause, at least in part, to remove the topic of religion from the vicissitudes of politics. Even the entanglement prong of the *Lemon* test has a sub-prong devoted to ferreting out government action that causes political entanglement: division of political bodies along religious lines. However, this issue does not seem to pose a great threat of dividing Congress along religious lines (though politicians from religions that engage in a great deal of missionary work might be more inclined to support a total ban, while politicians without a strong religious background might not care as much about the use of clergy in intelligence operations). Moreover, cases involving the CIA's use of non-citizens in foreign countries might involve the courts in second-guessing the executive branch's authority in foreign policy matters; something the Court does not generally like to do.²⁰¹ Though maybe if the person bringing the suit is a U.S. citizen, with standing, who claims injury from an establishment of religion then the Court might take the case.

E. Normative Analysis

The foreign policy and national security implications inherent in deciding whether the government can use clergy in intelligence operations, begs the question: should the courts interject themselves into this sort of national security discussion? As already mentioned, the judiciary has generally been reluctant to take part in such disputes.²⁰² In those instances in which it does enter the national security fray the courts seem to give a great amount of deference to government determinations.²⁰³ At times the judiciary's position on the matter seems somewhat dubious, as though they are trying to evade responsibility.

199 *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 [1962]).

200 *Id.* at 278.

201 See *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936); *Baker v. Carr* 369 U.S. 186, 211 (1962).

202 See *Tenet v. Doe*, 544 U.S. 1 (2005).

203 See *Curtiss-Wright Export Co.*, 299 U.S. 304; *People's Mojahadin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (citing *Chicago & Southern Air Lines Inc. V. Waterman Steamship Corp.* 333 U.S. 103 [1948]).

However, there is substance to some of the arguments advanced concerning the judiciary's institutional limitations.

1. Concerns over Institutional Capabilities

First, courts are limited in their fact-finding abilities. They must stay within the facts of a given case and cannot stray very far into the overarching policy implications of their decisions. For instance, a court might not be able to know the full extent of the clergy's role in intelligence operations because those documents might be classified. Second, courts do not always have adequate standards to properly weigh the equities in national security cases. Courts often rely on a cost-benefit analysis to resolve disputes. They take the severity of the harm, multiply it by the probability of the harm occurring and measure that metaphysical sum against the cost of preventing that harm. Even the Free Exercise Clause analysis is a form of cost-benefit with the scales severely skewed toward protecting religious freedom. The government action is often taken to prevent some harm or serve some governmental good, while the cost is thrown upon religious worshippers. The Free Exercise Clause, through the mechanism of strict scrutiny, makes sure that the severity of the harm is extremely high and the means used to avoid the harm have as little cost as possible.

However, the government has an almost full-proof way of tipping the scales back to its own favor. In national security disputes the government can always call upon the scepter of nuclear annihilation to make the severity of the harm rise exponentially. Through national security the government can always pass the first prong of the strict scrutiny analysis by pointing to the compelling state interest of stopping nuclear annihilation and terrorism. After passing this hurdle, all the government has to show is that it will use some restraint, so as not to make the costs higher than necessary, and the second prong is met as well.

With the recent decision in *Zelman* the Court may have provided itself with a way to apply the cost-benefit analysis to the Establishment Clause. On the one hand, this might allow courts to make more reasoned judgments that take account of societal welfare and necessity. On the other hand, it takes away an important safeguard in contexts such as national security in which the government can always tip the scales into its own favor. When disputes involving national security reach almost inevitable results it seems like a good reason for the courts to stay out of national security cases. However, staying away leads to the same result: the executive gets to do what it wants.

2. Concerns over National Security

National security cases also raise concerns over possible leaks of classified information. The Court in *Tenet* relied primarily on national security concerns and policy considerations to justify the continued existence of the *Totten* doctrine.²⁰⁴

204 *Tenet v. Doe*, 541 U.S. 1 (2005).

This included protecting the nation from embarrassment in its foreign affairs, the fear of revealing classified information, the risk of compromising agents and case officers in the field, the threat of "greymail,"²⁰⁵ and general concerns over wasting resources.²⁰⁶ As argued above, it may be possible for a petitioner to win by arguing that any use of clergy in intelligence operations is unconstitutional on its face. However, "as applied" challenges require the petitioner to prove the existence of an espionage relationship between the United States and a member of the clergy. Despite the Court's national security concerns it is possible to craft a workable solution that protects both sides.

The courts can protect identities and other classified information by employing special *en camera* hearings²⁰⁷ or by making use of the state secrets doctrine.²⁰⁸ The CIA's concerns about "greymail" and frivolous lawsuits are equally exaggerated. The courts and Congress can prevent frivolous lawsuits by enacting (and employing) stiff penalties for those who bring them, especially those who attempt to greymail the CIA. Additionally, greymail does not actually pose that much of a risk because the CIA can always use the state secrets privilege to prevent the disclosure of classified information.²⁰⁹ Therefore, national security does not require an absolute bar against adjudicating cases arising out of espionage agreements.

IV. NON-JUDICIAL SOLUTIONS

"The Constitution lives outside of judicial decisions" and Congress plays an invaluable role in navigating the boundaries of constitutionality.²¹⁰ Congress responded to a similar problem when it passed 50 U.S.C. § 403-7, the policy "prohibition on using journalists as agents or assets." Frederick Hitz argues that Congress should expand this statute to include clergy (as well as academics, Peace Corpsmen and USAID workers).²¹¹ For Hitz, the restrictions in 50 U.S.C. §

205 "[I]ndividual lawsuits brought to induce the CIA to settle a case out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations." *Id.* at 11.

206 *Id.* at 7-11.

207 John Radsan presents a model for handling spy contract lawsuits. See Radsan, *supra* note 186, at 1290, 1314-15. See also, Holly L. McPherson, Comment, *Tenet v. Doe: Balancing National Security and Contracts to Spy*, 28 U. HAW. L. REV. 201 (2005) (proposing some balanced alternatives to the current *Totten* doctrine).

208 Radsan, *supra* note 186, at 1292-93. See also *United States v. Reynolds*, 345 U.S. 1 (1953) (establishing the state secret privilege).

209 See *Reynolds*, 345 U.S. 1. Though some courts do not apply the state secrets privilege in a highly deferential way, Radsan, *supra* note 182, at 1294, the general trend is that the courts grant too much deference. See Sean C. Flynn, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793 (2001) (arguing that the state secrets privilege gives too much deference to the government especially in cases involving the military's pollution of the environment).

210 Peter J. Spiro, *Realizing Constitutional and International Norms in the Wake of September 11*, in *THE CONSTITUTION IN WARTIME* 198, 202 (Mark Tushnet ed. 2003).

211 Hitz, *supra* note 5, at 779.

403-7 adequately protect clergy from CIA excesses.²¹² The requirements, that the CIA director or the President must authorize the use of clergy and that the CIA must report to the Congressional oversight committees, both attempt to protect against excess and abuse.²¹³

To whatever extent such a law might protect against the CIA's abuses, it does little to alleviate the suspicions and dangers that clergy and missionaries face when they travel abroad. The waiver, however limited, grows into a huge chasm when seen through the eyes of a suspicious person with something to hide. Any waiver provision opens the door to suspicion, and such suspicions could lead to deadly consequences. Only a law that completely bans the use of clergy in intelligence operations has a chance of convincing foreigners that clergy operate completely free from the CIA.²¹⁴ Additionally, the waiver provision opens the door for foreign spies to recruit U.S. clergy "under a foreign flag."²¹⁵ Recruiting under a foreign flag is a dirty spy trick in which a U.S. spy, for instance, pretends to be a Russian case officer in order to recruit a Russian citizen to spy.²¹⁶ The Russians who have no qualms about using clergy as spies²¹⁷ might want to expand their intelligence reach by recruiting some U.S. clergy or missionaries. A complete legislative ban on using clergy in intelligence operations would at least send a clear signal to all U.S. clergy that the mysterious figure in the tuxedo meeting them for a drink probably does not work for the CIA.

Constitutionally speaking, expanding § 403-7 to clergy would mean that Congress believes that the Establishment Clause can be disregarded under certain "exceptional" circumstances, determined exclusively by the executive branch. According to Hitz, the post 9/11 world justifies this approach and requires the CIA to take a more proactive approach with human intelligence gathering.²¹⁸ Former national security advisor for President Carter, Zbigniew Brzezinski, echoes this view.²¹⁹

Using the current "War on Terror" to justify the use of clergy in intelligence operations proves problematic for two reasons. First, this proposal might be nothing more than a quick and flashy fix aimed to distract from the deeper

212 *Id.* at 779.

213 *Id.* See 50 U.S.C. § 403-7.

214 See Gvosdev, *supra* note 14, at 10. See also *CIA's Use of Journalists and Clergy*, *supra* note 15, at 17 (statement by Ted Koppel, arguing for an absolute ban which the CIA can violate in extreme circumstances and then be forced to account for the violation at a later time).

215 *No Comments in Moscow on Detention of Retired U.S. Officer on Spy Charges*, INTERFAX RUSSIAN NEWS, June 15, 2000 (reporting that KGB spy George Trofimoff was caught by an FBI agent who posed as a Russian agent).

216 *Id.* (quoting a high-ranking Russian intelligence officer who spoke under condition of anonymity).

217 See Mackay, *supra* note 58.

218 Hitz, *supra* note 5, at 777-79.

219 Maier and Paige, *supra* note 5 (reporting former national security advisor Zbigniew Brzezinski's view that the CIA is too narrow in its mind-set because it does not use journalists or clergy as spies).

organizational problems facing the CIA.²²⁰ The CIA's organizational defects make it more likely that relationships between case officers and clerics might develop to the point where they grossly offend the Establishment Clause.²²¹ Second, authorizing the CIA to use clergy in the "War on Terror" might hurt the United States on the ideological plane. To the outside world the "War on Terror" more accurately resembles a war on Islam.²²² The CIA's use of clergy will further cement this view because "the world view" in Islamic countries "does not separate politics and religion;"²²³ they will see the CIA's use of clergy as an alliance between the CIA and religious institutions, an alliance formed to carry on a new crusade to rid the world of Islam. Alternatively, if the CIA attempts to recruit Islamic clerics, then people in Islamic countries would likely take it as a desecration of the holy office and as an extreme offense to their religious sensibilities.

In the absence of a complete ban, Congress should at least place extra limits on the executive so as to address Establishment Clause and Free Exercise Clause concerns. First, the law (or a confidential regulation) could place a time cap on the use of a particular clergy member or religious institution. This would allow the government to deal with exceptional circumstances, such as an immediate terrorist threat, while preventing ongoing entanglement and fusion concerns. Additionally, the law could require the CIA and the FBI to draw up guidelines, if they have not done so already, detailing the authorized and unauthorized actions that case officers and agents can take toward clergy. For instance, the case officer should not be able to ask the clergy to do anything at odds with their religious beliefs. Finally, the law might involve some form of judicial approval of a governmental request to use clergy in an intelligence operation. A judicial oversight solution would work better for domestic intelligence operations run by the FBI because it is already used to obtaining judicial approval in the criminal context. Under this approach the government would have to demonstrate probable cause that a crime has been or is about to be committed.²²⁴ The courts could

220 See generally ODOM, *supra* 131. Also see Maier and Paige, *supra* note 5 (reporting William Odom's criticisms about the CIA; that it lacks supervision, is unaccountable and "answers questions that nobody is asking").

221 ODOM, *supra* 131, at 152-53. Odom argues that the art of "deception and misrepresentation" make a good case officer because those skills help in recruiting and managing spies. *Id.* at 152. However, case officers use those same skills to deceive their superiors in order to shield loyal spies or to hide their own mistakes. *Id.* at 152-153.

222 John H. Richardson, *How the Attorney General of the United States Became Saddam Hussein's Lawyer: the Dictator's Time Is Up*. Ramsey Clark, *Meanwhile, Soldiers on*, *ESQUIRE*, at 94, Feb. 2007 (interview with Ramsey Clark, former U.S. Attorney General).

223 *CIA's Use of Journalists and Clergy*, *supra* note 15, at 31 (statement by Dr. John Orme).

224 Cf. Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 *Emory L.J.* 75, 96 (1985):

For operations involving the infiltration of a political, governmental, religious, or news media organization, a finding of "probable cause" to believe that the operation is necessary to detect or prevent specific acts of criminality would be required. The same finding would be required for operations in which there was a significant risk that someone would enter into a confidential relationship with an undercover agent or informant posing as an attorney, physician, or member of the clergy or news media.

then lay out specific guidelines to ensure that the government agent does not impermissibly cross the line between unavoidable entanglement and impermissible fusion of the governmental and religious function.

The political decision on whether to adopt a balanced approach depends in large part on how much intelligence agencies gain from the ability to use clergy, versus how much religion loses. Even Hitz would agree that most of the improvement in human intelligence has to come in the recruitment of "dirty assets" as opposed to "angel" assets.²²⁵ Terrorists and "bad guys" generally hang out with other bad guys and the government needs to infiltrate those circles to get the best information. While being able to pose as a missionary might make it a little easier for the CIA to get access to a bad neighborhood in a foreign country it will not necessarily get them access to the bad guys. The use of clergy in disinformation capacities is admittedly strong, however situations in which the use of clergy is absolutely necessary and unavoidable, in that the government cannot obtain or disseminate the information through other means, will be likely be rare. Having a waiver provision for such circumstances, however, puts clergy and missionaries in danger and it provides a justification for abuses. Therefore an absolute ban is preferable to a balanced approach. Establishment Clause concerns justify expanding the ban to all clergy, including non-citizens. While the Constitution may or may not suggest this result (see discussion *supra* Part III) Congress can protect against clergy in foreign countries assuming the governmental function of the executive branch and it can protect religious freedom around the world.

CONCLUSION

The intelligence community sees clergy and missionaries as a potential asset in its operations. Prior to 1976, the CIA made this potential a reality by using clergy in intelligence operations in distant locales such as Chile. Since 1976, the CIA maintains a policy of not using clergy in intelligence operations except under exceptional circumstances. The use of clergy in intelligence operations, in general or under the CIA's current policy, poses concerns under the U.S. Constitution. First, the cloud of suspicion that hangs over the heads of clerics and missionaries places them in danger and makes it difficult for them to carry out the dictates of their religion. This potentially runs afoul of the Free Exercise Clause. Second, the potential for entanglement and fusion of the governmental and church functions potentially runs afoul of the Establishment Clause. Several justiciability and jurisdictional hurdles stand in the way of resolving the issues in federal court, but should a court choose to hear the case it should be able to apply traditional Free Exercise and Establishment Clause standards to resolving this dispute. Additionally, Congress can take action by enacting a law similar to the one it

Id. Requiring probable cause should not unduly hinder law enforcement investigating terrorism suspects because in relevant situations they will likely have probable cause to believe that the crime of conspiracy has occurred.

225 See Hitz, *supra* note 5.

enacted concerning the CIA's use of journalists. Important policy reasons support enacting a complete ban, as opposed to a limited ban with a waiver provision.

Religion at its best leads people toward spiritual truth and enlightenment. The clergy's role is to guide members of the congregation, to help them see the truth. "By definition, spies are liars"226 Why then, desecrate the clergy's sacred spiritual mission with this base governmental objective? The Revolutionary War Era clergy in the 18th century wanted freedom *for* religion. They wanted to practice free from the dictates of government. They wanted their churches to truly be their own; not just another branch for the federal government to control.

The clergy hold a special place in America's communities because of religion's power to inspire hope and faith. The government wants to use that built up goodwill for intelligence purposes so as to ensure the nation's security. On one level these are laudable goals, but the ends cannot always justify the means. In some cases the government must take the alternative road, no matter how seductive the temptation to use the fruits of the church's labors. The Establishment Clause is meant to ensure this result and if the Court's do not, or cannot, act to uphold it then Congress should step in and craft strict prohibitions on the government's use of clergy in intelligence operations. Of course, this safe haven for religion must come with its set of responsibilities;²²⁷ the most pertinent being that churches must not provide fertile ground for terrorist groups. In this case the monitoring of religious institutions comes into play. Though the monitoring might pose problems under the Free Exercise Clause, that clause, unlike the Establishment Clause, permits a cost-benefit analysis. These tradeoffs will help ensure the viability of both Church and State.

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226 Hitz, *supra* note 5, at 766.

227 See generally Ryder, *supra* note 80.