AMERICAN CIVIL LIBERTIES UNION of MARYLAND FOUNDATION

DEBORAH A. JEON
LEGAL DIRECTOR

May 2, 2008

Vice Admiral Jeffrey L. Fowler
United States Naval Academy
121 Blake Road
Annapolis, MD 21402-5000

Dear Vice Admiral Fowler:

I write on behalf of the American Civil Liberties Union of Maryland, the national ACLU, and a group of Naval Academy midshipmen – including both First Classmen and Underclassmen – to request that the U.S. Naval Academy discontinue its practice of requiring all midshipmen to stand in attendance at an official "noon meal prayer." It has now been over five years since the United States Court of Appeals for the Fourth Circuit[1] struck down as unconstitutional "supper prayers" at Virginia Military Institute. *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), *cert. denied,* 541 U.S. 1019 (2004). Accordingly, we believe it is long past time for the Naval Academy to discontinue the official lunchtime prayers that all midshipmen are compelled to attend.

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Let me make clear at the outset that this request is not motivated by any hostility to *voluntary* religious exercises by Academy midshipmen, nor do we fail to recognize the important place religious faith holds among many in the military. Indeed, the ACLU has long defended the fundamental right of religious communities, families, and individuals – including those in the armed services – to practice their faith freely and openly. Rather, our objection is to *compulsory* religious services mandated *by the government.* As the Fourth Circuit put it in the *Mellen* case, this is "precisely what the First Amendment forbids." *Id.* at 375.

> Put simply, [the Naval Academy's noon meal prayer] exacts an unconstitutional toll on the consciences of religious objectors. While the First Amendment does not in any way prohibit [midshipmen] from praying before, during, or after [lunch], the Establishment Clause prohibits [the U.S. Naval Academy] from sponsoring such a religious activity.

Id. at 372.

The midshipmen who have contacted the ACLU object to, and feel coerced against conscience by, the Academy's continued requirement that they stand in attendance during an official noon prayer. Plebes, in particular, find themselves in a difficult position during the noon prayer, if, as a matter of conscience, they do not wish to join in prayer. As you know, it is important for

[1] The U.S Court of Appeals for the Fourth Circuit is the federal appellate court governing the states of Maryland, Virginia, West Virginia, North Carolina and South Carolina.

plebes to adhere as strictly as possible to official practices at the Academy, and not to "stand out" as nonconformists. Yet, if a plebe fails to move from parade rest, to attention, to a position with head bowed head and hands folded, it is evident to all that he or she is not joining in the prayer. The situation is undeniably a coercive one for younger midshipmen, who are implicitly pressured into prayer by the senior midshipmen around them, as well as by the presence of a commissioned officer at the anchor. But even First Classmen have told us that it can be awkward and uncomfortable for them to remain at parade rest during the noon prayer. One such midshipman noted that it was difficult to serve as a squad leader during the noon prayer, due to concerns that failure to join in the prayer would be viewed as a bad example for subordinates. Midshipmen of all ranks are also deeply troubled by the idea that the U.S. Naval Academy would continue to employ practices that have been held unconstitutional by the federal courts, given their oath to uphold the Constitution.

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We have carefully reviewed the Naval Academy's "FAQs about the USNA Noon Meal Prayer," which we understand were distributed to midshipmen recently in response to concerns expressed by midshipmen about the prayers through the Academy's feedback system. However, the representations made in that document about the First Amendment and its Establishment Clause simply do not square with the controlling interpretations of the Constitution by our federal courts. The FAQs ignore entirely the Fourth Circuit's decision in *Mellen v. Bunting*, and do not even attempt to explain any legally significant difference between the Naval Academy's noon meal prayer and VMI's supper prayer. As a constitutional matter, we do not believe that two practices are distinguishable. If anything, the Naval Academy's practice is *more* problematic than the invalidated practice at VMI, in that the Academy's prayers are led by commissioned officers rather than midshipmen, and the Academy mandates attendance during the noon prayer, whereas VMI cadets were permitted to excuse themselves from the prayers by arriving late for supper.

Moreover, many of the points raised in the Naval Academy's FAQs were already argued by VMI in defense of its supper prayers, and rejected by the courts. For example, VMI sought to defend its prayers on the ground that it is a military college. *Id.* at 369. But rather than seeing that as a justification for the prayers, the Fourth Circuit held that the school's military nature makes the prayers inherently coercive. *Id.* at 371. The Fourth Circuit also rejected the assertion that prayers might have some legitimate secular purpose in "aiding VMI's mission of developing cadets into military and civilian leaders." *Id.* at 373. Further, the Court held that the asserted secular purposes for the prayer "obscure the difference between educating . . . cadets about religion, on the one hand, and forcing them to practice it, on the other." *Id.*

The FAQs defend the compulsory prayers as contributing to the moral and spiritual development of midshipmen. Yet, this precise rationale was considered and rejected in *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), in which the U.S Court of Appeals for the District of Columbia held that federal regulations requiring service academy students -- including Naval Academy midshipmen -- to attend chapel services on Sundays violate the First Amendment.

The *Mellen* Court also rejected the contention that the prayer's long history at VMI could insulate it from constitutional review. The Court essentially held that *Marsh v. Chambers*, 463 U.S. 783 (1983) (which followed this rationale with regard to legislative prayers) was confined to its facts, given the "unique history" of legislative prayer. The Court held that the *Marsh* analysis could not be applied to military colleges like the Naval Academy, which did not exist when the Bill of Rights was adopted. *Mellen*, 327 F.3d at 370. In any case, we believe the argument that the practice of compulsory prayer is a necessary incident of military education is undermined by the fact that the Naval Academy is the only service academy to retain such a requirement.

In short, like the Fourth Circuit, we "recognize and respect a [midshipman's] individual desire to say grace before [meals.]" But like the Fourth Circuit, we believe "the Establishment Clause prohibits the [Naval Academy] from sponsoring this religious practice." *Id.* at 375.

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Given the clarity of the law in this area, our submission of this formal complaint, and the Naval Academy's prior receipt of several informal complaints from midshipmen through the feedback system, we urge you to act now to discontinue the Academy's official noon meal prayers. While we are willing to challenge the practice in court, we do not think such a legal challenge should be necessary, and it is our preference to resolve this matter amicably.

Please contact me or have your legal counsel contact me at your first opportunity to let me know your intentions with respect to this complaint.

Sincerely,

Deborah A. Jeon
Legal Director

cc: Daniel Mach, Esq.