

SO WHAT IF JESUS LOVES NUKES?: THE  
CONSTITUTIONALITY OF THE CHRISTIAN JUST WAR  
THEORY TAUGHT TO THE AIR FORCE MISSILE  
LAUNCH OFFICERS

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I. INTRODUCTION

Imagine it was your job to launch a nuclear missile. Would you be able to drop a bomb so powerful that you knew it would kill thousands of innocent people instantly and then thousands more slowly? Ask yourself, could you press that button and make that decision in a split second? It does not matter what faith you practice or what you believe in; dropping a destructive weapon would more than likely go against your ingrained morals. Under what circumstances, if any, would your actions to kill thousands be justified? This is an issue constantly battled by the Special Air Force Officers who are trained specifically to launch the nation's nuclear weapons.

On August 6, 1945, the United States became the first and only country to drop an atomic bomb. The bomb dropped on Hiroshima ultimately killed an estimated 130,000 soldiers and civilians.<sup>2</sup> Three days later, the United States dropped a second bomb on the Japanese city of Nagasaki, killing an estimated 70,000 people.<sup>3</sup> After the bombs were dropped, Admiral Leahy, the military Chief of Staff, famously stated, “[I]n being the first to use [the atomic

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2. The exact death toll from the atomic bomb remains unknown, but it is estimated that 70,000 of Hiroshima's population of 350,000 were killed immediately from the explosion and another 70,000 died within five years due to radiation exposure. See Jennifer Rosenberg, *Hiroshima and Nagasaki (Part 1)*, ABOUT.COM, <http://history1900s.about.com/od/worldwarii/a/hiroshima.htm> (last visited Apr. 1, 2013) [hereinafter Rosenberg *Part 1*].

3. The second bomb dropped, which was initially intended for Kokura, was a much stronger atomic bomb than the one dropped over Hiroshima. Fortunately, the mountains of Nagasaki mitigated the damage of the atomic bomb. It is estimated that 70,000 of Nagasaki's population of 270,000 died within one year after the dropping of the bomb. See Jennifer Rosenberg, *Hiroshima and Nagasaki (Part 2)*, ABOUT.COM, [http://history1900s.about.com/od/worldwarii/a/hiroshima\\_2.htm](http://history1900s.about.com/od/worldwarii/a/hiroshima_2.htm) (last visited Apr. 1, 2013).

bomb], we had adopted an ethical standard common to the barbarians of the Dark Ages.”<sup>4</sup> There has been a longstanding ethical debate as to whether or not the bombings were necessary to end World War II and if they did indeed save more lives than they cost.<sup>5</sup>

Paul Tibbets, the pilot who dropped the first atomic bomb,<sup>6</sup> was consistently asked how he was able to drop a bomb, knowing it would kill so many innocent people. His response was always simple. He would explain that he knew people were going to die, but he wanted to do his job and end the war as soon as possible.<sup>7</sup> In Paul Tibbets’s defense, at the time, no one knew the severe effects and aftermath of radiation.<sup>8</sup> In one interview, Paul Tibbets stated,

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4. This was an extremely powerful statement, but it accurately reflects how most people felt ethically about the bombs. The bombs had the positive effect of ending the war, but they came at a devastating price, which Admiral Leahy clearly understood. See Tyler Wigg-Stevenson, *Hiroshima’s Lessons: What the Air Force Should Remember About Just War and Nuclear Weapons*, WASH. POST (Aug. 6, 2011, 11:47 AM), [http://www.washingtonpost.com/blogs/guest-voices/post/hirosimas-lessons-what-the-air-force-should-remember-about-just-war-and-nuclear-weapons/2011/08/06/gIQAFkbyI\\_blog.html](http://www.washingtonpost.com/blogs/guest-voices/post/hirosimas-lessons-what-the-air-force-should-remember-about-just-war-and-nuclear-weapons/2011/08/06/gIQAFkbyI_blog.html).

5. It was President Harry Truman’s choice to drop the atomic bomb without ever having tested one or dropping one from a plane before. Truman based his decision to drop the bomb on the claim that “[a] Normandy-type amphibious landing would have cost an estimated million casualties.” He believed he was saving not only American lives but also Japanese. There is no way to know for sure if Truman’s predictions were correct. See *The Decision to Drop the Bomb*, U.S. HISTORY, <http://www.ushistory.org/us/51g.asp> (last visited Apr. 5, 2013) [hereinafter *Decision to Drop*].

6. Paul Tibbets died on November 1, 2007 at the age of ninety-two. See Richard Goldstein, *Paul W. Tibbets Jr., Pilot of Enola Gay, Dies at 92*, N.Y. TIMES (Nov. 1, 2007), <http://www.nytimes.com/2007/11/01/obituaries/01cnd-tibbets.html?pagewanted=all>.

7. In an interview, Paul Tibbets was quoted as saying, “I knew when I got the assignment it was going to be an emotional thing. We had feelings, but we had to put them in the background. We knew it was going to kill people right and left. But my one driving interest was to do the best job I could so that we could end the killing as quickly as possible.” See *Man Who Dropped Atomic Bomb on Hiroshima Dies at 92*, FOX NEWS (Nov. 1, 2007), <http://www.foxnews.com/story/0,2933,307252,00.html> [hereinafter *Man Who Dropped Atomic Bomb*].

8. At the time the bomb was dropped “Truman saw little difference between atomic bombing Hiroshima and firebombing Dresden or Tokyo.” *Decision to Drop*, *supra* note 5. But as hindsight is twenty-twenty vision, everyone now knows that there is an extraordinary difference between atomic bombing and fire bombing. However, in Truman’s defense, not even the scientists who designed the bomb foresaw the awful effects of radiation. See *Rosenberg Part 1*, *supra* note 2, in which one eyewitness account explains, “The appearance of people was . . . well, they all had skin blackened by burns . . . They had no hair because their hair was burned, and at a glance you couldn’t tell whether you were looking at them from

“Morality in warfare is none of my business ... I never looked at war as a moral thing.”<sup>9</sup> However, separating morality from warfare is not a possible option for everyone.<sup>10</sup>

Although no atomic or nuclear bombs have been dropped since the two in August of 1945, the United States Air Force still needs to ensure its pilots are ready to drop one, on command, at any given time. One way in which the Air Force attempts to ease the pilots as to the idea of dropping nuclear bomb (the much stronger effects which are now known) is through a series of ethics courses taught by the Air Force Chaplains and Air Force instructors.<sup>11</sup> One course in particular taught by the Chaplains is based upon the age-old doctrine of Christian Just War Theory.<sup>12</sup> The course is designed to “address the officers’ possible objections to the use of nuclear weapons,”<sup>13</sup> while attempting to provide some form of histori-

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the front or in the back . . .” See also *Radiation Effects on Humans*, THINKQUEST, [http://library.thinkquest.org/3471/radiation\\_effects\\_body\\_body.html](http://library.thinkquest.org/3471/radiation_effects_body_body.html) (last visited Apr. 2, 2013) (explaining that the survivors of Hiroshima who suffered from radiation “suffered physically from cataracts, leukemia and other cancers, malformed offspring, and premature aging, and also emotionally . . . the incidence of lung cancer, thyroid cancer, breast cancer, and cancers of other organs has increased among the survivors.”).

9. Linda Deitch, *Bombing of Hiroshima, 1945 and the Columbus Connection*, COLUMBUS DISPATCH (Jan. 26, 2011, 2:20 AM), [http://www.dispatch.com/content/blogs/a-look-back/2010/08/bombing\\_of\\_hiroshima\\_1945\\_and.html](http://www.dispatch.com/content/blogs/a-look-back/2010/08/bombing_of_hiroshima_1945_and.html).

10. See Dave Bohon, *Air Force Suspends “Christian Just War Theory” Class for Missile Officers*, NEW AM. (Aug. 16, 2011, 5:13 PM), <http://www.thenewamerican.com/culture/faith-and-morals/item/976-air-force-suspends-“christian-just-war-theory”-class-for-missile-officers> (quoting David Smith, a spokesman for the Air Force Air Education and Training Command, as saying, “Ethics discussions are an important part of professional military development and it is especially important for our airmen who are training to work with nuclear weapons because they have to make hard decisions.”).

11. The class has been nicknamed “Jesus Loves Nukes” by former Air Force Pilots who have taken the course. See Jason Leopold, *“Jesus Loves Nukes”: Air Force Cites New Testament, Ex-Nazi, to Train Officers on Ethics of Launching Nuclear Weapons*, TRUTHOUT (July 27, 2011, 4:10 PM), <http://www.truthout.org/air-force-cites-new-testament-ex-nazi-train-officers-ethics-launching-nuclear-weapons/1311776738>.

12. “In broad terms, Christians must not love violence. They must promote peace whenever possible and be slow to resort to the use of arms. But they must not be afraid to do so when it is called for. Evil must not be allowed to remain unchecked.” *Just War Doctrine*, CATHOLIC ANSWERS, [http://archive.catholic.com/library/Just\\_War\\_Doctrine\\_1.asp](http://archive.catholic.com/library/Just_War_Doctrine_1.asp) (last visited Apr. 3, 2013).

13. These objections may include religious, moral, historical, or justice objections. See *Liberty Counsel Defends Air Force Nuke Training*, GOD & COUNTRY (Aug. 5, 2011), <http://christianfighterpilot.com/blog/2011/08/05/liberty-counsel-defends-air-force-nuke-training/>.

cal justification for taking thousands of lives. But as this note will explain, the theory has its roots in the Christian religion, and these roots were by no means hidden by the Chaplains in their teaching of the theory.

Recently, a group of Air Force officers, with the support of the Military Religious Freedom Foundation, has challenged this ethics course and the teaching of the Just War Theory,<sup>14</sup> claiming that it violates the Establishment Clause of the Constitution.<sup>15</sup> The group feels the course relies too heavily upon Christian teachings and is an attempt by the Chaplains to impose their religion on Air Force officers. Those in favor of the teachings claim it is merely one view, amidst many, to justify war, and the teachings are permissible under the Free Exercise Clause of the Constitution.<sup>16</sup> They argue that despite the move towards pluralism in society, the movement does not prohibit exposure to historical teachings. The Military Religious Freedom Foundation threatened to file a class action suit if the course was not removed from the Air Force curriculum. In response to the threat, the Air Force temporarily suspended the ethics course while it investigated the class.<sup>17</sup>

This note will begin by briefly explaining the class; what it taught, who taught it, how it was taught and how long it had been taught for. It will also explain what the Christian Just War Theory is, outside the context of the course, in a strictly philosophical light. Then it will examine the history of the military Chaplains and how the Federal Government came to fund a controversial multi-million dollar religious establishment in the military.<sup>18</sup> More

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14. Thirty-one missile launch officers reported the class to the Military Religious Freedom Foundation, which is the “secular watchdog group” of the armed forces. See Bohon, *supra* note 10.

15. The Establishment Clause is part of the First Amendment of the United States Constitution and states, “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I.

16. The Free Exercise Clause is part of the First Amendment of the United States Constitution and states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” *Id.*

17. Immediately following TRUTHOUT’s exposé about the ethics course, the Air Force removed the class from the curriculum and is now reviewing it to “make sure it reflected views of modern society.” See Jason Leopold, *Top Air Force Official Issues Religious Neutrality Policy in Wake of Truthout’s “Jesus Loves Nukes” Exposé*, TRUTHOUT (Sept. 14, 2011, 5:22 AM), <http://www.truth-out.org/aftermath-jesus-loves-nukes-scandal/1316010154>.

18. The military Chaplaincy has been a long-standing government program, and it has not been until recently that the program is beginning to be questioned. Liam J. Montgomery, *The Devil is in the Details: Policing the Implementation of the Military Chaplaincy*, SELECTEDWORKS, <http://works.bepress.com/>

specifically, the note will take a look into the Chaplains' role in the Air Force. As the note will discuss, the Chaplaincy Program has not always run smoothly, especially since the emergence of the Military Religious Freedom Foundation. The note will explore the ongoing problems the Air Force continues to encounter with Chaplains imposing their religions on officers.<sup>19</sup> This will include discussion of the Military Religious Freedom Foundation, which has posed several problems for the Air Force in recent years.

Next the note will explore the ongoing tension between the Establishment Clause and the Free Religion Clause of the First Amendment of the United States Constitution.<sup>20</sup> The two clauses have always played a tug-of-war game with each other, and the Air Force ethics course is one that seems to fall in the middle of the two. The note will provide the history of courts' past decisions and lay out the tests used to determine if there has been a violation of the Free Exercise Clause or a violation of the Establishment Clause. The military Chaplaincy is an exception to the Establishment Clause as it is a religious institution funded with government money. However, for reasons the note will explain, the exception is allowed because the courts have let the National Security Clause of the Constitution override the Establishment Clause. Therefore, this note will view the tensions of the Free Exercise Clause and the Establishment Clause in light of deference the

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[cgi/viewcontent.cgi?article=1001&context=liam\\_montgomery](http://www.viewcontent.cgi?article=1001&context=liam_montgomery) (last visited Apr. 5, 2013).

19. The Air Force Chaplains have been watched closely over the past few years due to several allegations of proselytizing. One former Chaplain of the Air Force Academy described the Air Force as having a "systematic and pervasive" problem of religion proselytizing." In 2005 there was an investigation into the Air Force to finally attempt to settle the numerous complaints of the Air Force Chaplain and Officer's proselytizing. There were arguments that those in leadership positions at the Academy were creating a "discriminatory climate" and in a survey taken in 2004, "more than half of the cadets said they had heard derogatory religious comments or jokes at the academy." See Laurie Goodstein, *Air Force Chaplain Tells of Academy Proselytizing*, N.Y. TIMES (May 12, 2005), <http://www.nytimes.com/2005/05/12/education/12academy.html?pagewanted=all>.

20. One author, who makes it clear that he does not agree the tension actually exists, describes it as a "clash of two First Amendment Clauses: a right under the Free Speech Clause to freedom of religious expression without discrimination versus a right under the Establishment Clause to a government that does not aid religion (the aid taking the form of the use of government property to convey a religious message)." See Carl H. Esbeck, *Institute of Bill of Rights Law Symposium: Religion in the Public Square: Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM & MARY L. REV. 883, 888 (2001).

courts must give to the military.<sup>21</sup> Once the note explains the tests, and the deference standard, it will consider the continuing struggle the Air Force has had with its Chaplains imposing religion on the officers. After the note has laid out the tensions, tests, and deferential standard, it will apply each of them to the issue of this note: the Christian Just War ethics course. The note will provide insight as to how the court would come out should the class action threat materialize.

Lastly this note will offer possible solutions for the Air Force to enact in order to quiet the claims that the Air Force Chaplains are imposing religion on the officers through the means of this particular ethics course. The Air Force immediately suspended the course at the threat of a lawsuit, with the promise to review it. They also promised to review the entire ethics curriculum. Yet, the Air Force has yet to release any more information regarding the course. It appears it will not be reinstating the course or providing any course in the teachings of the Christian Just War Theory. This note will explain other solutions the Air Force has the opportunity to implement regarding this course to preserve possibly one of the most important ethical lessons for nuclear missile launch officers.

## II. HISTORY AND BACKGROUND

### A. *The Class*

The Christian Just War Theory ethics course consisted of a forty-three-slide PowerPoint presentation taught by the Air Force Chaplains to the Air Force missile launch officers. The course has been taught for the past twenty years at the Vandenberg Air Force base in California. It was used by the Chaplains to “show that war

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21. Congress is granted through the Constitution the power to maintain and keep an army. It is permitted to make decisions with deference provided they are a means to national security. One annotation in the “Maintenance of National Security and the First Amendment” to the First Amendment explains:

Preservation of the security of the Nation from its enemies, foreign and domestic, is the obligation of government and one of the foremost reasons for government to exist. Pursuit of this goal may lead government officials at times *to trespass in areas protected by the guarantees* of speech and press and may require the balancing away of rights which might be preserved inviolate at other times. The drawing of the line is committed, not exclusively but finally, to the Supreme Court.

*Maintenance of National Security and the First Amendment*, FINDLAW, <http://caselaw.lp.findlaw.com/data/constitution/amendment01/13.html> (last visited Apr. 3, 2013) (emphasis added).

can be a moral endeavor,”<sup>22</sup> and to show that war may in some instances be morally justified; a lesson which the Chaplains felt necessary to teach, given “the nature of the job,”<sup>23</sup> consisting of the power to kill thousands of people instantly. The slideshow is also presented in Reserve Officers’ Training Corps classrooms across the country.

The slideshow begins with five ethical principles which are: 1) “worlds” often collide; 2) Majority is NOT always right; 3) You Can’t Just Turn it ON When it Matters; 4) Win at All Costs Will Cost You; and 5) You Are Not a Maintainer, You Are a Model.<sup>24</sup> After the five principles, there is an overview slide which presents four topics: 1) More than just benefits; 2) Can a person of faith fight in a war?; 3) Can War be Just?; and 4) The Unique position of the Nuclear Missile Officer.<sup>25</sup> Next, there are two slides entitled, “Can a person of faith fight in a war?”<sup>26</sup> The first of these two slides has a religious image on it, and the other has pictures of war heroes, Colonel Joshua Chamberlain, General George Washington, and General Thomas “Stonewall” Jackson.<sup>27</sup> It is not until the fifteenth slide where the Just War Theory is introduced.<sup>28</sup> There is also a slide giving Augustine’s definitions for Just Cause and Just Intent.<sup>29</sup> The next section of this note will discuss Augustine’s prominent role in developing the theory.

Slides eighteen through twenty-three are the controversial slides. The slides start by giving Bible passages from the Old Testament of the biblical icons that believed in Just War.<sup>30</sup> The slides

22. Bohon, *supra* note 10.

23. *Id.*

24. See PowerPoint: Chaplain, Captain Shin Soh, *Ethics*, at Air Force Missile Officer Training, 2-7, available at [http://www.truth-out.org/files/nuclear\\_ethics.pdf](http://www.truth-out.org/files/nuclear_ethics.pdf) (last visited Feb. 26, 2012) [hereinafter *Ethics PowerPoint*].

25. *Id.* at 9.

26. *Id.* at 11-12.

27. The course uses photos of the famous war heroes to show that “Christians may fight.” See Bohon, *supra* note 10.

28. This slide includes a picture of Augustine and ancient Rome. See *Ethics PowerPoint*, *supra* note 24, at 15.

29. “Just Cause” is defined as “to avenge or to avert evil; to protect the innocent and restore moral social order.” And “Just Intent” is defined as “to restore moral order, not expand power; not for pride or revenge.” *Id.* at 16.

30. The slides reference that Abraham organized an army to rescue Lot in *Genesis* 14. *Id.* at 18. They also reference the Judges (Samson, Deborah, Barak) who were motivated by God to fight and deliver Israel from foreign oppressors. *Id.* David, the warrior, who is also a “man after God’s own heart” is referenced. *Id.* at 19. As well as *Hebrews* 11:32-34, which shows Old Testament believers as a while engaged in war in a righteous way, as referenced in slide nineteen. *Id.*

give examples from the Intertestamental Period<sup>31</sup> and eventually give examples from the New Testament.<sup>32</sup> The next few slides speak of the atomic bombs dropped on Japan and World War II.<sup>33</sup> Then there is the slide asking the question, “Can you imagine a set of circumstances that would warrant a nuclear launch from the U.S., knowing that it would kill thousands of non-combatants?”<sup>34</sup> - which is the main reason for the ethics class. Given the purpose of the course, one would expect this to be the first slide and not one of the last. A little ironic, but the last three slides of the PowerPoint are dedicated to informing the officers of the different religious services and centers on the base.

The overtly religious nature of the course<sup>35</sup> was brought to the attention of Air Force officials through an article published by TRUTHOUT.<sup>36</sup> TRUTHOUT was sent information from the Military Religious Freedom Foundation.<sup>37</sup> The fact that the Foundation chose to go directly to the media rather than Air Force officials raised issues as to its motives. Immediately upon seeing the article, Air Force officials suspended the course in order to look into it.<sup>38</sup> A few days after the course’s suspension, the Air Force’s Chief

31. Interesting enough, this slide (twenty) has a picture of a menorah on it. See *Ethics PowerPoint*, *supra* note 24, at 20.

32. The New Testament Bible passages include *Luke* 3:14 (where John the Baptist does not tell the Roman soldiers to leave the army before being baptized) and *Luke* 7:10 (where Jesus uses Roman Centurion as a positive illustration of faith). *Id.* at 21. There is also reference to Paul interacting with Cornelius the Roman army officer, known as “devout and God fearing” in Acts 10:2, 22, 35. *Id.* Next, the slides refer to the *Romans* 13:4 where God calls the emperor to be an instrument of justice. *Id.* at 22. Citing *Timothy* 2:3 the slides explain Paul chooses three illustrations to show what it means to be a good disciple of Christ: 1) farmers because they work hard and are patient; 2) athletes because they are self-disciplined and trained; and 3) soldiers because they are willing to put up with hardship. *Id.* at 22-23. Lastly the slides reference *Revelation* 19:11 where Jesus Christ is the mighty warrior. *Id.* at 23.

33. *Ethics PowerPoint*, *supra* note 24, at 25-30.

34. The slides also ask the questions, “Can we exercise enough faith in our decision makers, political and military, to follow through with the orders that are given to us?” and “Can we train physically, emotionally, and spiritually for a job we hope to never have to do?” *Id.* at 32.

35. There are some who argue the course was not overtly religious. See *Liberty Counsel Defends Air Force Nuke Training*, *supra* note 13 (claiming that only three and half of the slides had dominating Christian views, while the rest were “equally valid.”).

36. See Leopold, *supra* note 17.

37. *Id.*

38. *Id.* David Smith, spokesman for the Air Force Air Education and Training Command, explained that the Air Force “was completely unaware that the

of Staff, General Norton Schwartz, sent out a memorandum to the entire Air Force<sup>39</sup> entitled, “Maintaining Government Neutrality Regarding Religion.” The memorandum cautioned the Air Force leaders not to use their position to proselytize. It emphasized the possible “degradation of the unit’s morale, good order and discipline”<sup>40</sup> if certain religions were being pressed on the Air Force. The Air Force is now reviewing all of its materials that deal with morals, ethics, core values and character development.<sup>41</sup> It is not disputed that these lessons need to be taught, but the Air Force needs to ensure they are being taught without the implication of religion.

### B. Christian Just War Theory

The Bible preaches peace. But it also permits the use of arms to defeat greater evils.<sup>42</sup> There are several passages in the Bible in which God commanded his people to defend their land by the use of arms. As Christianity grew, Augustine and other Christian theologians developed the Just War Theory.<sup>43</sup> Rutgers Professor

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missile class, which had been taught by Chaplains at California’s Vandenberg Air Force Base, contained the religious emphasis until officials were contacted by Truth-out.org.” See Dave Bohon, *Air Force Reviewing All Ethics Courses for Christian Themes*, NEW AM. (Aug. 22, 2011, 3:39PM), <http://thenewamerican.com/culture/faith-and-morals/8692-air-force-reviewing-all-ethics-courses-for-christian-themes>.

39. Although at first, the memorandum was only sent out to the Air Force Commands. See Chris Rodda, *Air Force Academy Was Against Chief Of Staff’s Religious Neutrality Edict Before It Was For It*, FREETHOUGHTBLOGS (Sept. 29, 2011), <http://freethoughtblogs.com/rodda/2011/09/29/air-force-academy-was-against-chief-of-staffs-religious-neutrality-edict-before-it-was-for-it/>. There was lot of opposition to this decision, as the memorandum made its way through the ranks and appeared in an AIR FORCE TIMES article as well as on a billboard in Colorado. *Id.* After this, General Schwartz decided to send the memorandum to the entire Air Force. *Id.*

40. Markeshia Ricks, *Schwartz: Don’t Endorse Religious Programs*, AIR FORCE TIMES (Sept. 16, 2011, 2:21 PM), <http://www.airforcetimes.com/news/2011/09/air-force-schwartz-warns-commanders-on-religious-programs-091611/>.

41. Jason Leopold, *Air Force Pulls Christian-Themed Ethics Training for Nuclear Missile Officers After Publication of Truthout Report*, TRUTHOUT (July 29, 2011, 11:53 AM), <http://www.truth-out.org/air-force-pulls-christian-themed-ethics-training-missile-officers/1311972789>.

42. See *Romans 14:3*. See also, *Just War Doctrine*, *supra* note 12.

43. The most modern form of the theory today can be seen in paragraph 2309 of the Catechism of the Catholic Church which reads:

The strict conditions for legitimate defense by military force require rigorous consideration. The gravity of such a decision makes it subject to

James Turner Johnson, a specialist in Just War thought, explains that the Christian theologians, who developed the theory, developed it from natural law and the moral responsibilities of the temporal government.<sup>44</sup> He further explains that they “emphatically did not develop this conception out of the Bible itself, though they saw it as consistent with the biblical revelation.”<sup>45</sup> This emphasizes that the theory itself, although rooted in the Christianity, is not a Christian theory. It is not a religious theory at all. It should be seen as a philosophical theory: the Just War Theory. The theory just adopted the name “Christian Just War Theory” as the Christians accepted and preached the theory.

The slides do not properly explain the Christian Just War Theory.<sup>46</sup> The slides incorrectly reference several biblical verses, when the only one that was ever cited in connection with the Christian Just War Theory was *Romans* 13:4,<sup>47</sup> which appears in the slides, but only plays a small role. Professor Johnson further explains that the Old Testament verses should not have appeared in the

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rigorous conditions of moral legitimacy. At one and the same time: the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain; all other means of putting an end to it must have been shown to be impractical or ineffective; there must be serious prospects of success; the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition. These are the traditional elements enumerated in what is called the “just war” doctrine. The evaluation of these conditions for moral legitimacy belongs to the prudential judgment of those who have responsibility for the common good.

*Just War Doctrine*, *supra* note 12.

44. Benjamin Mann, *Professors Say Air Force’s ‘Christian Just War’ Course Needs Revision*, CATHOLIC NEWS AGENCY (Aug. 6, 2011, 8:18 AM), <http://www.catholicnewsagency.com/news/professors-say-air-forces-christian-just-war-course-needs-revision/>.

45. *Id.*

46. Christian Just War Theory is interchangeable with Just War Theory, as is evident in the slides, where the titles change between Just War and Christian Just War. See e.g., *Ethics PowerPoint*, *supra* note 24, at 15, 18.

47. As mentioned previously, Augustine and the other theologians did not develop the theory based on the Bible, but rather found it consistent with the Bible. So Bible passages could be applied to the theory, but the theory did not come from the passages. This specific verse from the *Romans* explains that the responsibility for using armed forces lies within the temporal ruler and follows from the ruler’s obligation in the natural world to main order, justice, and peace. See *Romans* 13:4. The exact language of the verse reads, “[F]or it is a minister of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath on the one who practices evil.” *Id.*

PowerPoint because they were not necessary to teach the theory. Moreover, Professor Johnson explains that the theory could be taught without text from the scriptures and should be taught strictly through reason alone.<sup>48</sup>

The underlying theme of the theory takes three basic concepts, which do not mesh well together, and reconcile their differences. The three concepts are: 1) taking human life is seriously wrong; 2) states have a duty to defend their citizens and defend justice; and 3) protecting innocent human life and defending important moral values sometimes requires willingness to use force and violence. It is hard to defend citizens, innocent human life, and justice, all while being attacked, without the use of violence. The theory takes these concepts and explains when it is acceptable to use violence and how much violence is permitted.

The Christian Just War Theory is broken up into three parts. The first part explains the conditions (just causes) that need to be met to go to war.<sup>49</sup> Once war is declared, the second part of the theory states that the fighting must be just.<sup>50</sup> As a general rule, only combatants may be fought against. However, the definition of combatants can be stretched to mean the civilians of a country, if the entire country is at war.<sup>51</sup> Lastly, the war must be proportional in two ways; it must be in proportional in response to the offense that sparked the war and it must be proportional in that the benefits the war will have outweigh the harms.<sup>52</sup> The BBC has an

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48. Professor Johnson's position is that teaching the Just War Theory through scripture is not the best of way of teaching, especially in the Air Force, which is a multi-faith setting. See Mann, *supra* note 44.

49. Augustine believed there were three just causes to go to war: 1) defending against attack; 2) recapturing things taken; and 3) punishing people who have done wrong. They are essentially acts of justice. Today, the just causes have been modified as follows: "[F]orce may be used only to correct a grave, public evil, i.e., aggression or massive violation of the basic rights of whole populations." Augustine also said there were three groups of people who could be punished; 1) the whole people of another country; 2) the leaders of another country; and 3) private individuals in another country. See *Ethics Guide: Just War - Introduction*, BBC, <http://www.bbc.co.uk/ethics/war/just/introduction.shtml> (last visited Apr. 5, 2013).

50. Just War is defined by six conditions that must be satisfied. The six conditions are: 1) the war must be for a just cause; 2) the war must be lawfully declared by a lawful authority; 3) the intention behind the war must be good; 4) All other ways of resolving the problem should have been tried first; 5) there must be a reasonable chance of success; and 6) the means used must be in proportion to the end that the war seeks to achieve. *Id.*

51. The principle of not killing non-combatants lies at the heart of the atomic bomb dropping ethical debates. See *Id.*

52. *Id.*

online ethics guide, and the first description the guide offers about Christian Just War Theory is “[t]he Just War theory specifies conditions for judging if it is just to go to war, and conditions for how the war should be fought. Although it was extensively developed by Christian theologians, *it can be used by people of every faith and none.*”<sup>53</sup> This is something to keep in mind as this note continues.

C. *Constitutional Restraints on Religions: Establishment Clause v. Free Religion Clause*

There has always been some tension between the two religion clauses of the First Amendment: the Establishment Clause and the Free Religion Clause.<sup>54</sup> In general, the Establishment Clause prohibits the government from establishing any “official religion” and goes further by preventing any government action “respecting an establishment of religion.”<sup>55</sup> Under this Clause, the military, which is a government entity, may not impose any religion on any of its members, nor may it promote one religion over the other. In contrast, the Free Exercise Clause guarantees an individual’s right to hold religious beliefs; however, it does not guarantee the right to religious practices.

The courts use three tests to determine if a government action violates the Establishment Clause. The first test, known as the “*Lemon* test”, was established in the *Lemon v. Kurtzman* case.<sup>56</sup> This is a three-prong test. The first prong is to determine if the government action has a secular purpose.<sup>57</sup> The second prong is that the action’s primary effect must neither inhibit nor advance religion.<sup>58</sup> And the last prong is that the action must not foster an

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53. *Id.* (emphasis added).

54. *Cf. Esbeck, supra* note 20, at 892 (asserting that there really is no confusion or tension between the two because “[a]rguing a clash-of-the-Clauses is to advance the wholly improbable: that the Framers drafted an Amendment with two fundamental guarantees side-by-side, each trying to cancel out the other.”).

55. Major David E. Fitzkee & Captain Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F.L. REV. 1, 3 (2007).

56. *Lemon v. Kurtzman*, 310 F. Supp. 35 (D. Pa. 1969).

57. In order to pass this prong, the law must have at least one purpose that is not secular. See Kenneth J. Schweiker, *Military Chaplains: Federally Funded Fanaticism and the United States Air Force Academy*, 8 RUTGERS J. LAW & RELIGION 5, 9 (2006).

58. This prong is meant to determine if the primary effect of the action is to advance or deter a religion. *Id.* at 10.

“excessive government entanglement with religion.”<sup>59</sup> Government action needs to pass all three prongs in order to not be considered in violation of the Establishment Clause.

Another test courts often apply to determine if the Establishment Clause is violated is the “endorsement test”, found in *Cnty. of Allegheny v. Am. Civil Liberties Union*.<sup>60</sup> The analysis under the endorsement test asks “whether a reasonable and informed observer would view governmental action or practices as endorsing religion.”<sup>61</sup> Compared to the *Lemon* three-prong test, this test is based on an objective standard. The last test that courts use is known as the “coercive test”. This test is self-explanatory. The courts look at the government action to decide if it coerced “anyone to support or participate in religion or its exercise.”<sup>62</sup> The latter two tests are not as precise as the *Lemon* test, and give the courts some leeway as to how to interpret the Establishment Clause. It also gives courts the power to tailor the test specifically to the purpose or claim at issue.

Deciding if the Free Exercise Clause has been violated is generally a threshold question. The question is whether a government action has imposed a burden on the religion.<sup>63</sup> The only requirement for a person claiming protection under the Free Exercise Clause is that his or her belief be sincere.<sup>64</sup> There are two ways to determine if a government action imposes a burden on someone’s religious beliefs. The first is if the government action is aimed at religion.<sup>65</sup> In this case, almost any action would be considered a burden and thus void unless it serves a compelling governmental interest and it is narrowly tailored to that interest and therefore, survives strict scrutiny review.<sup>66</sup>

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59. This last prong is controversial and extremely hard to apply. *Id.* See also Fitzkee & Letendre, *supra* note 55, at 10 (explaining that “to determine whether entanglement is excessive, courts look to ‘the nature and character of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religion authority’”) (citations omitted).

60. *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989).

61. See Fitzkee & Letendre, *supra* note 55, at 12 (explaining that endorsement and promotion are almost synonymous).

62. *Id.*

63. *Id.* at 13.

64. *Id.* at 14 (explaining that a person’s beliefs “must be sincere, but need not be traditional as long they [sic] ‘occup[y] in the life of its possessor a place parallel to that filled by the God’ of traditional religions.”).

65. *Id.* at 14-15.

66. Fitzkee & Letendre, *supra* note 55, at 14-15.

The second test to decide if a government action imposes a burden is to decide if the law is religiously-neutral and is generally applicable. If this is the case, then the action is usually upheld.<sup>67</sup> Over the past few years there has been some debate about religiously-neutral laws. In *Employment Division v. Smith*, the Court determined that a religious-neutral law could in fact impose a burden on religion, but decided not to apply strict scrutiny in those cases.<sup>68</sup> The Court ultimately decided that as long as the law was neutral and valid, it would be upheld.<sup>69</sup> The *Smith* decision was extremely controversial, so in 1993, in response to the decision, Congress passed the Religious Freedom Restoration Act of 1993 (the "RFRA").<sup>70</sup> The RFRA essentially made free exercise cases subject to strict scrutiny, regardless if the law was aimed specifically at a religion or if it was religiously-neutral.<sup>71</sup> The RFRA was declared unconstitutional with regard to state law, but it is still good federal law and therefore applies to the military.<sup>72</sup>

While it is widely believed that the Establishment Clause and Free Religion Clause can work together, the general belief is that there will always be some form of tension between them. It should however be noted that there is a theory that the tension between the two clauses is non-existent. Carl Esbeck claims that the Free Religion Clause and Establishment Clause are both merely "carve out" exceptions to "existing government power."<sup>73</sup> Esbeck believes

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67. *Id.* at 17.

68. *Emp't Div. v. Smith*, 494 U.S. 872, 888-889 (1990).

69. *Id.*

70. Fitzkee & Letendre, *supra* note 55, at 20.

71. § 2000bb-1 states:

(a) In General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2011), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/pdf/USCODE-2011-title42-chap21B.pdf> (last visited Apr. 5 2013).

72. Fitzkee & Letendre, *supra* note 55, at 22-24.

73. Esbeck, *supra* note 20, at 893 (explaining that the two clauses were just negatives on enumerated powers).

that because both clauses are exceptions, it is not possible for them to conflict with one another.<sup>74</sup>

*D. The Exception for Military Chaplains in the Air Force (Deference)*

Major David E. Fitzkee and Captain Linell A. Letendre describe the tension between the “free exercise of religion by military members and establishment of religion by the military” as “a feat compared to navigating the narrow channel between Scylla and Charybdis in Greek mythology.”<sup>75</sup> The tension<sup>76</sup> between the two clauses is so great in the military context because the military must honour its members’ free exercise right, but it must do so without compromising its national security obligation,<sup>77</sup> which is granted in Article 1, Section 8.<sup>78</sup> This article of the Constitution gives deference to Congress’s decisions with regard to the military and all matters of national security.<sup>79</sup> Since members of the military must be ready to mobilize at any given time whether it is during a religious holiday or worship time, the members’ rights to free

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74. Esbeck believes it is possible for the two powers to overlap, but they will never conflict with one another. *Id.*

75. Fitzkee & Letendre, *supra* note 55, at 3 n7.

76. In *Katcoff*, the court plainly states the obvious tension between the two clauses in the military context, “Spending federal funds to employ Chaplains for the armed forces might be said to violate the *Establishment Clause*. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.” *Katcoff v. Marsh*, 755 F.2d 223, 235 (2d Cir. 1985) (emphasis in original) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 208-209 (1963)).

77. Fitzkee & Letendre, *supra* note 55, at 5.

78. Article 1, Section 8 grants Congress numerous powers. Article 1 Section 8, Clause 1 provides that Congress has the power to “provide for the common defense and general Welfare of the United States.” This allows Congress to use federal funds for the military. U.S. CONST. art. I, § 8.

79. The court in *Katcoff* explains,

The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military’s exercise of its discretion.

*Katcoff*, 755 F.2d at 234-35 (citing *Rostker v. Goldberg*, 453 U.S. 57, 64-68 (1981)).

exercise may be inhibited. Congress's solution was to employ military Chaplains, who could move with the members of the military as needed.

The majority of military personnel have always had some sort of religious preference. A recent study concluded that a little more than a quarter (26.3%) of military personnel have either no religious preference or an unknown religious preference.<sup>80</sup> This leaves seventy-four percent of military personnel with some sort of religious preference. The percentage of personnel with a religious preference in the Air Force is even higher, at approximately eighty-one percent. This majority only represents the actual military personnel themselves. It does not include their wives and families who, most of the time, live on base with them. Given the size of the majority and amount of people in need of religious leaders and facilities, the military Chaplaincy Program appears not only to be justified, but also necessary.

The military Chaplaincy Program was questioned in the *Katcoff v. Marsh*<sup>81</sup> case. Two law students, who had never served in the military, brought the case.<sup>82</sup> They argued that volunteers or privately-funded religious institutions should replace the Chaplaincy. The military is considered a government entity, and is thus funded by the government.<sup>83</sup> Under the Establishment Clause, as previously discussed, the government may not "impose, sponsor or support religion or force one to remain away from the practice of

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80. The U.S. Department of Defense conducted the study in 2009. Of the 1,407,580 military personnel surveyed, 283,671 reported not to have a religious preference. And then another 87,657 reported unknown. The survey also divided up the religious preferences by sector. The Department of Defense surveyed 329,771 Air Force officers. Out of those surveyed, 58,131 had no religious preference and only 3,421 were unknown. Combining the unknown with those who had no religious preference, it is calculated to be approximately 18.7%, leaving roughly 81% of the Air Force Personnel with a religious preference. *Raw Data: Religious Preference in the Military*, CNN (Nov. 12, 2009, 5:35 PM), <http://ac360.blogs.cnn.com/2009/11/12/raw-data-religious-preference-in-the-military/>.

81. *Katcoff*, 755 F.2d at 227.

82. Steven K. Green, *The Religion Clauses in the 21st Century: Article: Reconciling the Irreconcilable: The Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 176, 172 (2007).

83. Julie B. Kaplan, *Note: Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210, 1210 (1986). It should be noted that in 1986 the government put eighty-five million dollars a year into the military Chaplaincy Program. In 2008, it was estimated to be about a hundred million dollars per year. See Montgomery, *supra* note 18.

religion.”<sup>84</sup> However, despite the Establishment Clause, the courts have permitted Congress to instate a military Chaplaincy Program. Instating a military Chaplaincy Program and using the country’s tax dollars to support it, seems like the government is sponsoring religion. The theory behind allowing the military Chaplaincy Program is that members of the military have an increased need for religion because they are “uprooted from their home environments, transported often thousands of miles to territories entirely strange to them, and confronted there with new stresses that would not otherwise have been encountered if they had remained at home.”<sup>85</sup> There is a fear that if Chaplains were not available, members of the military would be unable to practice exercise their religions; consequently, the “motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened.”<sup>86</sup> Therefore, the program is justified by the need for a strong national defense.

In *Katcoff*, the Appellate Court affirmed the District Court’s decision not to apply the *Lemon* test because of the deference granted in military matters. Instead, the Appellate Court determined the issue to be decided first was whether “after considering practical alternatives, the Chaplaincy program is relevant to and reasonably necessary for the Army’s conduct of our national defense.”<sup>87</sup> After consideration, the court in *Katcoff* ultimately concluded that the Chaplaincy Program was in fact relevant and reasonably necessary for the military’s conduct of our national defense. The court focused on the individual rights of the military personnel and their free exercise of religion and found that the program was “a permissible means of reaching a constitutionally required end.”<sup>88</sup> The court in *Katcoff* rested its opinion on the basis that private funding would be insufficient to maintain the program.<sup>89</sup>

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84. Schweiker, *supra* note 57, at 6 n.27.

85. *Katcoff*, 755 F.2d at 227.

86. *Id.* at 228.

87. *Id.* at 236.

88. Kaplan, *supra* note 83, at 1210.

89. *Id.* at 1211. Kaplan points out that the court did not consider the possibility of changing other elements of the Chaplaincy so it would conform better to the Establishment Clause. The court’s lack of consideration to conform the Chaplaincy program better to the Establishment Clause could suggest that the court simply believes the Chaplaincy Program should be exempt completely from the constraints of the Establishment Clause all together. Or it could simply have meant the court did not want to actively proscribe any suggestions and would

*E. The History of the Air Force Chaplains*

The military Chaplaincy, including Air Force Chaplains, has been in place for more than 230 years.<sup>90</sup> In that time, there was relatively little challenge to the Chaplains and their presence in the Air Force. Their role is described in the army regulations. They are meant to act in the normal capacity of their clergy profession while accommodating the specific missions and circumstances of the military.<sup>91</sup> The line between the Chaplains' work and military functions is not always clear.<sup>92</sup> Given the nature of the Chaplaincy Program, "the Chaplains represent a unique, hybrid form of government employee. While immediately answerable to their military superiors, they are accountable to their host denominations for some matters of faith, in particular their certifications as clergy."<sup>93</sup> This dual role has posed some problems with the Chaplaincy, as was seen in the *Katcoff* case. Despite the deference given to military Chaplains, and the lack of judicial decisions against the military Chaplains, a close eye is kept on them.

Out of all the military sectors, the Air Force seems to have had the most problems with its Chaplains.<sup>94</sup> They have been under

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rather keep its position as is, and deal with the cases and they come forth. Given the history of the court, I would suggest the latter of the two possibilities was the reason for the court not considering changing any other elements of the Chaplaincy Program.

90. Schweiker, *supra* note 57, at 4.

91. Kaplan, *supra* note 83, at 1213 (explaining, "Army regulations do not specify the effect that the "distinctive conditions" and the "mission" of the Army have on religion, but the Chaplaincy system is designed to promote a vision of religion that is pluralist, ecumenical, and patriotic, minimizing the distinctions within and between religious groups.").

92. Kaplan describes that sometimes the "Chaplains [sic] duties are overtly secular" and these duties sometimes include the "integration of the principles of good moral conduct and citizenship" and it becomes part of the controlled life of the military personnel, which is what happened with the Christian Just War Theory class. *Id.* at 1215.

93. Green, *supra* note 82, at 183.

94. Jason Leopold, the reporter for TRUTHOUT who first brought the ethics course to the attention of the news and the head officials of the Air Force, briefly recapped some of the problems the Air Force has had in the recent past with its Chaplains and Commanders who are endorsing their religions and imposing them on the officers. Leopold, *supra* note 17. In 2009, at the Creech Air Force Base in Nevada, an Air Force Captain sent out an E-Mail to the entire Air Force personnel on the base inviting them to a Bible study class, which referred to Jews as whiners. *Id.* Leopold explains another incident from 2008 in which the Air Force gave a presentation on suicide prevention referring to the teachings of Rick Warren, a Megachurch leader. *Id.* The last example he gives is in 2009, when

strict scrutiny for proselytizing Air Force personnel. Michael Weinstein, a former Air Force Cadet and founder of the Military Religious Freedom Foundation,<sup>95</sup> is constantly challenging the Air Force Chaplains.<sup>96</sup> In 2005, he tried to bring a suit against the Air Force for military Chaplains proselytizing Air Force officers, but the case was dismissed on a technicality. His suit sought injunctive relief from the proselytizing Chaplains were allegedly employing.

Although Weinstein's suit was dismissed, it, along with other allegations against the Chaplains,<sup>97</sup> evoked a response from Air Force officials. First, the Air Force investigated all allegations and released *The Report of Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy*.<sup>98</sup> The Air Force also proceeded to release two sets of behavioral guidelines.<sup>99</sup> Air Force officials are allowed to have personal conversations about religion, but they are not allowed to impose their beliefs on others.

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senior command officers sent out an E-Mail to the entire Air Force personnel inviting them to the screening of a Christian movie. *Id.*

95. The Foundation, nicknames itself the "watchdog." Its mission is "dedicated to ensuring that all members of the United States Armed Forces fully receive the constitutional guarantees of religious freedom to which they and all Americans are entitled by virtue of the Establishment Clause of the First Amendment." *Military Religious Freedom Foundation: Mission*, MILITARY RELIGIOUS FREEDOM FOUND., <http://www.militaryreligiousfreedom.org/about/our-mission/> (last visited Apr. 2, 2013).

96. A recent example of the high scrutiny Weinstein places on the Air Force was when he questioned an E-Mail sent out by Air Force Officials concerning "Operation Christmas." Operation Christmas is a charity event where Air Force personnel have the opportunity to give gifts to underprivileged children. Weinstein argued that the E-Mail should have only been sent to the Christian officers instead of the entire Air Force. Weinstein saw it as a "Trojan Horse" attempt to promote Christianity. Brittany Smith, *Former Air Force Cadet Tried to Get Rid of Operation Christmas Child*, CHRISTIAN POST (Nov. 8, 2011, 9:35 AM), <http://www.christianpost.com/news/former-air-force-cadet-tries-to-get-rid-of-operation-christmas-child-60910/>.

97. Other allegations included preferential treatment of members of one religion as opposed to another, religious intolerance, and attempts at recruitment. See Schweiker, *supra* 57, at 3. Most of these allegations were significant because they occurred with the help and/or under the direction of representatives of the Air Force. *Id.* There are even allegations stating that those officers who challenged the Chaplains were faced with unwarranted reprimands. *Id.*

98. *Id.* at 20. The report was nothing more than statistical data retrieved during the investigations. *Id.*

99. The first set of guidelines was extremely restrictive. Conservative Christians lobbied at the White House to have them revised. *New Air Force Religion Guidelines*, MILITARY.COM (Feb. 10, 2006), <http://www.military.com/NewsContent/0,13319,87641,00.html>.

Less than three weeks after the threatened class action law suit against the Air Force for the Christian Just War Theory course, an Air Force instructor forwarded slides from a second course taught to the Air Force officers to the Military Religious Freedom Foundation which he felt were overtly religious as well.<sup>100</sup> The allegations were that this course included, “references to the Sermon on the Mount and the Ten Commandments as examples of ethical values.”<sup>101</sup> As with the Just War Theory course, there were arguments on both sides as to the validity of this course. Those in favor of the course being taught stressed that slides referred to the Golden Rule, which is found in five of the world’s major religions: “do unto others as you would have them do unto you.”<sup>102</sup> This course was produced by the Air Force’s Air Education and Training Command, which also produced the Christian Just War Theory ethics course.<sup>103</sup> After the course was brought to the attention of the Military Religious Freedom Foundation, the Air Force decided to review all its training materials that dealt with ethical and moral concerns.<sup>104</sup> However, as one can imagine, separating ethics and religion is almost impossible. Additionally, there has been no news coverage or statements from the Air Force regarding its review.

### III. ANALYSIS

When it comes to the military, given the nature and demand for control over all the personnel, there is a constant fear that someone or something could easily take “coercive control” over its personnel.<sup>105</sup> This fear is warranted, considering all sectors of the

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100. The course was called “Core Values and the Air Force Member.” See Bohon, *supra* note 10.

101. *Id.* The PowerPoint presentation for this course included the “Beautitudes” teaching of Jesus, as well as seven of the Ten Commandments. One slide specifically stated, “Have no other Gods before Me.” *Id.*

102. *Id.*

103. *Id.*

104. David Smith stated that the Air Force was reviewing all “training materials that address morals, ethics, core values, and related character development issues to ensure appropriate and balanced use of all religious and secular source material.” Bohon, *supra* note 10.

105. Green, *supra* note 82, at 172. Green explains in greater detail the fear of the Chaplains in the military. He points out that the purpose of the Chaplaincy Program is, “to provide for religious ministrations to servicemembers [sic]” and that “the system . . . exists to further military goals of enhancing morale and ensuring a loyal and compliant fighting force.” *Id.* But, he continues, “[B]ecause of

military are based upon discipline. The Air Force Academy currently has an eight-and-a-half-week boot camp program. Although the Air Force Academy is traditionally said to be less physically demanding than the other military divisions, it is still not only physically but also mentally demanding. The physical and mental stress induced on the trainees results in an extremely disciplined group of Air Force cadets. In this setting of stress and learning, coupled with living in a place away from home with strangers (the reasoning the court gave for allowing the Chaplaincy Program), there is also the fear that the vulnerability of the new cadets may be taken advantage of by senior officers, instructors, or Chaplains who may see it as an opportunity to impose their views on the cadets.

With that being said, the Military Religious Freedom Foundation definitely has a role to play in protecting the Cadets. However, it appears that the Foundation may be taking its protective role a little too far. It seems almost impossible to get anything remotely religious past these military religious “watchdogs.” The Military Religious Freedom Foundation continues to watch and question the acts of the controversial military Chaplains. And while they seem to have some success in keeping religion separated from the military, it does not appear that they would enjoy the same success if their claims were brought to the attention of the judicial system.<sup>106</sup>

Their success is primarily driven through releasing Air Force activities to the media, forcing the Air Force to respond quickly (and not always correctly) to do damage control. Initially, there were threats by the Military Religious Freedom Foundation to bring a class action suit against the Air Force if the Christian Just War Theory class was not removed immediately from the curriculum. In response, the Air Force suspended the course in order to review it. However, given the history of the judicial system, the past decisions dealing with the military Chaplains and the two conflicting religion clauses of the First Amendment, it would not

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the command and control structure of the military generally, there is always the danger that the military’s use of religion will take on a coercive quality, as demonstrated in the allegations of proselytizing and disparagement of religion at the Air Force Academy.” *Id.*

106. Several advocates of the Just War Theory course expressed anger when the Air Force immediately chose to suspend the ethics course rather than challenge the Military Religious Freedom Foundation’s allegations. *Air Force Guilty of Religious Bigotry – Bans Scripture in Class*, AM. FAM. ASS’N (Aug. 9, 2011), <http://www.afa.net/Detail.aspx?id=2147510498>.

appear that the Military Religious Freedom Foundation's claims against the Air Force would have been successful, despite the overtly religious nature of the Christian Just War Theory ethics course.

The deference the judicial system must give to the Air Force for any decisions it makes would play a major role if the ethics course were to be challenged in court. The course is taught to the Air Force pilots who are trained to drop nuclear weapons. The Air Force's ability to drop a nuclear weapon on an enemy would most likely be considered a compelling governmental interest.<sup>107</sup> Military decisions in general are given deference, and it would only make sense that any decision regarding the teaching of the men with the most controversial and/or possibly important job in the Air Force would be given similar deference. Given the nature and results of nuclear bomb explosions, those Air Force pilots must be mentally prepared for the damage and injury they will cause by pushing that one button to release the bomb. Therefore, all the Air Force Chaplains have to do is explain that the ethics course being taught is reasonably necessary and relevant to obtaining the government's compelling interest of having Air Force pilots who are not only physically, but mentally prepared to drop a nuclear bomb. An extremist view is that if the Air Force missile launch officers are not offered this ethics training, they could make the world a more dangerous place. The reasoning stands that those who are in control of such dangerous weapons must have "strict moral guidelines to keep them from inflicting the full level of harm of which they are capable."<sup>108</sup> In this case, there would be a compelling interest for the government. Not only do they need the officers to be trained well enough to know when to drop the nuclear weapons, they also need them to know when to stop, in order to prevent any additional harm to the country.<sup>109</sup> An argument may be made that there are alternatives, but how many alternatives are there really?

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107. Nuclear officers are a "special subset" of soldiers. Their job is unlike most others in the military. The "nuclear officer has to be, at the same time, both reluctant to resort to the nuclear option, yet decisive in exercising it the second it is truly required." *The Just War – A Christian Theory?*, WHITE MAN BLOG (Aug. 10, 2011, 6:18 PM), <http://whitemail.blogspot.com/2011/08/just-war-christian-theory.html>. There is no time for second thoughts when it comes to dropping a nuclear weapon.

108. *Id.*

109. *Id.* The blogger does, however, qualify his argument by explaining that the Navy does not offer any sort of ethics course of the same nature as the Just War Theory course, but rather just circulates a questionnaire. *Id.*

There is no easy way to justify taking innocent lives, even if it is done in defense of one's own country and its people.

If the deference granted to military decisions in order to fulfill its obligation to maintain national security is not enough to uphold the teaching of the ethics course, there is the argument that the course is simply an exercise of Free Religion and the Air Force's removal of the course (or if the issue was brought to court, a court's decision to remove the course) would violate the Air Force Chaplains' and pilots' right to free exercise. Matt Staver, the founder of Liberty Counsel,<sup>110</sup> raised this argument for those in favor of the course. He argues the course itself did not violate the Establishment Clause or the Free Exercise Clause. Rather, he argues the potential lawsuit action lies with the Air Force's decision to remove the course. His position is that when the Air Force chose to remove the course, it did so "purely on religion."<sup>111</sup> He argues that the course itself was not violating any standards and served an academic purpose. Therefore, the Air Force's removal of the course because it had religious content could have been "described as creating an environment hostile to religion, which the government cannot do."<sup>112</sup> This position has not been taken elsewhere, but it is something to think about.<sup>113</sup>

Those in favor of the course being reinstated argue that the military is an entity that should be promoting pluralism. As noted before, violations of the Free Exercise Clause are mainly threshold questions. Since the Air Force is a government entity, the RFRA would apply. So any government or court decision to remove the course would be subject to strict scrutiny review. The only reasonable, compelling interest that the government has would be that the pilots were uncomfortable with the class, and their comfort level with dropping nuclear bombs is a compelling interest of the government. Considering that an overwhelming number of officers

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110. Liberty Counsel is an international nonprofit litigation, education, and policy organization that is dedicated to advancing religious freedom. *Liberty Counsel*, LIBERTY COUNS., <http://www.lc.org/index.cfm?pid=14096> (last visited Apr. 2, 2012).

111. See *Liberty Counsel Defends Air Force Nuke Training*, *supra* note 13.

112. *Id.*

113. An interview with a former Air Force officer who took this course as part of his training, voiced his opinion that "by lobbying to eliminate the class, the anti-God community has made it *more likely*, not less, that religious beliefs will enter into military decisions." *Id.* (emphasis added). Allowing religious beliefs to enter into military decisions will create a problem for the Supreme Court. *Id.*

who threatened the suit were in fact Christians,<sup>114</sup> this does raise some questions. If those who believe in the Bible and its teaching are uncomfortable with a course preaching the Bible, then one could suspect there could be something wrong. However, while the pilots' comfort with dropping nuclear weapons is a compelling governmental interest, it would be a stretch to say the pilots' discomfort with the course was a compelling governmental interest. Therefore, the decision to remove the course may not survive strict scrutiny.

Another argument in favor of the class is that the Just War Theory, although it may stem from Christian roots, is an ethical justification for war, not a religious justification.<sup>115</sup> This would take the course completely out of the context of Free Exercise Clause and Establishment Clause jurisprudence. Ultimately every aspect of culture and all moral belief stems from religion or ancient philosophers in one way or another. It does not make them wrong or necessarily religious, those are just the roots.

On the other side, for those wishing the class were removed from the Air Force curriculum, their argument will be based upon the Establishment Clause. However, their argument would have to be extremely tailored following the *Katcoff* case. Proponents for removal cannot rely on the fact that the government pays the Chaplains who taught the course and funds the program.<sup>116</sup> The argument would have to be based on the fact the course was mandatory and taught by the Air Force (a government agency). The

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114. The threat of the class action suit was brought on behalf of thirty-one Air Force missile launch officers. Of the thirty-one officers, twenty-nine of them were Christians (either Catholics or Protestants). Chris Rodda, *TX Senator Demands That Air Force Answer to Him for Pulling "Jesus Loves Nukes" Training*, TALK TO ACTION (Sept. 8, 2011, 5:51 PM), <http://www.talk2action.org/story/2011/9/8/175144/4230>. Since the course has been brought to the attention of the media, thirty-eight more officers (thirty-two of which were Catholics) contacted the Military Religious Freedom Foundation to join the possible suit. *Id.*

115. The Stanford Encyclopedia refers to the Just War Theory as "probably the most influential perspective on the ethics of war and peace." It also explains that many of the Just War Theory rules have been codified with regards to international laws. Just War Theory has influenced laws in the United Nations Charter, the Hague Convention, and the Geneva Convention. *War*, STANFORD ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/fall2008/entries/war/> (last updated July 28, 2005).

116. *Katcoff* already established that the government is entitled to fund the military Chaplaincy Program given the nature of the military. *Katcoff*, 755 F.2d at 236.

court would apply any one of the three Establishment Clause tests: the *Lemon* test, the endorsement test, or the coercive test.

The court did not apply the *Lemon* test in the *Katcoff* case, and the test would most likely not apply in this case either under similar rationale. But if the court did apply the *Lemon* test, it appears that the government would pass the test and not be in violation of the Establishment Clause. In order to pass the *Lemon* test, the government would need to satisfy all three prongs. The first prong requires that there be a non-secular purpose for the action of the government or for the course. The purpose of the course is to allow the nuclear missile launch officers to feel more comfortable dropping nukes and therefore, enhancing their ability to protect the country. The government's obligation to maintain national security is a strong non-secular purpose. The government could easily pass the second prong as well. The primary effect of the course is not to deter or promote religion, it is to promote nuclear bomb dropping and justify war. The third prong is a little more difficult to predict. The class may not foster an excessive entanglement with religion and the government. However, the entire military Chaplaincy Program is an entanglement with religion and government. So it would be hard to prove that the ethics course is "excessive." Therefore, it would appear that the course would pass the *Lemon* test.

Similarly, the course would most likely not violate the Establishment Clause if the court chose one of the other two tests. The endorsement test asks "whether a reasonable and informed observer would view governmental action or practices as endorsing religion."<sup>117</sup> At first glance, an observer may see the PowerPoint presentation as endorsing the Bible's teachings. However, an "informed observer" would realize the Just War Theory is an old philosophical justification for war, which has been used for centuries across the globe. Although its roots lie within the Christian religion, the theory itself is not religious. The last test, the coercive test, probably would not be met either. Although the course is mandatory for all nuclear launch missile officers in the Air Force, it is merely one class, a forty-three-slide PowerPoint presentation. It does not in any way force the officers to believe the Bible or its teachings, but is merely offering one possible justification for war.

This entire analysis is premised on the hypothetical assumption that the Military Religious Freedom Foundation followed through on its threat to bring a class action suit against the Air

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117. Fitzkee & Letendre, *supra* note 55, at 12.

Force. Also, it is important to restate that the tests applied in this analysis are mainly devoted to testing laws passed by the government, not courses taught in the military. However, due to lack of precedent, these tests or tests very similar in nature would most likely be applied. The courts do not like to interfere with the military's judgment or with the First Amendment. Therefore, they most likely would conclude that the ethics course is constitutionally valid. However, just because the course would probably survive judicial review does not necessarily make it right.

Despite the Military Religious Freedom Foundation's high scrutiny placed on the Air Force, they were justified in questioning the Just War Theory PowerPoint presentation. The theory itself, although based on Christian roots, is and should be acceptable to be referenced and taught. However, the Air Force did not do the theory justice. The Foundation and basics of the Just War Theory were discussed earlier in this note. There are three major parts to the Just War Theory: the reasons to go to war, the requirement that the fighting must be just, and the requirement that the fighting must be proportional. The slides only mention the justifications to wage war but leave the rest of the doctrine out. There is also the controversial menorah that is placed on the one slide titled "Christian Just War."<sup>118</sup> It seems like a bad (not to mention incorrect) attempt to incorporate other religions into the Just War Theory. Perhaps the most controversial slide is the one quoting the wartime authors from the Holocaust.<sup>119</sup> The Holocaust was not a Just War, and its authors should never be combined with theories of "just war."

In conclusion, questioning the course was warranted by the Foundation. The course greatly misrepresented the Christian Just War Theory. But should this issue actually grow into a class action suit against the Air Force; chances are that the Air Force will win the battle in the courts. The high value the nuclear pilots have in today's society and Air Force creates a compelling interest that would survive not only the deferential standard needed for National Security actions, but it would most likely also survive the

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118. *Ethics PowerPoint*, *supra* note 24, at 20.

119. *Id.* at 35. Revered Tyler Wigg-Stevenson voices his opinion in the Washington Post article by stating, "It is appalling to hold up the wartime authors of the Holocaust and the Bataan Death March as Benchmarks for relativistic ethics." Wigg-Stevenson, *supra* note 4. He also goes on to explain that most of the Bible quotes chosen to represent the Just War Theory are not even relevant. *Id.*

strict scrutiny of the Establishment Clause and Free Exercise Clause.

#### IV. PROPOSED SOLUTIONS

As previously mentioned, there was a lot of anger expressed at the Air Force's quick decision to suspend the course. The Air Force suspended the course with a promise to review it. However, since the Air Force has suspended the course, there has been no discussion of reinstating it. Other than the two weeks of publicity the course received, there has been nothing said about it since. Even though the Air Force declared they would review the course and make changes, there is no evidence that either has been done. It seems as if the Air Force merely suspended the course, and now is in an "out of sight, out of mind" approach.

The quick decision to remove the course and the lack of enthusiasm to reinstate the course with changes could be detrimental to the Air Force. The Air Force missile launch officers are now missing an important life lesson and a potentially life-saving course. While the Military Religious Freedom Foundation may be providing a valuable service to all the men in the military, it needs to more closely evaluate the aspects of the military it is scrutinizing. This course may have been overtly religious, but because of the actions of the Foundation, the officers are now missing an ethics course. Instead of threatening a class action suit against the military and immediately bringing bad press to the Air Force, the foundation easily could have provided some simple suggestions to reform the course.

It is important to distinguish between those who believe the course was "an outrage and a deliberate attempt to torture and distort our Constitution"<sup>120</sup> and those who believe the course is teaching a valuable lesson, just in a "clumsy" way.<sup>121</sup> Rutgers Professor James Turner Johnson, who is a specialist in Just War thought, believes that "secular institutions can legitimately present religious perspectives on war," but he believed the Air Force's course misrepresented the theory.<sup>122</sup> There is nothing wrong with

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120. This is the view taken by Michael Weinstein and the Religious Military Freedom Foundation. See Mann, *supra* note 44.

121. *Id.*

122. *Id.* Professor Johnson explained in an interview, "Medieval just war thinking was 'Christian' in a broad, undifferentiated sense as a product of a Christian culture and having been contributed to by Christian canonists and theologians." *Id.* He goes on to explain that calling the theory Christian in this

showing the history of the theory and how it developed. Despite the Foundation's attempt to claim the course was proselytizing, it seems more likely that the course was just trying to show the "intellectual patronage . . . of an idea."<sup>123</sup> However, the Air Force Chaplains failed at showing the lineage of the theory in an objective manner.

The Just War Theory, as an age-old ethics doctrine, is something that should be taught to all military personnel expected to fight in a war, especially the nuclear launch missile officers who have the power to potentially kill thousands at the press of a button. But the doctrine should be taught correctly, which the Air Force Chaplains have failed to do. As this note previously mentioned, there are several components to the Just War Theory. This note could not even begin to do justice in explaining the theory in its entirety. The Air Force could delete its forty-three slide Power-Point and create a new one with more emphasis on the teachings of the theory rather than the theory's origins in the Bible. The slides are also missing the "justice of war" component of the theory would need to be added.<sup>124</sup> As previously established, the theory is consistent with the Bible. Therefore, the Chaplains could teach the course's basics in a religiously neutral fashion, and then it could add a voluntary supplement Bible course. This voluntary course could be for the Christian officers in order to help drive home the theory by showing its consistency with their faith. It would have to be a strictly optional course. The Chaplains could also find a way to apply the theory to other religions as well, and offer those as supplement courses to the officers of different faiths. To go a step further, the course could be taught by an academic, a professor, or philosopher. If a non-religious person taught the course, then it would appear less religiously-g geared towards outsiders who do not fully understand the theory.<sup>125</sup>

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sense, was completely different than the "narrow sense used in the Vadenberg Course." *Id.*

123. Mann, *supra* note 44.

124. *Id.*

125. Some will argue that the Chaplains have no role in teaching the ethics course. Austin Cline argues that the fact that Chaplains had been teaching the course for decades should have been a red flag. Austin Cline, *Air Force ROTC Promoting Christianity*, ABOUT.COM (Aug. 25, 2011), <http://atheism.about.com/b/2011/08/25/air-force-rotc-promoting-christianity.htm>. He claims that Chaplains, while they may provide some insight to the course, they should not be "the sole voice because that just reinforces the idea that ethical values require religion generally and/or Christianity in particular." *Id.*

Another option that the Air Force could exercise would be to make the course voluntary. Paul Tibbets clearly stated when he dropped the first atomic bomb that he did not see war as a moral thing but merely as his job.<sup>126</sup> For officers like him, the course is not necessary. But as this note mentioned, it is likely that Paul Tibbets is an exception. The United States government invests millions of dollars each year in its military Chaplain Program, which goes against the First Amendment of the Constitution, in order to ensure morale amongst military personnel. It is obvious that most military personnel cannot separate war from morality.

The last option the Air Force has is to reinstate the course as is, and let the Religious Military Freedom Foundation bring its class action suit. For reasons mentioned previously, the court most likely would dismiss the class action suit. It would generate bad press for the Air Force, which is something it obviously does not want. It also would cost money and waste Air Force resources, all to protect a course, which clearly needs some adjustments. At the same time, letting this dispute go to court would send a message to the “watchdogs.” Michael Weinstein is quoted in nearly every news article about the Just War Theory ethics course as claiming, “[W]e’re very pleased that the Air Force [suspended the course]. [H]ad they not done that, we would have filed an immediate class-action lawsuit in federal court to force their hand.”<sup>127</sup> Michael Weinstein already lost his own lawsuit he brought against the Air Force; yet, he seems to hold wield some power.

The Religious Military Freedom Foundation absolutely serves a legitimate purpose, but it cannot threaten lawsuits at every sign of religion in the military, particularly in the Air Force. Society is becoming more pluralistic, but that does not mean it is erasing its religious roots. Rather than threaten a lawsuit and expose every religious aspect of the Air Force to the press, the Foundation should properly approach religious situations in the military. Michael Weinstein, along with the rest of the members of the Foundation, clearly believes they would win a lawsuit against the Air Force with regard to this course. So if the Air Force let the suit go

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126. *Man Who Dropped Atomic Bomb, supra* note 7.

127. For just one example of where he is quoted as threatening to immediately bring a class action suit see Todd Starnes, *Air Force Suspends Christian-Themed Ethics Training Program Over Bible Passages*, FOX NEWS (Aug. 3, 2011), <http://www.foxnews.com/politics/2011/08/03/air-forces-suspends-christian-themed-ethics-training-program-over-bible/>.

through and let the court decide, the Foundation may start to change its ways.

This last solution is an extreme solution- and hopefully this dispute never gets to this point- but the Air Force needs to stand its ground against the Foundation. The Foundation needs to start addressing problems directly with Air Force officials. The Air Force officials in this case all claimed they had no idea the Power-Point even existed in the course until they read about it in the TRUTHOUT article. Obviously, it is not encouraging that the officials do not know what is going on in the training of their members, but hopefully next time the Foundation can bring it to the officials' attention first. This would give the officials the chance to appropriately address the problem, as opposed to the Foundation leaking the story to the press, and then forcing the officials to act in the eye, and scrutiny, of the public.

In general, it seems as if the Air Force acted too rashly in its decision to suspend the course upon the threat of a lawsuit. There were several different courses of action the Air Force could have taken, but instead it tried to erase the course and pretend it never existed. As is evident by the quick response of a second Air Force instructor reporting a second ethics course, there will never be a compromise if the Air Force keeps pulling its courses from the curriculum as soon as someone questions the course. Ethics and religion are so tightly intertwined that there clearly needs to be a discussion between the Air Force and the Military Religious Freedom Foundation in order to find a balance between religion and ethics courses.

## V. CONCLUSION

One of Martin Luther King Jr.'s most famous quotes is: "Our scientific power has outrun our spiritual power. We have guided missiles and misguided men."<sup>128</sup> The purpose of the Christian Just War Theory is to ensure that guided men fire our guided missiles, a legitimate government purpose. However, teaching the men to be guided, as this note has demonstrated, has turned out to be quite controversial for the Air Force.

The catch-22 for this entire ethics course is that it is designed to teach ethics to the nuclear missile launch officers to ensure they feel morally prepared to drop a nuclear weapon if they are ordered

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128. Martin Luther King Jr., QUOTABLES, <http://oz.plymouth.edu/~lsandy/quotables.html> (last revised Jan. 26, 2011).

to do so. However, dropping a nuclear weapon would never be considered just war tactics under the Christian Just War Theory.<sup>129</sup> Nuclear weapons are so “disproportionate and indiscriminate” that they would almost always be considered “intrinsically evil.”<sup>130</sup> So why does the Air Force even teach it?

This note has mentioned time and time again that the Air Force missile launch officers may encounter a time when they will have to make one of the hardest decisions of their life: whether or not to launch a nuclear missile and kill thousands of people. There are not many things that one can tell the pilots to ease their moral consciences. Therefore, regardless of whether this theory specifically allows the dropping of nuclear weapons; it at least provides some form of justification for going to war. Although our country has spent the last decade at war, for most people, war is a surreal event. The current war is not being fought on our soil, and it is hard for an ordinary individual who has not experienced it firsthand to imagine what war is actually like. But most would agree that constantly being around death and faced with choices of killing others would take a toll on a person’s morals and faith.

It appears that with the forty-three-slide PowerPoint, the Air Force Chaplains overstepped their boundaries. The teachings (the PowerPoint and images) of the course were too guided by religion. Regardless of how the course would have been ruled on by the courts, the PowerPoint was inappropriate. However, the course material and the Christian Just War Theory are not inappropriate topics for the Air Force, especially during a time when the country is at war. It is obvious that Air Force officials and the Religious Military Freedom Foundation have some issues to work out. It is also obvious that Air Force officials should be supervising the Chaplains and monitoring their courses more closely. But aside from that, there was no reason for the press to run around claiming that the Air Force preached “Jesus Love Nukes,” because that could not be further from the truth.

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129. See Mann, *supra* note 44 (quoting Monsignor Stuart Swetland, a former Naval Officer who taught ethics courses in the military, as stating, “[T]he Catholic Church’s just war teaching rules out any use of nuclear weapons that would indiscriminately kill both civilian and combatants, such as the U.S. bombings of Hiroshima and Nagasaki in August 1945.”).

130. *Id.*