

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION**

UNITED STATES OF AMERICA

*** CASE NO. 2:18-cr-22**

VERSUS

*** JUDGE WOOD**

ELIZABETH MCALISTER, ET AL

*** MAGISTRATE JUDGE CHEESBRO**

**DEFENDANT ELIZABETH MCALISTER RESPONSE TO THE COURT'S
NOVEMBER 28, 2018, ORDER DIRECTING SUPPLEMENTAL BRIEFING**

Elizabeth McAlister, defendant in this matter, submits supplemental briefing, as directed by the Court's Order dated November 28, 2018 (Dkt. No. 294), regarding the defendants' affirmative defense under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, as raised in their motions to dismiss. On November 7 and November 19, 2018, the defendants and the Government presented evidence and argument on the RFRA defense. The Court's Order directs the parties to limit their supplemental briefing "to identifying evidence submitted at the evidentiary hearing and explaining how that evidence relates to the RFRA arguments in Defendants' motions to dismiss." (Court's Order, page 1)

To avoid duplicative submissions, each defendant's supplemental brief contains two parts, in addition to the Summary. Part I addresses evidence and provides explanations common to all defendants, and it is adopted by reference by each defendant.¹ Part II addresses evidence and provides explanations specific to the particular defendant filing the brief.²

¹ Part I in its entirety appears identically in the Supplemental Briefing submitted on behalf of each defendant. Part II explains how Elizabeth McAlister's testimony corresponds to her RFRA defense.

² In analyzing her Religious Freedom Restoration Act defense, Ms. McAlister specifically incorporates her testimony at the initial appearance in this matter on May 17, 2018, her Affidavit filed in this matter on September 26, 2018, the testimony of Professor Jeanine Hill Fletcher, the testimony of Bishop Joseph Kopacz, the declaration filed in this matter by Bishop Thomas Gumbleton, and her own testimony at the hearing on November 19, 2018.

SUMMARY

The evidence is compelling, as a matter of law, that the prima facie elements of the RFRA defense have been satisfied, and that the burden has shifted to the Government to produce evidence and prove that this criminal prosecution is justified under RFRA. The evidence also demonstrates, as a matter of law, that the Government has failed to prove that it has a compelling interest to prosecute any of these individual defendants, and that the Government has failed to prove that such prosecution is the least restrictive means of furthering any compelling governmental interests. Therefore, on this evidentiary record, the Court must grant the defendants' motions to dismiss the charges. If the Court decides not to rule on any of the prima facie factual issues as a matter of law, then the available evidence is clearly sufficient to create triable issues of fact for the jury. However, on the two factual issues for which the Government bears the burden of production and proof (marginal compelling interest and least restrictive means), the Government has failed to even produce sufficient evidence for the jury to find in the Government's favor.

The evidence of the defendants on the prima facie elements of the RFRA defense clearly shows that the teaching of the Catholic Church is that the possession of nuclear weapons is immoral, as well as the use of those weapons to threaten or cause death and destruction. Moreover, a Catholic whose conscience is formed by those teachings conducts an exercise of religion when she or he engages in prophetic action to raise the consciousness of society about the immorality of those weapons. The defendants sincerely hold these Catholic beliefs, and every action of theirs for which they have been criminally charged was not only a prophetic religious action, but also a symbolic and sacramental religious action. Given the depth with which each defendant has long

Additionally Ms. McAlister specifically claims and incorporates the testimony and affidavits and declarations of each and every one of the other six people facing these charges.

held these religious beliefs, imprisonment constitutes a substantial burden on her or his continued exercise of these religious beliefs.

Because the defendants have produced compelling evidence to prove their prima facie case under RFRA as a matter of law, that statute requires the Government to produce evidence and prove that, with respect to each defendant taken individually, the Government is undertaking only those actions that are the least restrictive of the defendants' exercise of religion, as a means of achieving some compelling governmental interest. The Government contends that one general interest in this case is the prevention of unauthorized entry onto the Kings Bay naval base, which entry disrupts normal base operations and risks injury to base personnel and possibly to those entering – a risk of injury not caused by any violent action by these nonviolent defendants, but possibly through accidental injury. The Government's only other claimed interest, based on the evidence, is a general interest in compensation for any injury to Government property that was caused by the defendants.

RFRA therefore requires the Government to assess, with respect to each defendant, whether the Government's general interests are so "compelling" that they justify the imposition of a substantial burden on religious exercise. RFRA also requires the Government to assess, with respect to each defendant for whom it does have a compelling interest, the range of means that would be effective in furthering those compelling interests. Then the Government is required to use that means that is least restrictive of a defendant's continued exercise of her or his religious beliefs. What the Government can never legitimately do is use the imprisonment of these defendants as a means to deter possible religious protests in the future.

However, the Government's evidence conclusively proves, as a matter of law, that it has met none of these RFRA requirements in this case. It has not produced sufficient evidence to prove

that its general interests are “compelling” as to any individual defendant. It has undertaken no assessment, for any individual defendant, of any effective but less restrictive means of achieving its interests, other than criminal prosecution. The only relevant evidence is the testimony of Captain Lepine that his policy is to ignore the religious nature of protests altogether, that he has no authority to implement alternatives to criminal prosecution, and that he regarded his only option to be turning the defendants over to the Camden County Sheriff’s Department for prosecution. Indeed, the evidence shows that no decision process exists at Kings Bay for implementing RFRA in the case of religious protestors, that there is no policy for treating religious protestors any differently than terrorists are treated, and that these defendants were in fact treated the same as terrorists on the night of their arrests.

Finally, there is no evidence at all that, in the considerable time since the arrests of these defendants, anyone in the federal government has conducted an individualized assessment of less restrictive means. Indeed, there is positive evidence that Captain Lepine has the authority to issue “ban and bar” (“debarment”) letters to the defendants, but that Captain Lepine did not even consider using this or any other less restrictive means. There is also positive evidence indicating that Captain Lepine has a policy of disregarding the religious nature of protests generally, which helps to prove that the Government has failed to address its RFRA responsibilities in this case.

While this Court has no authority to create or implement RFRA policies for the Executive Branch, it does have the obligation to conclude, on this evidence, that the Government has violated RFRA in bringing these criminal charges against these defendants. The Court must therefore dismiss these charges.

I. EVIDENCE AND EXPLANATIONS COMMON TO ALL DEFENDANTS

This part of the brief presents the evidence and explanations common to all defendants, insofar as that evidence relates to the actions of the defendants that are the basis for the criminal charges (hereinafter, “defendants’ actions at Kings Bay”). This evidence was presented at the hearing on Nov. 7 by Professor Jeannine Hill Fletcher (PHF: 29/11–97/16), Bishop Joseph Kopacz (BK: 99/1–123/12), and Captain Brian Lepine (CL: 211/13–287/6); and at the hearing on Nov. 19 by Mr. Scott Bassett (SB: 177/17–198/19).

A. Evidence Relevant to the Prima Facie Elements of the RFRA Defense

1. Each action of the defendants at Kings Bay constituted an “exercise of religion.” The evidence clearly identifies the nature of all of the defendants’ actions at Kings Bay as an exercise of religion, and clearly articulates the religious principles underlying those actions. Each action of the defendants at Kings Bay bore those characteristics that mark it as an exercise of religion that is in accordance with the beliefs, principles and practices of the Catholic Church. As Professor Hill Fletcher testified, the actions of which the defendants are accused – “trespassing onto military property, cutting a lock, cutting a fence, and spreading blood and paint on symbols of nuclear weapons” – “are in accordance with Catholic practice and Catholic faith.” (PHF: 40/21–41/3, emphasis added; also 39/8-9, 43/7-9) In addition, the testimonies of individual defendants, discussed in Part II of defendants’ briefs, show that all of the defendants’ actions at Kings Bay were motivated by those Catholic religious beliefs.

a. Each action was in accordance with the beliefs and principles espoused by the Catholic Church at its highest levels. “[T]he belief of the defendants that nuclear weapons are immoral is, in fact, the teaching of the [Catholic] Church” – “not just when [those weapons] have been used in the past,” and “not just the threat of their being used now,” but “the very possession of these weapons of mass destruction” is immoral. (PHF: 38/13–39/1; BK: 104/12-20) The bases

for this conclusion are the teachings of Pope John XXIII (in the encyclical *Pacem in Terris*), of the Second Vatican Council of Catholic bishops (in *Gaudium et Spes*), and of Pope Francis (“The threat of their use as well as their very possession is to be firmly condemned”). (PHF: 37/11–38/12; BK: 104/15-20)

b. Each action was a sacramental action in accordance with the Catholic tradition. In general, an action that is sacramental within the Catholic tradition is more than merely symbolic: it is “not just a symbol of Christ’s grace but actually mak[es] it a reality in the world.” (PHF: 94/7-23) The idea of sacramental action “within the Catholic tradition is that, in following Christ, those who follow him become ... sacramental signs of Christ.” (PHF: 41/14-17) “[T]he actions that we undertake in the world are not just ... symbolic, but they actually make the presence of God’s grace a reality in the world.” (PHF: 41/17-20)

In particular, “the actions that the defendants undertook [at Kings Bay], ... [were] sacramental signs that are aimed at making holy what had been desecrated.” (PHF: 41/21-23) “[I]n breaching that false security of those fences [at Kings Bay], ... they entered the space to announce the message of Pope Francis.” (PHF: 42/14-16) “[B]y entering that space, announcing that message, and reminding us that the call of the Catholic is to simply love one another ..., those actions are in continuity with ... a Catholic sacramental understanding of our job, our role as Catholics to be part of a world and to continue to make it God’s holy creation.” (PHF: 42/20-25; also 89/9–90/6)

In addition, the defendants’ actions at Kings Bay have “a pattern that is outlined within Catholic canon law, ... [W]hen sacred places are violated by gravely injurious actions done in them, then ... the Code of Canon Law 1211 has a penitential rite by which that sacred space is repaired.” (PHF: 65/5-13) To be a sacramental action, it cannot be performed simply anywhere:

“the reality of what’s in front of us [is] part of the sacramental moment” – “in terms of really being connected with the site of the desecrated location ... then it has to be performed in that location.” (PHF: 67/20–68/6) Also, the use of blood as a material “for making holy what has been desecrated, is a tradition that we can see within both the Old Testament and the New Testament.” (PHF: 87/17-20)

c. Each action was also a prophetic action in accordance with the Catholic tradition.

In general, “prophetic action is designed to call a community or a nation back to justice and righteousness” (PHF: 93/9-19) “The role of the prophet is to look at the signs of the times, what’s going on, and to call the community back to justice and righteousness.” (PHF: 53/10-12) A sacramental action may simultaneously be a prophetic action, if it “authentically makes present Christ’s grace in a situation of injustice,” and “it is denouncing injustice and bringing about justice and righteousness.” (PHF: 96/3-10) “In the history of the Catholic and the Christian tradition the prophetic role is one that often necessarily violates unjust laws in order to see those laws transformed.” (PHF: 53/14-16)

In particular, “the actions of the defendants [at Kings Bay] are in accordance with Catholic faith on the understanding of what prophetic action is and ... their actions are in accordance with the Catholic faith on this.” (PHF: 44/10-13; BK: 109/4-15, 116/6-21) “[T]he actions that the defendants undertook were actions that were attempting to reveal our own idolatry in protecting that warhead. They cut the fence to break that symbolic hold of Trident over those of us who are kind of just going along our day and not even aware that that idol is so clearly in place.” (PHF: 42/8-13) “Their prophetic call in that action was at the heart of the Christian Gospel.” (PHF: 46/17-22) “[T]he reality that the prophetic action reveals is a reality that some among us as human beings

have made the claim that we can decide the future of the planet. ... [N]uclear weapons could destroy humanity as we know it, the earth as we know it.” (PHF: 58/24–59/3)

Moreover, the location of the defendants’ actions at Kings Bay is important to the prophetic action. “I would also underscore that the kind of complacency that our nation has adopted with respect to nuclear arms is contrary to what the Catholic Church is teaching, that is, that ... the possession of nuclear arms is firmly condemned. So ... this particular sacramental action was also directed at what the prophet does in terms of waking up the rest of society to the injustice that has become the status quo.” (PHF: 72/7-15; also 83/7-24) And “the location is very important here in terms of a sacramental action that called a prophetic call to transform that particular reality of idolatry and to reclaim that particular location as part of God's creation and to transform that reality.” (PHF: 81/21-25)

d. Each action was also in accordance with the Catholic beliefs and principles about the moral primacy of an individual’s conscience. In accordance with the concept of prophetic action within the Catholic Church, it “is enjoined on Catholics that they, too, must read the signs of the times and interpret them in the light of the Gospel.” (PHF: 46/9-12, emphasis added) “[T]he teaching of the Church is that conscience binds us to those human laws that are in accordance with the moral law, or the law of God written on our hearts, and that conscience is not binding on those laws that are determined to be unjust laws.” (PHF: 35/2-6) “Laws and decrees passed in contravention of the moral order, and hence of the divine will, can have no binding force in conscience since it is right to be obey [sic] God rather than men.” (PHF: 40/15-19, quoting Pope John XXIII’s encyclical *Pacem in Terris*; BK: 108/19–109/3) Moreover, “it's not just doing wrong actions [for which we are responsible]; it's actually simply participating in a status quo that is unjust.” (PHF: 60/5-12) “[E]very Christian, every Catholic is responsible for the justice or injustice

of the world that we live in and ... Catholics are called to be part of the transformation of unjust structures.” (PHF: 60/18-22; also BK: 121/11-24) Conscience can compel action in the sense that, given “an internal listening to the law of God that's written on human hearts,” the action is “compelled by a deep spiritual, internal understanding of what one's conscience is bound to do.” (PHF: 92/1-7; BK: 106/25–107/25)

In particular, “the actions of the defendants [at Kings Bay] are in accordance with Catholic social teaching on the primacy of conscience.” (PHF: 34/18-20) And “the unjust law in this case is the proliferation of nuclear weapons that is not directed towards the global common good and that, from Catholic perspective, overreaches the power of any human lawmaker to have that sort of an arsenal that can destroy life on this planet.” (PHF: 82/9-13)

2. The religious beliefs of the defendants are “sincerely held.” Part II of this supplemental brief presents persuasive evidence that this defendant sincerely holds these Catholic beliefs, and the defendant is not “seeking to perpetrate a fraud on the court.

3. The Government’s bringing criminal charges imposes a “substantial burden” on the defendants’ exercise of religion. As the evidence discussed in Part II helps to show, the Government’s bringing criminal charges for the defendants’ actions at Kings Bay places considerable pressure on the defendants to violate their sincerely held religious beliefs. As the Government’s evidence shows, this criminal prosecution is intended to place pressure on defendants not to exercise their sacramental religious actions: “failing to prosecute them would only reinforce that behavior” (CL: 230/11-13). But imprisonment places a substantial burden not only on sacramental religious actions involving unauthorized entry onto Government land, but it also places a substantial burden on future prophetic religious actions by the defendants that are permitted on public or private land. Imprisonment places a substantial burden on the defendants’

religious actions that protest the immoral possession of nuclear weapons. “If they're being restricted from acting, then that is, in effect, compelling them not to act.” (PHF: 77/14-17)

B. Evidence Relevant to the Government’s Asserted Justification under RFRA

1. The Government’s evidence is insufficient, as a matter of law, to establish a “compelling governmental interest” against any one of these individual defendants. As the defendants have explained in their earlier supplemental briefs on the RFRA defense, the Government has the heavy burden of establishing, against each defendant as an individual, the Government’s “marginal interest in enforcing” the statutes under which it has criminally charged that defendant. (Dkt. No. 245, pages 24–27.) First, the Government must clearly identify the legitimate interest that it seeks to achieve through criminal prosecution. Second, the government must prove, with respect to each individual defendant, that its “marginal interest” in not accommodating that individual defendant’s nonviolent religious exercise is itself “compelling.”

a. The Government claims a general interest in (1) preventing unauthorized entry onto the Kings Bay naval base and in (2) recovering compensation for injury to government property. First, according to the testimony of Captain Lepine, “there is absolutely a compelling interest to prevent unauthorized access to Naval Submarine Base Kings Bay” (CL: 226/15-16). The presence of such unauthorized personnel “may ... endanger the safety of base personnel” (CL: 226/17-20), and “those intruders [are] endangering ... their own safety” (CL: 228/13-18). Moreover, “it puts the entire security contingent on that installation on alert, which is disruptive to normal day-to-day operations associated with the operation of the base. Disruption of those operations has the ability to impact operations that are directly in support of our nation's strategic deterrence programs, timelines, and policies and procedures.” (CL: 227/16–228/2) Second, there is testimony by Scott Bassett that a fence was cut on the base, that concertina wire was cut, that a padlock was cut, and

that the static missile display suffered some defacement – all of which required some repair. (SB: 197/15–198/16)

b. The Government has presented insufficient evidence, however, that it has assessed the religious actions of individual defendants, and that its interests are so “compelling” as to justify not accommodating these particular religious exercises. As the case law and this Court has made clear, “the inquiry under RFRA for the compelling interest has to be focused specifically on the individual defendants” (Nov. 7 transcript, 234/25–235/5). The Government in this case confirms this requirement: “there has to be an individual basis, particularly with the compelling interest that needs to be articulated as to each specific defendant” (Nov. 7 transcript, 240/17-19). The Government, however, has produced insufficient evidence to prove that, with regard to each individual defendant’s particular religious exercise, it has an interest that is so compelling as to warrant not accommodating these individual defendants. Indeed, there is good evidence to suggest that an individualized assessment would have demonstrated that the Government’s two general interests are not compelling as to at least some defendants.

First, the Government’s own evidence demonstrates that, in the context of the defendants’ actions at Kings Bay, “at no time was anybody threatened,” “there were no reported injuries,” and “no military personnel or ‘assets’ were in danger” (statement of Scott Bassett to *The Washington Post*, reported on April 5, 2018, and reaffirmed by Scott Bassett, SB: 190/16-23, 191/5–192/4; also 179/3-16). Thus, the Government acknowledges that the defendants’ religious exercises on April 4-5 were in fact nonviolent and posed no harm.

Second, several of these defendants conducted their religious exercise on April 4-5 at the static missile display inside the base perimeter fence. (CL: 244/14–245/1; SB: 198/1-3) This missile display is such a popular destination for the general public and of such little military

importance that Scott Bassett, as public affairs officer, has the authority to take members of the general public on tours to see it, and does so probably two or three times per week. (SB: 189/22–190/15, 192/13-22) Given this fact, the Government owes a specific explanation for how “compelling” it is to keep any defendants away from this specific location.

Third, the Government’s practice of merely turning all trespassers over to the Camden County Sheriff’s Department, normally without further follow-up as to the fate of those trespassers, undermines the Government’s claim that its interest is so “compelling.” In the case of another trespasser who was turned over to the Sheriff in a prior incident, Captain Lepine testified that he did not know whether federal charges were brought against that trespasser (CL: 258/20–259/4), and Captain Lepine apparently did not even issue a debarment letter in that case (see CL: 286/4-20). Indeed, the evidence would support a finding that the Government has in fact singled out these defendants in bringing a federal criminal prosecution in their case – the very opposite of what RFRA requires. At the very least, the Government owes an explanation of how “compelling” its interests are in the case of these nonviolent religious protestors.

Fourth, the Government has produced no evidence proving that a decision to accommodate the religious exercises of these defendants will lead to an increase of similar religious actions in the future, by these defendants or by others. The unsupported generalizations of Captain Lepine in this regard are precisely the kind of “slippery-slope” argument that the Supreme Court has rejected as a matter of law. (See Dkt. No. 245, page 31, using the wording of Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006))

Finally, the Government’s evidence not only shows that no individual weighing occurred of religious interests against governmental interests, it shows a policy of ignoring the religious nature of protests altogether. For example, when groups have requested permission to conduct

anti-nuclear protests at the Bancroft Memorial, located on the real property of the base but outside the perimeter fence, those requests have not been treated any differently, whether they have a religious purpose or not. (SB: 187/13-23, 183/7–184/21; also CL: 249/18–250/8) If a group were to request permission to conduct a religious exercise at the static missile display, located inside the perimeter fence, it would not receive permission, and the religious nature of the exercise would be considered irrelevant. (CL: 271/10-22) This shows a mistaken understanding of what RFRA requires, and generally undermines the Government’s evidence about whether its interests are “compelling” when weighed against the individuals’ religious interests.

2. The government’s evidence is insufficient, as a matter of law, to establish that criminal enforcement is “the least restrictive means” with respect to any one of these individual defendants. As the defendants have explained in their supplemental briefs on the RFRA defense, the government must produce evidence and prove, against each individual defendant, “that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion” of that defendant (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. — , 134 S.Ct. 2751, 2780 (2014)). (Dkt. No. 245, pages 30–33) The defendants have proposed the following as means that are less restrictive than imprisonment: civil injunction against future trespass, and civil damages or community service for injury to property; “ban and bar” (or “debarment”) letters issued by the base commander; a pretrial diversion agreement by federal prosecutors; and a policy and practice to permit religious exercises on the Kings Bay naval base under certain circumstances. The Government acknowledges that it “has the obligation to respond to the alternative proposals that are put forward by the defense” (Nov. 7 transcript, 236/6-10). Nevertheless, the Government has not presented any such particularized evidence in relation to even a single defendant.

The only evidence even remotely on point is Captain Lepine's general and unsupported speculation that "prosecution is the least restrictive means of securing the compelling interest of protecting the property, assets, personnel on Kings Bay submarine naval base" (CL: 286/21–287/2). In reaching this conclusion, Captain Lepine considered the religious motivations of the defendants to be an irrelevant factor. (See CL: 257/20–258/19, discussing the charge of conspiracy) Because the issue of whether one means is less effective than another necessarily involves considering the religious motivations of the defendants, the Court should assign no probative value to Captain Lepine's generalization.

Moreover, this opinion is unsupported by Captain Lepine's experience, because he has never tried to impose civil injunction or community service as a base commander at Kings Bay. (CL: 248/1-13) Indeed, Captain Lepine's speculation is inconsistent with his experience. He has personally signed about 20 bar and ban (debarment) letters, and "that act has been successful at preventing [the] return of individuals" to the base – indeed, none of those individuals has re-entered the base and needed to be prosecuted. (CL: 248/16–249/2; 265/18–266/19) Left unexplained is why such debarment letters, which are within the base commander's discretion and authority, and which have been so effective in Captain Lepine's experience, would not be equally effective at achieving the Government's interests against these religious defendants.

As another example of a less restrictive means, Captain Lepine (and even Scott Bassett) has the authority to permit tours to the static missile display within the base perimeter fence, where some of the defendants exercised their religious beliefs, and members of the general public are routinely and often authorized access to "tour" the display. (SB: 189/22–190/15, 198/1-3; also CL: 244/14–245/1) Yet Captain Lepine testified that "members of the general public are not authorized access inside the fence line in any capacity to exercise their religious rights." (CL: 270/11-13)

Because the Government has refused to consider permitting religious exercises to occur at the static missile display, it has no basis for arguing that such an accommodation would be ineffective at furthering its interests.

Captain Lepine's opinion is also speculative with respect to what means may or may not be effective with respect to these particular defendants. At the hearing, this Court ruled that Captain Lepine "is unable to testify or offer any speculation about what would or would not have deterred these defendants" in the past. (Nov. 7 transcript, 235/1-3; also 231/20–232/1) In order to give a non-speculative opinion about any specific defendant, Captain Lepine would have had to undertake an analysis based on "knowledge about each individual defendant." (see Nov. 7 transcript, 237:9-15) There is no evidence that Captain Lepine has undertaken such a defendant-specific analysis. Indeed, the evidence shows that Captain Lepine has not even "considered [any] less restrictive means short of prosecuting" these defendants. (CL: 229/8-10, emphasis added)

The most that Captain Lepine could offer at the hearing were generalizations about hypothetical categories of individuals (e.g., about individuals with prior records of formal charges or convictions for trespass), but such hypothetical opinions are insufficient to satisfy RFRA's "exceptionally demanding" least-restrictive-means standard (using the wording of Hobby Lobby, 134 S.Ct. at 2780). As the Government has acknowledged, in responding to each of the defendants' proposed alternative means, the Government must assess "the probability of those alternatives in achieving ... those compelling interests" (Nov. 7 transcript, 236/11-15). That assessment surely requires taking into account the specific beliefs, motivations, intentions and circumstances of each individual defendant. Otherwise, RFRA's "exceptionally demanding" standard would be routinely defeated by generalized hypotheticals.

It is not helpful to the Government if the evidence shows that Captain Lepine himself, as base commander, has “no authority to implement” fines, injunctions, pretrial diversion, or community service. (See CL: 229/6-16, emphasis added; also 264/10–265/10) Nor is it helpful that Captain Lepine’s “responsibility to deal with trespassers, terrorists, or any ... other unknown individuals ... would be to turn them over to the Camden County sheriff for, essentially, arrest and use ... this process to file charges against them” (CL: 229/16-21). RFRA places its obligations on the federal government as a whole, not on any specific official. The Government has presented no evidence that any government decision maker has even considered any of the defendants’ proposed alternatives to criminal prosecution.

It is an inescapable conclusion from the evidence, as a matter of law, that the Government has failed to investigate alternative means of furthering its compelling interests, and that it has failed to demonstrate to the Court, on the basis of evidence, that it has complied with its responsibilities under RFRA.

PART II. ELIZABETH MCALISTER SPECIFIC RFRA COMMENTS

Elizabeth McAlister is 79 years old. She has been in jail since her arrest in this matter since April 4, 2018. Ms. McAlister has three children and six grandchildren.³

Raising issues of religious freedom is nothing new for Ms. McAlister. She tried to raise a defense of religious freedom in federal court over three decades ago after discussions with former Attorney General of the U.S. Ramsey Clark.⁴ “On March 14, 1984 I spoke about this to U.S. District Court Judge Howard Munson of the Northern District of New York in response to the US government’s efforts to keep us from talking about freedom of religion and the idolatry of

³ Transcript November 19, 2018, page 125.

⁴ Transcript November 19, 2018, page 128. See also Affidavit of Elizabeth McAlister, filed September 26, 2018, paragraph 33 and the book referred to there.

nuclear weapons. We sought to speak to the jury about the state religion of nuclear weapons. I spoke at length then about the idolatry of nuclear weapons and the religion of protecting those weapons and how that is contradictory to our belief in God. My plea to the court was published as “ON FREEDOM OF RELIGION AND CONTEMPORARY IDOLATRY,” in THE TIME’S DISCIPLINE: The Beatitudes and Nuclear Resistance, 132-145 (Fortkamp Press 1989) authored by myself and my husband Philip Berrigan.”⁵ (A copy of the argument on those pages, which was referenced by Ms. McAlister in her testimony is attached to this Memorandum as Exhibit A).

Ms. McAlister has been a Roman Catholic since birth.⁶ She became a Catholic sister of the Religious of the Sacred Heart of Mary after two years of college and remained for 8 years.⁷

Ms. McAlister married Philip Berrigan and together raised their three children in a faith and resistance community called Jonah House in Baltimore Maryland. Ms. McAlister has been an active peacemaker for decades, speaking, writing and acting against nuclear weapons for decades.⁸ Her actions in this case are based on her faith. The Catholic church, its leaders and its teaching condemn the possession and use of nuclear weapons as immoral and illegal.⁹

Pope Francis condemned nuclear weapons on November 20, 2017. For Ms. McAlister, Pope Francis' position made it clearer to me that I should be involved in the process of eliminating nuclear weapons.¹⁰

⁵ Transcript November 19, 2018, page 128. See also Affidavit of Elizabeth McAlister, filed September 26, 2018, paragraph 33 and the book referred to there.

⁶ Transcript November 19, 2018, page 127.

⁷ Affidavit of Elizabeth McAlister, filed September 26, 2018, paragraph 2 and 3.

⁸ Transcript November 19, 2018, page 128. See also Affidavit of Elizabeth McAlister, filed September 26, 2018, paragraph 3 and 5.

⁹ See declaration of Bishop Gumbleton and testimony of Professor Hill Fletcher and Bishop Joseph Kopacz.

¹⁰ Affidavit of Elizabeth McAlister, filed September 26, 2018, paragraph 9.

All her preparations for the actions at issue in this case were “seeded and steeped in prayer.”¹¹ All the actions taken which are the subject of this case were taken as an expression of her Catholic faith, as outlined by Professor Hill Fletcher and others.¹²

The monument to nuclear weapons set up on the base is a religious symbol which makes these weapons and object of worship.¹³ The shrine to nuclear weapons is a form of idolatry. Missiles which are more and more powerful, more and more destructive are lined up for admiration, even worship.¹⁴

Idolatry of nuclear weapons is a total contradiction of religious faith. “It's putting -- putting these things before God, and, you know, pushes God to the back seat. We've got our ways, and these are the weapons. Now, we might invoke God in them, but we're really putting our trust in the weapons. We are not putting our trust in God.”¹⁵

“Everything I did at Kings Bay was a result of my faith and my commitment to challenge the idols whose only purpose is to destroy human life on an unimaginable scale. I went to Kings' Bay to use my body to refuse to bow down to these idols. I went to try to bring attention to the idolatry that it is requiring of our nation and its people. I went in a spirit of prayer and repentance. I went in hope that this witness might invite other people to reflect on the obscenity and on the idolatry that it is before God. believe in God, Creator, who made all things including human beings. I believe God created humans (me and you) with a special mission to care for creation – exercising stewardship within creation. I have come to believe (informed by prayer, study of the scriptures, learning about the lives of those deemed "saints" in the Church) that

¹¹ Transcript November 19, 2018, page 139.

¹² Transcript November 19, 2018, page 139.

¹³ Transcript November 19, 2018, page 131.

¹⁴ Transcript November 19, 2018, page 131-132.

¹⁵ Transcript November 19, 2018, page 132.

stewardship means living gently, reverently upon the earth. We come to King's Bay to answer the call of the prophet Isaiah (2:4) to 'beat swords into plowshares' by disarming the world's deadliest nuclear weapon, the Trident submarine."¹⁶

Why did her faith compel her to confront these weapons on Kings Bay instead of from across the street? "I think that's the kind of action we have done and continue to do repeatedly, and I'll continue to do that kind of action. But there are moments when I feel and have felt called to, you know, go close and to go right up front, go right up to it and say, no, no. These weapons should not exist, and they certainly should not be the objects of idolatry, and they are in this culture."¹⁷

"The government's decision to prosecute me for several felonies means I am facing a long time in prison for acting consistent with my beliefs. I am faced with the choice of either following my conscience and living a life consistent with my faith and beliefs and going to jail, or denying the faith and beliefs with which I have tried to live my whole life. Going to jail for my beliefs keeps me away from my loving children and grandchildren, but these nuclear weapons and the government which protects their massive destructive power, leave me no choice, I must follow my conscience and my faith."¹⁸

At the conclusion of her direct testimony on November 11, 2018, Elizabeth McAlister read a prayer from Psalm 46 she copied down to say to the court. "'God is our refuge and our strength, an ever-present help in distress; thus, we do not fear, though the earth be shaken and the mountains quake to the depths of the sea, though the waters of the sea foam around the mountains and the mountains totter. Come, come and see the works of God, Who has done

¹⁶ Affidavit of Elizabeth McAlister, filed September 26, 2018, paragraphs 42, 44, 45, 47, and 48.

¹⁷ Transcript November 19, 2018, page 132.

¹⁸ Affidavit of Elizabeth McAlister, filed September 26, 2018, paragraph 1.

fearsome deeds on earth, Who stops wars to the ends of the earth. Who stops wars to the ends of the earth, breaks down the bow, splinters the spear and burns the shields with fire. Be still and know that I am God. I am exalted among the nations, exalted on earth. The Lord of hosts with us. Our stronghold is the God of Jacob."¹⁹

It is in that spirit that this memorandum is offered.

Respectfully submitted,

/s/ William P. Quigley

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2019, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel registered for electronic service.

/s/ William P. Quigley

William P. Quigley

¹⁹ Transcript November 19, 2018, page 135.

Exhibit A



The Time's Discipline

*The Beatitudes and
Nuclear Resistance*

PHILIP BERRIGAN
ELIZABETH MCALISTER

Foreword by Daniel Berrigan

CATHOLIC WORKER
REPRINT SERIES

The minister of Christ is communitarian, capable of building a community of resistance, eager to struggle in one as well. Christ called the disciples to community as his first public act. After Pentecost the disciples left Jerusalem for the most part, to build the Church, to build communities of nonviolent resistance. Their resources did not exceed ours—the same Gospel, the same Baptism, the same Spirit. But their vision differed. Paul told the Corinthians that the ways of God were completely different from human ways. Cf. 1 Corinthians, 1: 25-29.

In preparing for the disarmament action at Griffiss Air Force Base, Thanksgiving 1983, the community of the Griffiss Plowshares devoted substantial time to the inevitable trial. A defense of “necessity,” a defense of “international law” had precedents; and we would, we agreed, prepare to make those defenses.

But a question arose. Why not go to court with our deepest motivation for such an action? Why not allow our effort to be single-minded in God’s service speak for itself? Legally stated, that would be a “freedom of religion” stance. If we recall correctly, it was Karl Smith (one of the seven) who first put the idea, and who was most firmly behind it. We agreed to try to formulate the statement. Initial versions were done even before the action; but before these could be translated into an argument in court, a great deal more work was required. Elmer Maas and Ramsey Clark were “resources extraordinaire” in the process. The argument we presented orally in our pretrial hearing went as follows:

ON FREEDOM OF RELIGION AND CONTEMPORARY IDOLATRY

(An argument to the Court)⁹

Syracuse, New York, March 19, 1984

Judge Munson,¹⁰ the government has responded to our written motion by declaring it totally without merit; that we made no

⁹ Liz presented the argument in court on behalf of the seven Griffiss Plowshares. The seven are the “we” throughout this argument.

¹⁰ Judge Howard Munson, Federal Court Judge, Northern District of New York.

showing that nuclear weapons constitute a religion in any generally accepted sense. We are not surprised by this response because we are dealing with a phenomenon that has grown among us and remains largely unanalyzed. We believe it is finally time that the issue be heard. There is a great debate abroad on this issue; may it be heard in this court where it has long needed to be heard.

We speak today for ourselves and many in our own and in other religious traditions. We think especially of Native Americans who, for generations, held as sacred, land that is now being mined for uranium; whose faith and religious values are trampled by such actions. We think, too, of Buddhists for whom honoring all life and the spirit of compassion are foundations for sanity and happiness and who, because of their religious faith, must constantly resist the nuclear threat.

Hear us a bit; we are, above all, trying to find our voice here, trying to articulate feelings that have long disturbed us, looking for this articulation. I will be as brief as possible; but still it may take a few more words than you or I would like to hear or speak.

We are dealing with serious constitutional issues—namely, the issue of a national religion having been established in our country in violation of the First Amendment. The religion of national sovereignty or nuclearism is alive and flourishing. And its existence, its pre-eminence, its rituals, gods, priests, and high priests make serious encroachments on all of us. In fact—and this is the second part of our argument—violating our freedom of religion. This state religion not only compels acts that are prohibited by the laws of God but the state religion itself prohibits the free exercise of religion. The state religion compels a quality of loyalty focused on our acceptance of the existence of nuclear weapons as a necessity. Weapons we are expected to pay for, adulate, thank God for, become sacred objects of worship. And such worship is prohibited by the laws of God.

Likewise the state religion prohibits the acts of justice that God's law requires. The acts of justice include not only not

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killing or preparing to kill, but also the rescuing of victims of murder, or intercession on their behalf. In this time when nuclear weapons threaten all created life, in this time when THE CLOCK¹¹ stands at three minutes of midnight, in this time when 40,000 children die daily from hunger while the world spends \$1.3 million a minute on annihilatory weapons, acts of rescuing victims or intercession on their behalf take the form of direct acts of disarmament. And fulfilling God's law means obedience to the Biblical imperative to beat nuclear swords into plowshares.

Then to use the laws of our land for the purpose of punishing people who carry out acts of nonviolent direct disarmament is unconstitutional. Such application of the law prohibits our free exercise of religion and violates Article I of the Constitution. I refer to the application to our conduct of descriptions of sabotage, destruction of government property, and criminal conspiracy.

We are not asking you to decide this motion now. But, in the interests of justice, that you be open to hearing the issues that cross-cut and define it most clearly. Let us bring into this court, in pretrial hearing, experts who would point up the truth that this religion has been established; that it is unconstitutional; that it amounts to idolatry; that it contributes to the violation of the whole set of checks and balances on which our system has been established. On the basis of such testimony, make your ruling.

It is clear to us that the religion of nuclearism that has deified nuclear weapons not only contradicts the spirit and letter of the Constitution, but is, as well, part of a long evolving phenomenon that has, for over a century and a half, threatened the basic freedoms espoused in the Declaration of Independence and the Constitution. Let me now take a little time to

¹¹ Refers to the Clock of the Bulletin of Atomic Scientists, a clock that is moved nearer to or farther from midnight depending on the scientists' evaluation of the seriousness of the political situation and its impact on the possible use of nuclear weapons.

outline the establishment of our national religion and its encroachment on religious freedom.

Some have argued that CHRISTIANITY IS THE NATIONAL FAITH; others that church and synagogue celebrate only the generalized religion of the AMERICAN WAY OF LIFE; few realized that there exists, alongside of and rather clearly differentiated from the churches, an elaborate and well-institutionalized civil religion in America. It has its own seriousness and integrity and requires the same care in understanding that any other religion does. I want to make it clear that we have no quarrel with what, from the earliest years of the Republic, served as a genuine vehicle of a national religious self-understanding. We simply want to show an evolution from the earliest days of America's civil religion into our more recent history.

The first great event that involved national self-understanding so deeply as to require expression in civil religion was the Revolutionary War. And until the Civil War, American civil religion focused, above all, on the event of the Revolution—seen by our foreparents as the final act of exodus from the “Old Lands” across the sea.

The phrase “civil religion,” which many today use to describe the national religion, comes from Rousseau's *Social Contract* in which he outlined the simple dogmas of that religion: the existence of God; life to come; reward of virtue and punishment of vice; exclusion of religious intolerance. Ben Franklin expressed his own faith in a way exactly parallel to Rousseau. Washington did also—seeing religion and morality as “indispensable support . . . the firmest props of the duties of men and citizens.”¹² The Declaration of Independence embodied this same spirit, stating that it was “the laws of nature and nature's God” that entitle people to be independent; that our fundamental legitimacy lies in our being “endowed by our Creator with inalienable rights;” and it indicates a God of History who stands in judgment over the world in its appeal to “the

¹² Richey, Russell and Jones, Donald. *American Civil Religion*. Harper and Row, New York. 1974. p. 26.

Supreme Judge of the world for the rectitude of our intentions;" and expresses a "firm reliance on the protection of Divine Providence."

Maybe our concern with America's civil religion begins when Jefferson, in his second inaugural, wove the theme of AMERICAN AS THE NEW ISRAEL IN THE PROMISED LAND, a theme that was used, almost from the beginning, as a justification of the shameful treatment of the Indians. The America as the New Israel theme is overtly or implicitly linked to the idea of MANIFEST DESTINY, which was used to justify a number of adventures in IMPERIALISM since the early nineteenth century. Our manifest destiny to overspread the continent allotted to us by PROVIDENCE. Manifest Destiny became an expression of our civil religion—an expansion deigned and favored by God.

The Civil War was the second great event that involved national self-understanding so deeply as to require expression in civil religion. And we have no quarrel with the attempt of our country to come to grips with what Lincoln called "its punishment by God for the sin of slaveholding" (second inaugural address) or with the themes Lincoln, in his Gettysburg Address, introduced into the religious spirit of the country—themes of sacrifice, of death, and resurrection.

The essay by Robert Bellah in *Daedalus*¹³ in 1967 gave the phrase "civil religion" a life of its own in this country. The term has been picked up by major media and inspired books, essays and symposia. The debate it inspired centers on two questions: "Does civil religion exist in the United States?" and "Should it exist?" The weight of evidence and opinion is that it is alive and well and, as presently formulated, it is illegal. As presently formulated. WHAT CONCERNS US IN THIS COURT IS WHAT WE MUST CALL A THIRD PHASE IN THE DEVELOPMENT OF OUR RELIGIOUS EXPERIENCE AS A COUNTRY USHERED IN BY THE NUCLEAR AGE which radically altered our lives and values and sense of self.

¹³ Bellah, Robert. "Civil Religion." *Daedalus*. Winter 1967.

At the explosion of the first atomic weapon (code-named "TRINITY") witnesses were transfixed by the power of it. A passage from the Hindu Scriptures came to Oppenheimer's mind: "I am become death, the shatterer of worlds."¹⁴ That line of scripture was uttered by the Exalted One, Lord of the fate of mortals; Oppenheimer applied it to himself, sensing that into his hands a far too mighty instrument of power had been given. He referred to his work on the bomb as a Faustian bargain with the forces of evil.

All the scientists, even those (the majority) without religious faith, recounted their experience in religious terms: Kistia-kowsky—"This was the nearest to doomsday one can possibly imagine. I am sure that at the end of the world . . . the last man will see something very similar to what we have seen." To this William Lawrence, science writer for *The New York Times*, responded—"But it is also possible that if the first man could have been present when God said 'Let there be Light,' he might have seen something very similar to what we have seen . . ." Still another said: "It was like being witness to the Second Coming of Christ."

When Truman was informed of the successful explosion of the atomic bomb on Hiroshima, his response was—"This is the greatest day on earth. Thank God that he has given us the bomb and may we use it in his ways."¹⁵ This then was echoed by Senator Brian McMahon when he told the Senate that the bombing of Hiroshima had been "the greatest event in world history since the birth of Christ."¹⁶

More than any other person we know, the psychologist Robert J. Lifton has analyzed the way nuclear weapons radically altered our existence so that nothing we feel or do is free of their influence. "Nuclear weapons," he said, "make their possessors either mass murderers or else deceivers and self-de-

¹⁴ *Bagavad-Gita*. Chapter II, verse 32.

¹⁵ Lens, Sidney. "The Doomsday Strategy." *The Progressive*. February 1976. p. 19.

¹⁶ Congressional Record for August 1945.

ceivers who fluctuate between feelings of omnipotence and impotence as they gradually loose their hold on ethical tradition and existence itself.”¹⁷ Lifton points up the absurdity of being poised to destroy humankind, and living as if we weren’t so poised; being unable to imagine nuclear holocaust, yet waiting and preparing for it to happen, the special fear that these weapons inspire and the set of illusions they foster: the illusion that we control them, that we can limit their damage, that we can prepare for and thus protect ourselves in face of nuclear war, that we can recover from nuclear war. We are left, he says, with the radical reality of vulnerability and the loss of FUNDAMENTAL STRUCTURES we have counted on in the past. A significant response to this condition has been an exaggerated restatement of those threatened FUNDAMENTALS that becomes NARROW FUNDAMENTALISM.

So in the 1970s and 1980s we have witnessed what he calls a world-wide outbreak of fundamentalisms: People’s Temple in Guyana; the radical right politics of the moral majority; Khomeini in Iran; Jewish “Biblical Politics” in Israel; Hal Lindsley’s movement around the celebration of the apocalyptic event. These would be some of the more dramatic examples. Usually such movements would be short-lived, such is the nature of fundamentalism. But, in an era of potential nuclear omnicide, we can expect them to become permanent fixtures in our collective experience. But the gravest fundamentalism (AND THE RELIGION OF OUR COUNTRY TODAY) is “NUCLEARISM,” as Lifton and a host of others term it. It is a religion in which the bomb is the new fundamental, the new source of salvation. If this sounds outrageous, we need to listen to the way in which the bomb is described and talked about. Recall William Lawrence’s response to the detonation of the hydrogen bomb—an amazing statement in which he moved from a sense of awe at its power to a sense of total security with the bomb

¹⁷ Falk, Richard and Lifton, Robert. *Indispensable Weapons: The Political and Psychological Case Against Nuclearism*. Basic Books Publishers. New York. 1982. p. 33.

as our shield, to seeing (and articulating) the bomb as our salvation.

Nuclearism is the ultimate fundamentalism of our time. Above all, this is the idolatry against which we stand and because of which we stand in this court. And the modern state is the child of the nuclearist religion. In the years since 1945, the modern state has moved steadily in more and more authoritarian directions. The process was subtle. Leaders who insisted that the major stake in international conflict was the fate of democracy were the very ones who steadily eroded democratic content in the name of "National Security." Legally, we have witnessed a constitutional antipathy to standing armies give way to an expanding, permanent military establishment with the Pentagon as the cathedral of the nuclearist religion. We have seen the Executive Branch claim privileges to keep national-security information secret without any correction from the judiciary. Judge Munson, this nuclear, national-security state is a new, as yet largely unanalyzed phenomenon in the long history of political forms and of civil religions.

Being constantly ready to commit the nation and the planet to a war of annihilation in a matter of minutes created a variety of structural necessities that contradict the spirit and substance of democratic government: secrecy, lack of accountability, permanent emergency, concentration of authority, peacetime militarism, plus an extensive apparatus of state intelligence and police. "NO KING EVER CONCENTRATED IN HIS BEING SUCH ABSOLUTE AUTHORITY OVER HUMAN DESTINY."¹⁸

"The claim by fallible human beings to inflict total devastation for the sake of THE NATIONAL INTERESTS OF ANY PARTICULAR STATE IS AN ACUTE VARIETY OF IDOLATRY."¹⁹

¹⁸ Falk, Richard and Lifton, Robert. *Indispensable Weapons: The Political and Psychological Case Against Nuclearism*. Basic Books Publishers. New York. 1982. p. 262. Emphasis added.

¹⁹ *Ibid.*

We would cite, as further evidence of the direction our democracy is taking, a Council on Foreign Relations study called "Security in the Nuclear Age . . ." (Brookings Institution, 1975). The report describes and justifies blatant usurpation of the faith and power of the people and subordinates them to non-accountable decisions made, not only by elected officials but as well by bureaucrats, generals, and corporate executives. The process leading to this point has occurred somewhat invisibly, generally obscured by claims of "emergency" and "necessity."

One very clear example of this process was the decision to build the hydrogen bomb. A general advisory commission, headed by Oppenheimer, in October 1949 came to a unanimous conclusion opposing its development. With that recommendation in hand, and on the basis of seven minutes of Cabinet-level discussion, President Truman announced the decision to go ahead with the H-bomb in January 1950. (" . . . We have no other choice.") Citizens and even Congress were denied any voice or role despite the absence of any pressing emergency or circumstance of war. And it amounted to a quantum leap in the arms race and a threat to all life.

When Congress did get involved in the Atomic Age, it was determined by the McMahon Act that decisions about nuclear weapons, development, and doctrine should be made within the Executive Branch on the basis of secret and technical information. This decision and practice destroyed the healthy relationship envisioned by the Constitution between government and citizens, and it did so in the area most crucial to the future well-being of our society. The military came to enjoy a permanent place in the bureaucracy, a place that is unchallengeable even by elected political leaders. Truman's decision regarding the H-bomb exemplified two major things: one, his "We have no other choice" expressed the Faustian bargain—once the commitment was made to nuclear weapons, *we would be first*. Two, it revealed that only the most aggressive, the most militant were the voices that would survive in the evolving web of violence. The H-bomb also created its own system of loyalty, so that anyone who bucks the "most aggressive" route gets

spewed out of the system. Thus, what we have managed to witness by way of dissent from nuclear orthodoxy has come almost exclusively from those who, at or near retirement, renounce nuclearist structure so central to their entire professional lives. This list is a very long one.²⁰

And, Judge Munson, this has all been done "legally," and it amounts to a congressionally established religion. "Congress will make *no law with respect to* the establishment of religion . . ." Yet Congress has passed laws approving and funding the Manhattan Project, the continued arms race including the first strike arsenal of cruise, MX, Trident; the new scenario for winning a nuclear war. It requires that our taxes finance these projects. The bomb and nuclearism have been protected too by laws concerning national security, restrictions on free speech by government employees, loyalty and secrecy oaths required for security clearances. And now the laws of sabotage, laws that protect government property from destruction, and the conspiracy laws are used to punish and prosecute those who, from a perspective of conscience and Christian witness, would speak the truth, would resist the evil of nuclearism and the idolatry of nuclear violence. To so use these laws is to prohibit the free exercise of religion and violates the constitutional guarantee of this freedom.

Judge, it is within your power to contradict this trend. It is within your power—it is, as we understand it, part of your responsibility in this government—to be a check against the imperial power of the presidency; to be a check against the unconstitutional use of laws to prohibit and punish those who speak the truth, who resist the idolization of the bomb and carry out direct nonviolent acts of disarmament on the ultimate manifestation of the demonic idols—the weapons themselves. We are (or should be) a nation of laws. These laws are violated daily, and I don't mean by the likes of us. We submit that you

²⁰ The list includes such architects of our nuclear policy as Admiral Hyman Rickover, President Dwight David Eisenhower, J. Robert Oppenheimer, William Lawrence, Henry Stimson.

need to apply to the state the criteria of this court, even as we, as Christians, need to apply to the state the criteria of Christianity. And there is a clear basis in Christian political thought from which our criteria can and must proceed.

The first of these bases is the principle that the state is not the origin of human political society. It is called to serve, not to rule. This idea of service is a fundamental tenet of liberal democracy but it is also applied by the Bible to political power (Romans, 13: 4). The makers of political society are the people; this principle obliges us to act to undo what has been done in our name, yet without our understanding and consent. We must therefore recall our leadership to service as a crucial step in resisting the idolatry of nuclearism.

The second basis is that the state is not the author of law and justice but their servant. Thus, law and justice need to be embodied in institutions above the power of the state. The only good statist power is one that is limited; law and principles need to be stronger than the state. This is a Christian or Biblical view. It is also the view of our own Constitution and the reason we bring these concerns to this court. For too long the authority of the courts has been compromised by the failure of the courts to address the legality of nuclear-weapons deployment and use. And we ask ourselves, "Of what use is the law, if it cannot prevent the killing of all people and the destruction of our beautiful world by nuclear fiat?"

Third, Christian political thought distinguishes between the people and the state. The thrust of power—especially today—is to blur and destroy that distinction; for the state to identify itself with or as the people. The national-security ideologies with which we are saddled today are based on a simple if radical idea of the state. Namely, that the state is the people. The state has become its own power and that power lies in the hands of its most representative (and most violent) bearer, the military. Such developments require our stance of resistance; we believe that they require yours as well.

Judge Munson, from where we stand today, it is our conviction that much as our leaders push the concept as a justification

for yet more weaponry, *national security no longer exists*. There is no security with nuclear weapons, and there is no such thing as defense.

We all need to remind ourselves that the B-52s on which we hammered and painted and poured our blood do not drop leaflets or ping-pong balls or food for hungry people. We focused on the B-52 because of the role envisioned for the B-52 at Griffiss Air Force Base. They have been prepared as carrier-launchers for the cruise missiles, which are destabilizing weapons, weapons that violate the United States commitment to non-proliferation treaties, weapons that in Pentagonese have "the highest kill probability against 'hard' targets of any of our forces." The cruise missile system is an integral and indispensable part of the evolving United States' first-strike, offensive, disarming, and war-initiating system.

We were plainly and simply smashing at an idol of our national religion, a religion that is unconstitutional. The laws that exist to protect such weapons exist to protect our national religion. Ours was an act of our religion, including a prayer that all weapons be disarmed. If the courts continue to say that such weapons—and their planning, production, and testing—are legal, when will they be able to say that their use is illegal? It is too late once the weapons are launched. All those dead and dying will not find relief or solace when the courts finally say it was wrong after all. In refusing to rule on the legality of these weapons, the courts are protecting the religion of nuclearism.

Our intent was not to injure national-defense materiel (there being no national defense with nuclear weapons to begin with) but to strengthen our real defense; our intent was not to contaminate, but to purify or cleanse; our intent was not to infect, but to heal and liberate. In view of the realities we all face, the conduct of the seven of us was both more rational and more religious than that of our government. Our intent rose from our religious convictions backed by voices and spirits of religious women and men like Bishop Raymond Hunthausen, who said: "Our security as a people of faith lies not in *demonic weapons*

that threaten all life on earth. Our security is in a loving, caring God. We must dismantle our weapons of terror and place our reliance on God."²¹

Conspiracy, in the sense of breathing together, is our proper work in God's spirit. We own it. We seek it. We long for the spirit of community and the unity that was the object of Christ's prayer for us before his death. Contrary to the government's allegation in response to our motion, we reflected and conspired carefully to ensure that *no one would be hurt*. We could have gone into a deadly-force area of Griffiss Air Force Base—we know of at least two such places. There was never a question of our harming anyone; we prepared ourselves to endure rather than inflict harm. But our concern was the possibility of some guard having to live with the knowledge that he had harmed or even killed one or more of us.

We conspired carefully in the hope that our statement would be clear, that each of our voices might be heard. But our conspiracy did not have as its object the commission of offenses against the U.S. government. Rather it amounted to this: planting the seed of our highest hope, the hope that men and women and children might be able to live together on this planet in justice and peace without the domination of weapons of mass destruction over our lives minute by minute. We believed that this was the highest religious and political act possible to us.

Judge Munson, you are being called upon to rule in this case. If there is in you the slightest resonance with what I've been saying, you owe it to yourself, to your profession, to your oath—you owe it to our children and their hope of raising children—to hear more, to hear until you've heard enough to be able to render a just judgment.

²¹ Hunthausen, Bishop Raymond. "Faith and Disarmament." A speech delivered to the Pacific Northwest Synod for the Lutheran Church in America. June 12, 1981. This talk is available on video tape from Jonah House.

The judge listened intently and allowed that ours was a solid legal argument. He took it under advisement for a month before ruling against a hearing. The substance of his response was that the government didn't create nuclear-arms systems out of religious motivations, but to effect a military purpose of preserving the national defense.

We keep coming on new threads of this reality: that nuclearism is indeed North America's national religion. Dan, for example, addressed his Jesuit brothers for the feast of the Holy Name of Jesus in 1985. America, he said, usurps the name and work of Jesus in its claim to "save," to be "savior." John Whitehead, law instructor at Oral Roberts University, wrote that in modern America the state does not openly claim divine worship, but in effect it is seeking to make itself the center of all human loyalties, the goal of all human aspirations, the source of all human values and the final arbiter of all human destiny. In doing so, without using the language of revelation, it is claiming to be divine.²²

In 1984 the Department of Energy recommended that the government establish "An Atomic Priesthood" to create and spread "rituals and legends" that will warn the next 300 generations against the dangers of nuclear waste.²³ Early in 1986, Reagan justified his "hijacking" of the Egyptian airliner with: "I will disobey international law if it means catching terrorists." Then the secretary of war asserted that "regardless of Congressional rulings, he would find a way to test nuclear weapons." In explaining the bombing of Libya, April 1986, Reagan used the same bankrupt phrase as Truman when the earlier president decided to develop the H-bomb: "We had no other choice!" We wondered and continue to wonder how often that phrase has been used to justify our oppression of one another on large

²² Whitehead, John W. *The Second American Revolution*. Elgin, Illinois. David C. Cook. 1982. Also recommended is the film version of the book, by the same title. It is produced by Franky Schaeffer V. Productions, P.O. Box 909, Los Gatos, California 95030.

²³ Reid, T.R.. "U.S. Seeks 10,000-Year Warning for Planned Nuclear Waste Dump." *The Washington Post*. November 17, 1984.