

JONES DAY

555 CALIFORNIA STREET, 26TH FLOOR • SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE: (415) 626-3939 • FACSIMILE: (415) 875-5700

Direct Number: (415) 875-5712
cnmitchell@jonesday.com

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VIA UNITED STATES POSTAL SERVICE
OVERNIGHT DELIVERY

John McHugh
Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0101

Gen. George W. Casey Jr.
Army Chief of Staff
1400 Defense Pentagon
Washington DC 20301-1400

Re: The Comprehensive Soldier Fitness Program's Unconstitutional Soldier Fitness Tracker and Global Assessment Tool

Dear Sirs:

I write this letter on behalf of my client, the Military Religious Freedom Foundation (MRFF), to demand that the United States Army immediately cease and desist its policy of administering the spiritual component of the Comprehensive Soldier Fitness (CSF) Program's Soldier Fitness Tracker (SFT) and Global Assessment Tool (GAT) to enlisted men and women and immediately discontinue all mandatory follow-up to that component of the test.

MRFF is a 501(c)(3) non-profit organization dedicated to ensuring that all members of the United States Armed Forces receive the full Constitutional guarantee of religious freedom to which they and all Americans are entitled by virtue of the Establishment Clause of the First Amendment and related Constitutional provisions. MRFF has reviewed the SFT and GAT and has determined that soldiers who do not fit a certain religious faith profile cannot candidly answer the questions without receiving substandard scores and without being required to participate in remedial activities. MRFF believes that the methodology of the SFT and GAT is flawed because questions asking enlisted soldiers to affirm statements such as "I am a spiritual person" and "I believe there is a purpose for my life" are geared toward soldiers that hold particular religious beliefs, while punishing soldiers who do not share those beliefs, particularly atheists and nontheists. Soldiers who fail to perform sufficiently well on the spirituality component of the SFT are required to spend extra time and effort to undergo supplemental "spiritual training" to become "more spiritual" through the use of CSF Training Modules or whatever other "remedial" instruction their commanders prescribe. MRFF understands that it is

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the military's position that soldiers are not fit for duty if they do not attain an adequate "spiritual fitness" score on the spirituality component of the SFT and GAT or do not undergo required remedial training in spirituality.

The spirituality components of the SFT and GAT, and certain CSF Program Modules, violate the First Amendment to the Constitution and must be discontinued. The leading case in this area is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The SFT and GAT violate *Lemon* because they (1) have a primary purpose of endorsing religion over non-religion; (2) have a primary effect of advancing religion; and (3) excessively entangle the government in religious matters. Additionally, the SFT and GAT are unconstitutional because they (4) amount to coercive religious instruction and (5) constitute religious tests in violation of Article VI, Clause 3 of the U.S. Constitution.

(1) The SFT and GAT Violate the Establishment Clause Because They Have a Primary Purpose of Endorsing Religion.

The Establishment Clause requires the same respect for atheists as for adherents of the Christian faith. Accordingly, the Supreme Court has steadfastly rejected the proposition that the Establishment Clause "forbids only governmental preference of one religion over another," *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216 (1963), explaining instead that the interest in "forestalling intolerance extends beyond intolerance among Christian sects – or even intolerance among 'religions' – to encompass intolerance of the disbeliever and the uncertain." *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985).

In *Wallace*, the Supreme Court held unconstitutional Alabama's "moment of silence" statute because it was enacted for the "sole purpose of expressing the State's endorsement of prayer activities." *Id.* at 60. The Court explained that when a government policy is primarily aimed at promoting religion, it necessarily violates the Establishment Clause. *Id.* at 56. The Court made clear that the Establishment Clause is not limited to situations in which one Christian sect is promoted over another, rather, it demands "equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Id.* at 52.

Consistent with this case law, the first prong of the *Lemon* test requires that any government statute or practice that touches upon religion have a secular purpose and not be intended to promote one religion over another. *Lemon*, 403 U.S. at 612. If the statute or practice does not have a secular purpose or is intended to promote religion, then it violates the Establishment Clause of the First Amendment. *Id.*

The spirituality components of the SFT and GAT fail this prong of the *Lemon* test because they unconstitutionally promote religion over non-religion. The SFT materials are aimed at increasing a soldier's spiritual fitness, in order to provide him or her with "a sense of purpose, meaning, and the strength to persevere and prevail when faced with significant

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challenges and responsibility.” The purpose of the SFT and GAT, though couched in general and vague language, is to strengthen a soldier’s religious conviction. Soldiers who hold deep religious convictions routinely pass the spirituality component of this test while atheists and nontheists do not. The Army cannot avoid the conclusion that this test is an unconstitutional endorsement of religion by simply substituting the word “spiritual” for “religious.” The content of the examination and remedial materials make evident that the test favors religious soldiers over non-religious soldiers.

For example, the majority of the spiritual statements soldiers are asked to rate are rooted in religious doctrine, premised on a common dogmatic belief regarding the meaning of life and the interconnectedness of living beings. The statements in the tests and remedial materials repeatedly promote the importance of being a believer of something over electing to be a non-believer. Moreover, the images that accompany portions of the CSF Training Modules make clear the religious aspects of the spirituality training. For example, Slide Six of the CSF shows the image of members of a congregation at a chapel ceremony with the caption, “You may also seek support from your spiritual community back home.” This indicates that the military intends to further religion under the guise of “spirituality.” The materials also urge soldiers to participate in prayer or to seek out a “higher power,” again favoring the practice of religious traditions over those of non-believers.

(2) The SFT and GAT Have a Primary Effect of Advancing Religion Because They Communicate Government Endorsement of Religion.

The SFT and GAT also fail the second prong of the *Lemon* test. To pass constitutional muster, the SFT and GAT must neither advance nor inhibit religion in their principal or primary effect. *Lemon*, 403 U.S. at 612. Advancement of religion can occur even where no particular religious belief or denomination directly benefits from the governmental action. In attempting to explain the second prong of the *Lemon* test, Justice O’Connor noted “What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.” *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J. concurring). This principle has been adopted by lower courts to mean that government “should pursue a course of neutrality favoring neither one religion over another nor religion generally.” *Freedom From Religion Foundation, Inc. v. Nicholson*, 448 F. Supp.2d 1028, 1033 (W.D. Wis. 2006).

In *Nicholson*, plaintiffs alleged that the Veterans Affairs (VA) Hospital was violating the Establishment Clause because it had adopted a holistic approach to health premised upon the belief that “good health care is incomplete without substantively addressing the spiritual dimension of each patient.” *Id.* at 1030. As part of its intake procedures, the VA Hospital would gauge the spiritual health of patients through the use of screening questionnaires. *Id.* The court rejected defendants’ motion to dismiss and held that such a practice, if proven, violated the Establishment Clause because it had the primary effect of advancing religion. *Id.* at 1033.

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Despite the fact that the spiritual screening did not explicitly discuss religion or God, the court found that plaintiffs' allegations tended to show that the government was favoring religion over non-religion, thereby violating the Establishment Clause's requirement of neutrality. *Id.*

Nicholson demonstrates that the Army's practice of requiring service members to undertake a spirituality test and requiring compulsory remediation if they do not score sufficiently well runs afoul of the Establishment Clause. As in *Nicholson*, the primary effect of this spirituality test is to advance religion, especially because the test inherently praises those who are deeply religious and finds those who are not deficient.

(3) The SFT and GAT Excessively Entangle the Government with Matters of Religion, Violating the Supreme Court's Establishment Clause Jurisprudence.

The third prong of the *Lemon* test requires that government practices not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 613. Where the government provides a service and spirituality becomes intertwined with that service, there is an entanglement between the state and religion. *See Nicholson*, 448 F. Supp.2d at 1033. In *Nicholson*, the Court ruled that demonstrating that the VA believed it could not "provide its patients with complete quality health care unless it substantively integrate[d] a spiritual dimension into all aspects of care . . . could support a finding of excessive entanglement between government provided health care and religion." *Id.* In the same vein, requiring that a spiritual dimension be integrated into the assessments that determine the fitness of enlisted personnel also constitutes excessive entanglement between religion and the service of defending the country. By intermixing spirituality and religion with the daily operations of the military, the SFT and GAT unlawfully entangle the government with matters of religion, just as the VA Hospital entangled the government with matters of religion through its holistic care plan. *See id.* at 1030.

(4) The SFT and GAT are Unconstitutional Because they Amount to Coercive Religious Instruction in Violation of the Establishment Clause.

In addition to the *Lemon* test, the Supreme Court has also found that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weissman*, 505 U.S. 577, 587 (1992). Pursuant to *Weissman*, the Second and Seventh Circuits have ruled that prison mandated programs incorporating religion violate the Establishment Clause. *See Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1074-75 (2d Cir.1996) (holding that coerced attendance at Alcoholics Anonymous meetings that emphasized religion violates the Establishment Clause); *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996) (holding that coerced attendance at Narcotics Anonymous meetings that emphasized religion violates the Establishment Clause). Similarly, nonsectarian programs that incorporate spirituality, as opposed to religion, also violate the Establishment Clause. *See Ross v. Keelings*, 2 F. Supp.2d 810, 818 (E.D. Va. 1998).

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In *Keelings*, an inmate was forced to participate in a therapy program to overcome addiction to drugs and alcohol. *Id.* at 812. Religion was “incorporated into the program so that [inmates could] seek out and find [their] own spirituality.” *Id.* at 813. The district court held that the program was a *per se* violation of the Establishment Clause because the state was coercing participation in religion. *Id.* at 818. It was inconsequential that no one religion was promoted over another. The court explained that the spirituality component of the therapy was religious because it focused on “spiritual well-being” and certain publications referred to God and the Serenity Prayer. *Id.* Because attendance was forced, the court ruled that it violated the Establishment Clause. *Id.* Notably, the prison modified the program to remove the Serenity Prayer and any direct references to God, yet the a subsequent court found that the program still violated the Establishment Clause, noting that the spirituality components still implicitly espoused religion. *See Nusbaum v. Terrangi*, 210 F. Supp.2d 784, 788 (E.D. Va. 2002).

(5) The SFT and GAT Constitute “Religious Tests,” which Directly Contravene the Mandate of Article VI, Clause 3 of the United States Constitution.

Article VI, Clause 3 establishes that “No religious test shall ever be required as a qualification to any office or public trust under the United States.” U.S. Const. Art. VI, cl. 3. Courts have commented that “the object of [this] provision is to keep participation in the political community from being narrowed on the basis of religious adherence....[O]bseisance to a state approved or endorsed religious ideology cannot be a legitimate criterion or litmus test for inclusion in the political community.” *See Smith v. Lindstrom*, 699 F. Supp. 549, 561 (W.D.Va. 1988). Accordingly, to require that an individual in the Army to maintain a religious conviction as a prerequisite to working for government violates the Religious Test Clause of Article VI. *See Torcaso v. Watkins*, 367 U.S. 488, 489 (1961).

In *Torcaso*, the plaintiff was appointed to serve as a notary, but refused to affirm his belief in the existence of God, as required by Maryland law. *Id.* The Supreme Court held that the affirmation required by Maryland violated both the Establishment Clause and the Religious Test Clause of Article VI. *Id.* at 496. In so holding, the Court explained that the government may not “pass laws or impose requirements which aid all religions as against non-believers, [or] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” *Id.* at 495.

The SFT and GAT, however, do just what the Court in *Torcaso* prohibited. The tests require that soldiers exhibit a requisite level of “spirituality” in order serve in the military. When applying this test against atheists and non-theists, the SFT and GAT “aid religions as against non-believers,” because many non-believers cannot answer the questions candidly and still receive a passing score. *See, e.g., id.* The military’s requirement that soldiers pass the spirituality component of the SFT and GAT to serve their country directly contravenes the clear language of Article VI, Clause 3, which requires that religious adherence play no part in the ability of the citizenry to participate in the political community. *See Smith*, 699 F. Supp. at 561.

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The Army is using religion as a screen to determine which soldiers it will allow to serve the country and which it will bar from doing so. Such religious testing is expressly forbidden by the Religious Test Clause of Article VI and is therefore unconstitutional. *See id.*

In sum, there is strong authority to support MRFF's position that the spirituality component of the SFT and GAT are unlawful and violate the United State Constitution. MRFF and its supporters are exploring all possible legal avenues to challenge this practice. We would prefer, however, to resolve this amicably with the Army's agreement to cease and desist this practice before resort to the courts becomes necessary.

Accordingly, we request the Army's prompt assurances and written undertaking, within twenty-one (21) days from the date of this letter, that it will immediately cease and desist its policy of administering the spiritual component of the Comprehensive Soldier Fitness Program's Soldier Fitness Tracker (SFT) and Global Assessment Tool (GAT) to enlisted men and women and that it will discontinue any and all mandatory follow-up to the spiritual component of the test.

Please feel free to contact me to discuss any aspect of this request. I may be contacted at (415) 875-5712 or 555 California Street, 26th Floor, San Francisco, CA 94104.

Very truly yours,



Caroline N. Mitchell

cc:

President Barack Obama
President of the United States of America

Dr. Robert M. Gates
Secretary of Defense

Adm. Michael G. Mullen
Chairman of the Joint Chiefs of Staff

Gen. James E. Cartwright
Vice Chairman of the Joint Chiefs of Staff

Ray Mabus
Secretary of the Navy

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Michael B. Donley
Secretary of the Air Force

Gen. James F. Amos
Commandant of the Marine Corps

Adm. Gary Roughead
Chief of Naval Operations

Gen. Norton A. Schwartz
Air Force Chief of Staff