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FIRST AMENDMENT RIGHTS OF MILITARY PERSONNEL: DENYING RIGHTS TO THOSE WHO DEFEND THEM

INTRODUCTION

In *Goldman v. Weinberger*,¹ the Supreme Court decided that prohibiting a rabbi from wearing a yarmulke² while on duty as a commissioned officer and psychologist in an Air Force hospital did not violate his first amendment³ right to free exercise of religion.⁴ The Court deferred to the "professional judgment"⁵ of the military that this prohibition was necessary for the "group mission,"⁶ and never examined the petitioner's first amendment claim. The Supreme Court gave Goldman the choice either to violate daily a religious practice or to risk court-martial;⁷ it did not balance the interests of the parties, require the government to establish a connection between the wearing of yarmulkes and harm, or indicate when it would enjoin the military for unconstitutional encroachment on free exercise of religion.

Judicial deference to decisions of the military is slowly becoming entrenched as the rule of decision in the federal courts.⁸ The holding in *Goldman*, although surprising because of its facts, is consistent with Supreme Court precedent, and has been reinforced by the latest Supreme Court decisions, which virtually immunize the military from judicial review. During the 1986 Term, the Supreme Court decided two cases that will have potentially devastating effects on the constitutional protections enjoyed by military personnel.⁹

¹ 475 U.S. 503 (1986).

² A yarmulke is a skullcap. Religious Jews cover their heads. See Shulchan Aruch, Orach Chayim 2:6, 151:6, 282:3 (code of Jewish conduct). The Jewish practice of head covering originated in Babylonia during the Talmudic period. See 2 A. Shulman, *Gateway to Judaism* 603 (1971).

³ The first amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech" U.S. Const. amend. I.

⁴ *Goldman*, 475 U.S. at 506-10.

⁵ *Id.* at 507.

⁶ *Id.* at 509-10. The Court did not define this term. For a discussion of military necessity, see notes 64-65 and accompanying text *infra*.

⁷ *Goldman*, 475 U.S. at 509-10.

⁸ See notes 92-99, 123-26 and accompanying text *infra*.

⁹ In *Solorio v. United States*, 107 S. Ct. 2924 (1987), the Court enlarged the jurisdiction of courts-martial in criminal cases, thus depriving many defendants of procedural protections in the civil courts. See note 57 *infra*. In *United States v. Stanley*, 107 S. Ct. 3054 (1987), decided on the same day as *Solorio*, the Court denied recovery to a soldier who had been used as an

The judiciary occupies a sensitive position when it reviews military cases because, in this area, explicit constitutional powers have been granted to both the executive and the legislative branches of government,¹⁰ and the judiciary is without a specific constitutional grant.¹¹ Nonetheless, the judiciary is always obliged to decide "[c]ases . . . arising under [the] Constitution, [and] the Laws of the United States"¹²

When a military regulation conflicts with a constitutionally guaranteed individual right, there is a clash between co-equal branches of government.¹³ The judiciary, as the final reviewer of constitutionality,¹⁴ has the burden of deciding how closely to scrutinize decisions made by other branches.¹⁵ Where there are not such explicit grants of authority to the other branches, the courts are active in safeguarding the Bill of Rights.¹⁶ For example, the federal judiciary has played the central role in enforcing equal protection for blacks in public education,¹⁷ in establishing a

unknowing subject in LSD experiments, and had suffered lasting harm as a result.

¹⁰ "The Congress shall have Power . . . To declare War . . . To raise and support Armies . . . To provide and maintain a Navy; To make Rules for . . . the land and naval Forces" U.S. Const. art. I, § 8, cls. 11-13. "The President shall be Commander in Chief of the Army and Navy of the United States" U.S. Const. art. II, § 2, cl. 1.

¹¹ The Court has often invoked the constitutional scheme to explain its deference to the other branches of government in military matters. See e.g., *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

¹² U.S. Const. art. III, § 2. In addition to this constitutional mandate, the judiciary has historically championed individual rights. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (woman has constitutional right to abortion); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state cannot force Amish children to go to school against will of their parents in contravention of religious beliefs); see notes 16-19 and accompanying text *infra*.

¹³ Although this is true every time the judiciary reviews congressional legislation, it is more severe in military matters because the constitutional grants are explicit; power is granted to both of the other branches and the Court has treated the clash as a barrier to rigorous review. See *Rostker*, 453 U.S. at 59 (reciting constitutional powers of Congress). The American system of separation of powers requires that each federal branch respect the decisions of the others. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (Court will respect decision of coordinate branch of government); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Executive must comply with order from Court).

¹⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial supremacy).

¹⁵ The judiciary must decide how closely to scrutinize the decisions already considered by other branches because of its duty to decide cases and controversies. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); U.S. Const. art. III, § 2.

¹⁶ This has been especially true when the federal courts have reviewed state legislation. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (state antimiscegenation law violated equal protection); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (state law requiring production of group's membership lists violated associational liberty); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-45 (1925) (state law requiring children to attend public schools violated free exercise of religion).

¹⁷ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971) (busing may sometimes be constitutionally mandated remedy to end de jure segregation in public schools); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregated schools unconstitutional).

right to privacy,¹⁸ and in guaranteeing freedom to speakers espousing unpopular views.¹⁹

Although individuals in the military may have the same claims against the government as have civilians, the courts exercise more restraint towards the military than towards other government entities, both out of institutional respect and also due to the courts' unfamiliarity with the military.²⁰ The military has been treated as a "separate community"²¹ with its own laws, morality, and courts, and the federal courts have been extremely reluctant to become involved. The "separate community" notion defines the military as having a character distinct enough from the civilian community to be independent of it.²²

This Note argues that only service personnel in combat during war should be treated as members of a separate community. Most military personnel should be treated as a part of the civilian community, equally protected by the Constitution under which the rest of American society functions.²³ The few who are in the separate community should be completely outside of the jurisdiction of the federal courts, pursuant to the political question doctrine.²⁴ Conversely, those service personnel not in combat, who cannot be said to be part of a separate community, deserve protection by the federal judiciary when their constitutional rights are violated. For these people, the courts can balance military interests against individual interests in the same manner that they balance other governmental interests against individual interests.²⁵ In peacetime, the

¹⁸ See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (right to view pornography in one's home); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right to use contraceptives).

¹⁹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (racist speech protected unless it poses formidable clear and present danger).

²⁰ See notes 49-58 and accompanying text *infra*.

²¹ See, e.g., *Parker v. Levy*, 417 U.S. 733, 744 (1974); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

²² For a defense and analysis of the concept of the separate community, see Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177 (1984). But see Finn, *The Two Societies*, in *Conscience and Command* 3 (J. Finn ed. 1971) (arguing against separate community).

²³ This Note is concerned only with the first amendment rights of service personnel. All other constitutional rights are beyond the scope of this discussion.

²⁴ The political question doctrine relates solely to justiciability; the courts leave the decision to another branch. See Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 599-600 (1976). Although some of the factors that determine whether an issue is a political question are also important in determining the proper amount of deference due to a co-equal branch, this Note uses the term "political question" to refer solely to justiciability. See notes 156-58, 164-71 and accompanying text *infra*.

²⁵ A balancing test is appropriate in adjudicating first amendment claims. See, e.g., *Wayte v. United States*, 470 U.S. 598, 611 (1985) (state must show important government interest unrelated to suppression of speech that restricts speech no more than necessary); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (state must show interest of "highest order" that would not otherwise be achieved to restrict free exercise of religion).

worker who sits at a desk in the Pentagon should enjoy the same rights as his counterpart at a desk in the Capitol.

Part I of this Note discusses the structure of the military system of justice and its relationship to the civilian community. It describes the constitutional scheme that defines the powers over the military and how constitutional conflict among the branches of government arises when a first amendment claim is raised by military personnel. Part I then outlines the system of justice in the military and compares that system to the civilian system.

Part II explains the development of first amendment law for the military in the federal courts from cases that dealt with dissent by service personnel during the Vietnam War. These decisions were restrictive, and later cases used their precedents aggressively, leading to today's limited first amendment rights for military personnel.²⁶

Part III proposes a standard for adjudication of first amendment claims raised by military personnel in the federal courts. It argues that the rights of military personnel are restricted by the military establishment without any compelling government interest, and that no other group of people subject to the control of the United States government is expected to suffer such abridgment of its rights. This Part suggests that the courts establish two separate standards for review—one for combat troops in war (the "wartime" standard), and one for all other military personnel (the "peacetime" standard). In combat, military efficiency, on-the-spot command decision making, and discipline are critical, and the consequences of judicial mistake may be catastrophic. Decisions made about combat troops during war should therefore be regarded as political questions according to the Supreme Court's definition of that doctrine in *Baker v. Carr*,²⁷ and the federal courts should refuse to hear cases that arise during wartime.²⁸

On the other hand, the peacetime standard for adjudication of first amendment claims of military personnel should be the well-established standard for civilians. For civilians, once an activity is determined to be protected by the first amendment, the government must present the court with compelling justification to restrict that activity; the court then balances the interest of the government against the interest of the individual. Under such a standard, the court would engage in a balancing test and incorporate the military interests into the evaluation of whether the state

²⁶ Although the substantive rights to free speech and free exercise of religion are different, this Note uses case law regarding these rights interchangeably because the test that the Court applies is the same.

²⁷ 369 U.S. 186 (1962).

²⁸ This does not suggest that the military courts, including the United States Court of Military Appeals, should not hear such cases.

has raised a compelling purpose, and weigh this evaluation against the individual rights of the serviceperson. When the federal courts have jurisdiction and adjudicate a dispute, they should review the substantive issues thoroughly, and in peacetime, service personnel deserve full consideration of their claims.

I

THE RELATIONSHIP OF MILITARY AND CIVILIAN CONTROL

A. A Constitutional Power Struggle

Throughout American history, control over the military has been concentrated in the hands of the Executive and Congress.²⁹ Article I of the Constitution grants Congress the power "To declare War . . . To raise and support Armies, . . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces."³⁰ Article II makes the President the Commander in Chief of the Army and the Navy.³¹

The judiciary is absent from this scheme. The military has operated independently, employing its own courts³² to review both exclusively military problems and crimes committed by military personnel.³³ Nonetheless, since 1953, the Supreme Court and the Court of Military Appeals³⁴ have made it clear that the Bill of Rights's guarantees should apply to service personnel.³⁵

When a military law or regulation impinges upon a serviceperson's first amendment rights, a constitutional conflict arises. If the law or reg-

²⁹ The Court recently expressed the view that Congress's power over the armed forces is as plenary as it is over interstate commerce. *Solorio v. United States*, 107 S. Ct. 2924, 2928 (1987).

³⁰ U.S. Const. art. I, § 8, cls. 11-13.

³¹ *Id.* art. II, § 2, cl. 1.

³² Courts-martial, unlike the federal courts, are article I courts, not article III courts. Article I courts have less power than article III courts, and decisions of article I courts are usually reviewable by article III courts. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 (1982).

³³ See notes 49-55 and accompanying text *infra*.

³⁴ The Court of Military Appeals is the highest specialized military court and is composed of civilian judges. See Uniform Code of Military Justice (U.C.M.J.) art. 67, 10 U.S.C. § 867 (1982 & Supp. III 1985).

³⁵ See *Burns v. Wilson*, 346 U.S. 137 (1953). There are still some exceptions to this general proposition. See J. Bishop, *Justice Under Fire* 133-36 (1974). For example, service personnel are explicitly excluded from the right to a grand jury indictment. U.S. Const. amend. V. They also do not enjoy the rights to trial by jury or bail. See J. Bishop, *supra*, at 114.

Commentators disagree as to whether the framers intended the protection of the Bill of Rights to apply to service personnel. Compare Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957) (arguing that Bill of Rights was intended to protect service personnel) with Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 Harv. L. Rev. 1, 266 (1958) (refuting Henderson theory).

ulation is fully enforced, then the individual's Bill of Rights guarantees will be infringed; if the courts move to protect the individual's rights, then the political branches' explicit and plenary constitutional power over the military will be limited. It is a sensitive task to determine which part of the Constitution requires fullest enforcement in a particular case. Whereas the civilian judiciary is properly silent on most military matters,³⁶ its role as the protector of individual rights is implicated when the military restricts first amendment expression.³⁷

Judicial protection of rights of military personnel may therefore be seen as a power struggle between the constitutional grants to the branches of government. From the perspective of enforcing the Constitution, it is necessary to understand how justice is dispensed in the military, and determine whether constitutional concerns can be better balanced by the federal courts.

B. Military Justice and Discipline

From the founding of this country, a separate criminal code governed the military.³⁸ The understanding through the nineteenth century was that the purpose of the military justice system was to ensure disciplined troops, and the court-martial was a tool that could be used at the commander's discretion to instill fear and obedience in his soldiers.³⁹ Following World War II, there was a great outcry against the military justice system.⁴⁰ The American armed forces were larger during World War II than ever before, and there was an unprecedented number of courts-martial.⁴¹ Congress replaced the anachronistic Articles of War with a Uniform Code of Military Justice (U.C.M.J.),⁴² which made military law more like civilian law.⁴³

Even today the basic structure of authority in the military charges a commander with applying the laws and the regulations to the service personnel under his command.⁴⁴ Many regulations give a commander

³⁶ For example, the federal courts will not review matters of purely military concern. See *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) (no review of decision whether to grant officer a commission).

³⁷ "[G]enerals and admirals, not federal judges, are expert about military needs. But it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment." *Brown v. Glines*, 444 U.S. 348, 370 (1979) (Brennan, J., dissenting).

³⁸ The colonists adopted the British Articles of War intact. Major revisions were made in 1776, 1786, 1806, 1874, 1916, and 1920. E. Byrne, *Military Law* 8 (3d ed. 1981).

³⁹ Sherman, *Justice in the Military*, in *Conscience and Command* 21 (J. Finn ed. 1971).

⁴⁰ See J. Jacobs, *Socio-Legal Foundations of Civil-Military Relations* 5 (1986).

⁴¹ *Id.*

⁴² 10 U.S.C.A. §§ 801-934 (West 1983 & Supp. 1987).

⁴³ J. Jacobs, *supra* note 40, at 6.

⁴⁴ See *Brown v. Glines*, 444 U.S. 348, 356 (1979).

the power to make exceptions to the rules.⁴⁵ Although the grant of power from the Department of Defense to the commanders directs them to preserve free speech "to the maximum extent possible,"⁴⁶ congressional delegation to the military is essentially plenary, and therefore there is no real limitation.

Congressional guidelines for commanders are sometimes vague, forcing the ad-hoc application of the laws, even when the commander is genuinely interested in fairness of application.⁴⁷ No other segment of American society is as vulnerable to the judgments of others, or required to comply with someone's personal will or otherwise fear criminal sanctions.⁴⁸

The military is governed by a special system of laws passed specifically for it, and its criminal-trial process is wholly independent from the civilian judiciary. Today, the U.C.M.J. is the primary source of substantive law in the military,⁴⁹ and it includes provisions parallel to civilian

⁴⁵ For example, the regulation under which Goldman was forbidden to wear his yarmulke allowed the commander to make limited exceptions. See *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) (citing Air Force Reg. 35-10 (1980)). Delegation of such substantial power to commanders presents serious problems for judicial review. With regard to actions by the departments of the military and action by commanders, the standard that courts generally use in reviewing delegated power provides little limitation. See B. Schwartz, *Administrative Law* 436 (2d ed. 1982). Challenges to administrative power are based on an *ultra vires* theory, but if the grant of power is very broad, then there is much discretion without violation of granted powers, and therefore no control over agency action. See *id.* Congress must circumscribe delegated power and announce an adequate standard for an agency to ensure that important policy decisions are made by Congress, rather than the departments or the officials within them. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

⁴⁶ Department of Defense Directive 1325.6 par. II (Sept. 12, 1969), reprinted in *Conscience and Command* 283 (J. Finn ed. 1971).

⁴⁷ For example, article 133 of the U.C.M.J. makes punishable "conduct not becoming an officer and a gentleman." U.C.M.J. art. 133, 10 U.S.C. § 933 (1982). Article 134 criminalizes "all disorders and neglects to the prejudice of good order and discipline . . . [and] conduct of a nature to bring discredit upon the armed forces." U.C.M.J. art. 134, 10 U.S.C. § 934 (1982). Under articles 133 and 134, various acts have been subject to court-martial. See, e.g., *United States v. Vaught*, 9 M.J. 685 (1979) (sniffing intoxicants); *United States v. Sanchez*, 11 C.M.A. 216, 29 C.M.R. 32 (1960) (bestial acts with a chicken); *United States v. Huffman*, 6 C.M.R. 244 (1952) (passing bad check). These articles were challenged for vagueness and overbreadth, but upheld by the Supreme Court. See *Parker v. Levy*, 417 U.S. 733 (1974); notes 66-87 and accompanying text *infra*.

Speech may easily fit under these articles. See *United States v. Howe*, 17 C.M.A. 165, 37 C.M.R. 429 (1967) (upholding officer's court-martial conviction for carrying at rally sign that called President a fascist).

⁴⁸ See U.C.M.J. art. 92, 10 U.S.C. § 892 (1982) (anybody who fails to obey orders subject to court-martial). While criminal sanctions in the military are applied to a much broader range of activity than for society generally, the punishment for many offenses is very light or of a different nature than in civilian life. See U.C.M.J. art. 15, 10 U.S.C. § 815 (1982) (describing nonjudicial punishment).

⁴⁹ The Manual for Courts-Martial, produced by the Executive with the delegated authority of Congress, is substantive only in the areas of sentence determination and definition of aggra-

criminal law as well as unique military offenses.⁵⁰ The U.C.M.J. placed the court-martial system under the supervision of a civilian Court of Military Appeals.⁵¹

The modern military court system is quite different from the usual civilian court. There are three types of courts-martial, each designed to handle infractions of varying severity, and each permitted to mete out certain maximum punishments.⁵² A court-martial is convened in the same way in all cases:⁵³ a commander decides what type of court-martial will try an accused and sets it up.⁵⁴ This is the characteristic that most

vating circumstances. See E. Byrne, *supra* note 38, at 10-11, 13-14 (1981). The Department of Defense may issue directives, and each of the services also has the authority to pass regulations for itself. See 10 U.S.C.A. § 5043 (West Supp. 1987) (marines); *id.* § 3013(g)(3) (army); 10 U.S.C. § 6011 (1982) (navy); *id.* § 8012(f) (air force).

⁵⁰ U.C.M.J. arts. 77-134, 10 U.S.C. §§ 877-934 (1982), are "punitive articles" that describe the substantive law. They include: larceny (art. 121, 10 U.S.C. § 921), murder (art. 118, 10 U.S.C. § 918) and rape (art. 120, 10 U.S.C. § 920), as well as desertion (art. 85, 10 U.S.C. § 885), failure to obey orders (art. 92, 10 U.S.C. § 892) and conduct unbecoming an officer and a gentleman (art. 133, 10 U.S.C. § 933).

Some commentators believe that the U.C.M.J. provides service personnel with virtually all of the procedural protections that are guaranteed to accused civilians. See J. Bishop, *supra* note 35, at 25-44; see also E. Byrne, *supra* note 38, at 87 (defending fairness of military justice system). Other commentators, however, believe that the U.C.M.J. preserved the major flaw in the old court-martial system—commander control over proceedings rather than an independent judiciary. See Sherman, *supra* note 39, at 35-52; notes 54-55 and accompanying text *infra*.

⁵¹ 10 U.S.C. § 867 (1982 & Supp. III 1985). Some commentators credit the United States Court of Military Appeals with subordinating the military justice system to the rule of law, see Jacobs, *supra* note 40, at 6-7, and others blame it for undermining military efficiency, see E. Byrne, *supra* note 38, at 12.

⁵² A summary court-martial consists of one officer, who decides the case. U.C.M.J. art. 16, 10 U.S.C. § 816 (1982). The Supreme Court has held that representation by counsel is unnecessary in a summary court-martial. *Middendorf v. Henry*, 425 U.S. 25 (1976). Special and general courts-martial are composed of members who act as a kind of jury, although they are not the peers of the accused. U.C.M.J. art. 25 describes who may serve on a court-martial. See 10 U.S.C.A. § 825 (1983 & West Supp. 1987). The accused is entitled to a military lawyer in special and general proceedings, and a lawyer also represents the government, both of whom are detailed by the commander, and both of whom are in the unit. U.C.M.J. art. 27, 10 U.S.C. § 827 (1982 & Supp. III 1985). Although a commander is not permitted to consider an attorney's defense of an accused as a factor in evaluations for promotions, the possibility for subtle commander control is enormous. See J. Bishop, *supra* note 35, at 34; see also West, *Command Influence, in Conscience and Command* 102-09 (J. Finn ed. 1971) (describing blatant action taken against enthusiastic defense counsel). In all general and some special courts-martial, a military judge who is appointed by the Judge Advocates General is required to preside. U.C.M.J. art. 26, 10 U.S.C. § 826 (1982 & Supp. III 1985). The military judge is not subordinate to the commander—this is the only characteristic of an independent judiciary found in the military. Since 1968, an accused has had the right to ask for a bench trial in order to minimize the possibility of commander influence by removing the decision-making apparatus from the control of the unit commander. See U.C.M.J. art. 16, 10 U.S.C. § 816 (1982 & Supp. III 1985).

⁵³ The parties who may convene each kind of court-martial differ, however. See U.C.M.J., arts. 22-24, 10 U.S.C. §§ 822-824 (1982).

⁵⁴ E. Byrne, *supra* note 38, at 86-92.

differentiates the military court system from the civil system. Critics of the military justice system are most disturbed about command control of the court-martial machinery and the unfair influence it can have on an adjudication.⁵⁵

Within the military, there is an extensive system of appeals. The Court of Military Review may review both the facts and the law in a court-martial. The highest court is the United States Court of Military Appeals, which, as a civilian court, can review only errors of law in courts-martial.⁵⁶

Habeas corpus has been of some use to service personnel seeking review in the civilian courts, but historically its use has been very limited. Until the 1950s, the only basis for the issuance of a federal writ of habeas corpus was lack of jurisdiction by the military court over either the subject matter of or a party to the dispute.⁵⁷ If the federal court found that

⁵⁵ See Sherman, *supra* note 39, at 28; West, *supra* note 52, at 73. The Supreme Court has expressed clear skepticism about the quality of justice dispensed in the military courts. "[C]ourts-martial . . . are singularly inept in dealing with the nice subtleties of constitutional law. . . . [A] military trial is marked by the age-old manifest destiny of retributive justice." *O'Callahan v. Parker*, 395 U.S. 258, 265-66 (1969) (dictum) (overruled by *Solorio v. United States*, 107 S. Ct. 2924 (1987)).

⁵⁶ U.C.M.J. art. 67, 10 U.S.C. § 867 (1982).

⁵⁷ See, e.g., *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Gibson v. United States*, 329 U.S. 338 (1946). The U.C.M.J. granted wide jurisdiction to the court-martial, but in the ensuing years the Supreme Court cut back that jurisdiction so that, until last Term, military courts had jurisdiction only over the most narrow class of cases: military personnel doing service-connected acts. *O'Callahan v. Parker*, 395 U.S. 258 (1969). Last Term, the Supreme Court broadened the jurisdiction of the military courts by overruling *O'Callahan* and conditioning court-martial jurisdiction on only one factor—military status. See *Solorio v. United States*, 107 S. Ct. 2924 (1987). *Solorio* did not expressly overrule the other limitations on court-martial jurisdiction that have developed. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (military courts cannot try ordinary civilians); *Reid v. Covert*, 354 U.S. 1 (1957) (military courts cannot try military dependents in capital cases); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (military courts cannot try military dependents in noncapital cases); *Harmon v. Bruckner*, 355 U.S. 579 (1958) (military courts cannot try military personnel for acts committed prior to induction into the military, or not included in a serviceperson's military record); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (military courts cannot try military personnel for acts committed during military service but not tried until after discharge).

Whether the civilian court has jurisdiction over the case is also an issue in federal court review of courts-martial. See *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). The Supreme Court has not explicitly described when the federal courts have jurisdiction over a case that originated in the military, but it has itself reviewed such cases, implying that they are within the jurisdiction of the federal courts. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986). There are eight circuits that require claims against the military to pass a threshold test before federal courts will entertain them. See Note, *Judicial Review of Constitutional Claims Against the Military*, 84 Colum. L. Rev. 387, 397 (1984) (listing cases). The test, articulated in *Mindes*, 453 F.2d at 201, requires that the court balance several factors before deciding to review a case, including: (1) the "strength of the plaintiff's challenge to the military determination"; (2) the "potential injury to the plaintiff if review is refused"; (3) the "type and degree of anticipated interference with the military function"; and (4) "[t]he extent to which the exercise of

the military courts had correctly exercised jurisdiction over both the person and the subject matter, then the aggrieved person had no further remedy from the civilian courts.⁵⁸ The landmark case of *Burns v. Wilson*⁵⁹ began the federal courts' substantive habeas review for constitutional violations.⁶⁰

II

DEVELOPMENT IN THE FEDERAL COURTS OF FIRST AMENDMENT LAW FOR THE MILITARY

*Burns v. Wilson*⁶¹ established that service personnel do have constitutional rights, which, although not absolute, will be vindicated by a federal court upon review by habeas corpus.⁶² The Supreme Court has subsequently stated that "[w]hile the members of the military are not excluded from the protection granted by the first amendment, the different character of the military community and of the military mission requires a different application of those protections."⁶³ Nonetheless, the Court has never explicitly defined the circumstances in which constriction of first amendment rights is proper, the permissible extent of the abridgment of constitutional rights, nor the governmental interest necessary to override the interest of the individual.

The government generally proffers "military necessity" to support the constriction of first amendment rights of military personnel,⁶⁴ and

military expertise or discretion is involved." *Id.*

⁵⁸ J. Bishop, *supra* note 35, at 120-21.

⁵⁹ 346 U.S. 137 (1953).

⁶⁰ See notes 61-63 and accompanying text *infra*. Habeas for military personnel has become more like the habeas available for state court convictions. Military personnel are required to exhaust military remedies and review before going into federal court. See *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Sherman*, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 Va. L. Rev. 483 (1969). Habeas petitions are still of no help to service personnel complaining of punitive discharge, reduction in rank, forfeiture of pay, or nonjudicial punishment. See J. Bishop, *supra* note 35, at 130. However, the Military Justice Act of 1983, U.C.M.J. art. 67, 10 U.S.C.A. § 867 (West 1983 & Supp. 1987), increased the possibility for Supreme Court review of cases coming from the Court of Military Appeals by instituting a procedure for writ of certiorari. See J. Jacobs, *supra* note 40, at 24.

⁶¹ 346 U.S. 137 (1953).

⁶² The decision in *Burns* has four separate opinions and is cryptic, but has subsequently been characterized by Chief Justice Warren as holding that

court martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights. The various opinions of the members of the Court . . . constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.

Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962).

⁶³ *Parker v. Levy*, 417 U.S. 733, 758 (1974).

⁶⁴ See, e.g., *Brown v. Glines*, 444 U.S. 348, 354 (1980). The government offers this explanation generally, but this Note is concerned only with first amendment rights, so the discussion

there is no doubt that the special characteristics of the military must be considered in adjudicating these cases. However, as the law currently stands, the mere invocation of military necessity is sufficient to trump a serviceperson's claims that his or her first amendment rights have been violated by the military.⁶⁵ A review of the development of first amendment law for the military shows that what began as a weak but substantive review has degenerated into virtually no review at all.

A. *Parker v. Levy: Defining First Amendment Rights*

Whereas *Burns* seemed to signal increased protection of individual rights for military personnel, that liberalization has not been extended to first amendment guarantees. *Parker v. Levy*⁶⁶ was the first case to squarely present the issue of first amendment rights of military personnel before the Supreme Court.⁶⁷ The facts of the case were particularly explosive because Levy, a doctor whose job was to train medical personnel,⁶⁸ was an officer actively dissenting against a war to which his students were likely to be sent.⁶⁹ The difficult factual setting may explain its restrictive holding. Nevertheless, because it was the first case to discuss service personnel's first amendment rights, it continues to be a central case in this field.⁷⁰

Although Captain Levy performed most of his work, he refused to train special-forces personnel.⁷¹ He also expressed his views on the Vietnam war to his students.⁷² The army court-martialed him for "conduct

will be limited to those issues specifically.

⁶⁵ The most extreme example of this is *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the military claimed that compliance with every detail of the uniform regulations was necessary, but did not offer any connection between the practice and the purposes of uniformity or any other military goal. See *id.* at 514-15 (Brennan, J., dissenting); cf. *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976) (upholding congressional determination to abrogate right to counsel in summary court-martial proceedings to save military time and paperwork).

⁶⁶ 417 U.S. 733 (1974).

⁶⁷ *Id.* at 768 (Douglas, J., dissenting).

⁶⁸ *Id.* at 736.

⁶⁹ *Id.* at 736-37.

⁷⁰ *Parker* is cited in virtually every military case cited in this Note.

⁷¹ *Parker*, 417 U.S. at 736-77. Levy was tried under U.C.M.J. articles 133 and 134 not for refusing to fully perform his work but for his speech. *Id.* at 769 (Douglas, J., dissenting).

⁷² The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. . . . Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Id. at 769-70 (quoting Dr. Levy). For an interesting account of events leading up to this case, see Levy, *Personal Testimony*, in *Conscience and Command* 161 (J. Finn ed. 1971).

unbecoming an officer and a gentleman,"⁷³ and "disorder and neglects to the prejudice of good order and discipline in the armed forces."⁷⁴

In its opinion, the Court reviewed the long history of court-martial for these offenses, and decided that Levy had violated the U.C.M.J.⁷⁵ It also held that Levy's conduct "was unprotected under the most expansive notions of the First Amendment."⁷⁶ The Court then disallowed Levy's claims that the statutes were unconstitutional on their faces.

On the claims presented, *Parker* established a standard for review of military statutes by the civilian courts. In *Parker*, the appellee argued that two articles of the U.C.M.J.⁷⁷ were "void for vagueness" under the due process clause and overbroad in violation of the first amendment.⁷⁸ The Court did not apply conventional first amendment vagueness and overbreadth analysis to the case,⁷⁹ and instead established a standard very deferential to the decisions of Congress in facially reviewing articles of the U.C.M.J. The Court held that the proper standard for review of vagueness claims against articles of the U.C.M.J. is the standard used in

⁷³ U.C.M.J. art. 133, 10 U.S.C. § 933 (1982).

⁷⁴ Id. art. 134, 10 U.S.C. § 934 (1982).

⁷⁵ "[A]ppellee could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so" violated articles 133 and 134. *Parker*, 417 U.S. at 757.

⁷⁶ Id. at 761. Had the Court applied conventional first amendment law, it may have found that Levy's speech was covered by the first amendment, but that the military's interest in fighting the war in Vietnam provided a compelling state interest. Justice Douglas was of the clear opinion that Levy's speech was within the ambit of the first amendment.

Making a speech or comment on one of the most important and controversial public issues of the past two decades cannot by any stretch of dictionary meaning be included in "disorders and neglects to the prejudice of good order and discipline in the armed forces". . . . [Dr. Levy] was uttering his own belief—an article of faith that he sincerely held. This was no mere ploy to perform a "subversive" act. Many others who loved their country shared his views. . . . Uttering one's beliefs is sacrosanct under the First Amendment. Punishing the utterances is an "abridgment" of speech in the constitutional sense.

Id. at 772 (Douglas, J., dissenting) (footnote omitted).

⁷⁷ U.C.M.J. arts. 133-134, 10 U.S.C. §§ 933-934 (1982).

⁷⁸ 417 U.S. at 752.

⁷⁹ Conventional first amendment overbreadth analysis requires that statutes restricting first amendment activity be narrowly and specifically drafted so as to avoid chilling constitutionally protected activity, see *Shelton v. Tucker*, 364 U.S. 479 (1960), and even people who clearly violated the statute may challenge its validity, see *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). Vagueness challenges have elements of due process, even in the first amendment context, and a statute is void for vagueness if there are no clear guidelines for law enforcement officials or triers of fact, see *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

Instead of allowing Levy to present the claims of other potential speakers as is often done in adjudication of overbreadth and vagueness challenges, see *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the *Parker* Court claimed to follow *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and disallowed a challenge that the statute may be unconstitutional as applied to someone other than the defendant. *Parker*, 417 U.S. at 759.

reviewing criminal statutes that regulate economic behavior.⁸⁰ In economic affairs, the standard is that a defendant cannot be held liable if he could not have reasonably known that the conduct in question was prohibited.⁸¹

This standard is sufficiently clear for adjudication of vagueness challenges to the U.C.M.J.—if a defendant could have reasonably known that his action would be prohibited under an article of the U.C.M.J., then he can be held liable for it. This standard directs an individual to adjudications of economic regulation, and therefore provides a would-be lawbreaker with some guidance. Although the Court places a heavy burden upon the claimant, the burden can be justified because the U.C.M.J. is a statute drafted by Congress, and the *Parker* Court showed respect to a co-equal branch by requiring a clear showing of unconstitutionality before overturning a congressional decision.

Regarding Levy's overbreadth challenge, the Court cited *United States Civil Service Commission v. National Association of Letter Carriers*⁸² and *Broadrick v. Oklahoma*,⁸³ adopting those cases' requirements of substantial overbreadth, and going beyond those cases to additionally constrict third-party standing because of the military context.⁸⁴

Whereas the standard that the Supreme Court developed in *Parker* may be criticized as too restrictive of service personnel's first amendment rights, it is, at least, an enunciated standard that can be followed in other vagueness and overbreadth challenges to articles of the U.C.M.J. However, *Parker's* vagueness and overbreadth standards are simply of no use in determining the constitutionality of other laws and regulations, such as prior restraints on the expression of military personnel,⁸⁵ bans on political speeches by civilians at a military base,⁸⁶ or whether religious exceptions should be made to military regulations.⁸⁷ However, *Parker*—because it was the first Supreme Court case to discuss the issue of first amendment rights of military personnel—has been considered the paradigmatic case for all first amendment claims in the military context, even where the standard enunciated in that case is inapplicable.

⁸⁰ *Parker*, 417 U.S. at 756.

⁸¹ See *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971); see also *Parker*, 417 U.S. at 757.

⁸² 413 U.S. 548, 580-81 (1973), cited in *Parker*, 417 U.S. at 760.

⁸³ 413 U.S. 601, 615 (1973), cited in *Parker*, 417 U.S. at 759-60.

⁸⁴ *Parker*, 417 U.S. at 760.

⁸⁵ See *Brown v. Glines*, 444 U.S. 348 (1980).

⁸⁶ See *Greer v. Spock*, 424 U.S. 828 (1976); see also *United States v. Albertini*, 472 U.S. 675 (1985) (concerning selective deprivation of right to speak at open event on military base); *Persons for Free Speech v. United States Air Force*, 675 F.2d 1010 (8th Cir.) (same), cert. denied, 459 U.S. 1092 (1982).

⁸⁷ *Goldman v. Weinberger*, 475 U.S. 503 (1986).

B. *Parker's Progeny*

Parker has been repeatedly cited for the proposition that the military may constrict rights⁸⁸—even where the *Parker* test is completely inappropriate because the issue was not vagueness or overbreadth. Two years after *Parker*, in *Greer v. Spock*,⁸⁹ the Supreme Court decided a facial challenge to military regulations that required prior approval of all political speeches and political literature before distribution on a military base.⁹⁰ The military commander was empowered to prevent the distribution of political literature if the commander was acting to avert what he perceived to be a “clear danger to the loyalty, discipline, or morale of troops on the base.”⁹¹ Although civilians brought this case on the ground that it was a prior restraint on their right of free speech,⁹² they made a facial attack on a military regulation that applied to service personnel and civilians alike. The Court upheld the regulation,⁹³ noting that the policy of keeping the military politically neutral had a long and constitutional history.⁹⁴

In *Greer*, the Court went even further than it had in *Parker*, because the challenge was to a regulation, review of which should require less

⁸⁸ See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 299 (1983); *Brown v. Glines*, 444 U.S. 348, 354 (1980); *Middendorf v. Henry*, 425 U.S. 25, 50 (1976). The issue was identical to *Parker* in *Secretary of the Navy v. Avrech*, 418 U.S. 677 (1974). The Court did not reopen the constitutional debate in that case, but instead cited *Parker* and upheld the constitutionality of the statute. See *id.* at 678.

⁸⁹ 424 U.S. 828 (1976).

⁹⁰ *Id.* at 831 (citing Fort Dix Reg. 210-26 (1968); Fort Dix Reg. 210-27 (1970)).

⁹¹ *Greer*, 424 U.S. at 840.

⁹² *Id.* at 833-34.

⁹³ The Court could have upheld the regulation as applied to civilians, rather than upholding it generally. Subsequent cases have reinforced the proposition that military bases are not public forums and civilians have no right to get inside them to present their message. See *United States v. Albertini*, 472 U.S. 675 (1985); *Persons for Free Speech v. United States Air Force*, 675 F.2d 1010 (8th Cir.), cert. denied, 459 U.S. 1092 (1982).

Because *Greer* involved a challenge to a military regulation brought by civilians, the Court could have applied conventional standards for public forums. A military base is not generally an open area for the public, and as such it cannot be compared with the most protected public forums—streets and parks. See, e.g., *Hague v. CIO*, 307 U.S. 496 (1939). A military base is property owned by the government, but it has been well established that not all governmental property can be considered a public forum. See, e.g., *Perry Educ. Ass'n. v. Perry Local Educators Ass'n.*, 460 U.S. 37 (1983) (teachers' mailboxes in a public school are not public forums); *Cox v. Louisiana* 379 U.S. 559 (1965) (courtroom is not public forum). Furthermore, conventional first amendment analysis would hold that Dr. Spock had many available forums and many willing listeners to his message. Although the Court is concerned that a speaker have some adequate forum for his message, see, e.g., *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), denying him access to military bases did not silence his message. Even military personnel had access to Spock's message off of the base or through other media. *Greer*, 424 U.S. at 849 (Powell, J., concurring).

⁹⁴ *Greer*, 424 U.S. at 839.

institutional respect than a congressional statute.⁹⁵ The Court's scrutiny of the regulation in *Greer* was also less exacting than of the statute in *Parker*, because while the *Parker* Court enunciated a test—weak though it was—and evaluated the statute against it,⁹⁶ the *Greer* Court did not even enunciate a standard by which to judge the regulation. It merely trusted the commander's decision about what presents a threat to his troops.⁹⁷

When facts similar to *Greer*, with military personnel as plaintiffs, reached the Supreme Court in *Brown v. Glines*,⁹⁸ the Court treated *Greer* as authoritative, and recognized no difference between civilian and military personnel challenging the prior restraint.⁹⁹ Unlike the plaintiffs in *Greer v. Spock*, a serviceperson lives on a base, and the people there are his local community. Silencing military personnel on military bases virtually silences them altogether. Furthermore, the military justice system makes military personnel subject to a greater array of criminal sanctions for speech¹⁰⁰ than civilians.

In *Brown*, military personnel wanted to collect signatures for petitions to be sent to members of Congress and the Secretary of Defense, but did not obtain the prior approval required by regulation from their commanders.¹⁰¹ The Supreme Court upheld the regulation by relying upon *Greer*¹⁰² and reiterating approval of a commander's discretion to "prevent the circulation of material that he determines to be a clear threat to the readiness of his troops."¹⁰³ The Court noted that the regulation was the least restrictive means for achieving a governmental interest,¹⁰⁴ even though the commander's judgment was the only criterion and the Court offered no explanation of the "substantial governmental

⁹⁵ While Congress is the judiciary's co-equal branch, the Department of Defense is not.

⁹⁶ See text accompanying notes 77-84 *supra*.

⁹⁷ The Court admitted, "It is possible, of course, that Reg. 210-27 might in the future be applied irrationally, invidiously, or arbitrarily." *Greer*, 424 U.S. at 840.

⁹⁸ 444 U.S. 348 (1980).

⁹⁹ See *id.* at 356 n.13 ("Glines would distinguish [*Greer*] on the ground that the plaintiffs in that case were civilians who had no specific right to enter a military base. The distinction is unpersuasive.").

¹⁰⁰ There are several articles in the U.C.M.J. directed at speech. See U.C.M.J. art. 88, 10 U.S.C. § 888 (1982) (contempt toward officials); U.C.M.J. art. 89, 10 U.S.C. § 889 (1982) (disrespect toward superior officer); U.C.M.J. art. 91, 10 U.S.C. § 891 (1982) (insubordinate conduct including disrespectful language). Other articles may incidentally affect speech. See U.C.M.J. arts. 82, 101, 104, 107, 117, 133-34, 10 U.S.C. §§ 882, 901, 904, 907, 917, 933-934 (1982).

¹⁰¹ *Brown*, 444 U.S. at 351.

¹⁰² *Id.* at 353. The Court should not have relied upon *Greer* because, although the *Greer* Court sustained the regulation on its face, the *Greer* analysis centered on public forum doctrine from the perspective of an outsider requesting access. See *Greer*, 424 U.S. at 834-38.

¹⁰³ *Brown*, 444 U.S. at 353; see also *Greer*, 424 U.S. at 837-39.

¹⁰⁴ *Brown*, 444 U.S. at 355.

interest."¹⁰⁵

This deference to the judgment of the commander went further than the *Parker* Court had gone because the *Brown* Court accepted the commander's determination of whether an application of the regulation would be constitutional, rather than the Court itself determining whether, in any particular case, the application had in fact been constitutional. The regulation's built-in caveat that "advises commanders to preserve servicemen's 'right of expression . . . to the maximum extent possible' "¹⁰⁶ was enough to convince the Court that the regulation was sufficiently narrow.¹⁰⁷

The *Brown* Court could not apply the standard announced in *Parker* for the simple reason that a vagueness standard would be inappropriate in deciding whether a regulation is an unconstitutional prior restraint. It relied upon *Parker*, however, for the proposition that the military must be allowed broad discretion over service personnel.¹⁰⁸

According to conventional first amendment doctrine, *Brown* is clearly more restrictive of first amendment rights than is *Parker*. If the facts of the two cases were to be analyzed under the rigorous "clear and present danger" standard that is the controlling law in the civilian community,¹⁰⁹ then Levy's speech in *Parker* may have been restricted on the grounds that he was directing his inferiors to imminently disobey lawful orders to go to Vietnam.¹¹⁰ However, there was no possible expectation of imminent lawless action in *Brown*, where all that Glines wanted to do was petition his elected representatives about Air Force grooming requirements.¹¹¹ To the contrary, his actions were entirely within the classic methods of bringing about change in a representative democracy.

Brown illustrates the Court's further divergence from civilian first amendment tests, and shows a weaker level of scrutiny than the Court gave the military in *Parker*. On their faces, the regulations at issue in both *Greer* and *Brown* are of the most unconstitutional sort in the civilian realm. Prior restraints are the most extreme cases of abridgment of the first amendment right to free speech.¹¹² The *Brown* Court took the deci-

¹⁰⁵ Id.

¹⁰⁶ Id. (quoting Department of Defense Directive 1325.6 (1969)).

¹⁰⁷ See id.

¹⁰⁸ See id. at 357.

¹⁰⁹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (state may not restrict speech unless speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

¹¹⁰ See *Parker v. Levy*, 417 U.S. 733, 736-37 (1973).

¹¹¹ See *Brown*, 444 U.S. at 351.

¹¹² The Court will uphold prior restraints only for the most compelling governmental interests. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715-16 (1931).

sion in *Parker* further, freeing the military from the rigorous standards that are ordinarily required to restrict first amendment rights. The Court had only one more step to take after *Brown*—to accept explicitly the constitutional judgment of the military and announce that it would not give any substantive review to decisions made by the military that service personnel claim infringe their first amendment rights.

C. Goldman v. Weinberger: *The Abyss*

The trend away from protecting the first amendment rights of service personnel reached its extreme expression in *Goldman v. Weinberger*,¹¹³ the most recent Supreme Court decision to review the military establishment's power to abridge first amendment rights.¹¹⁴ Goldman was a military psychologist who worked in a hospital on an Air Force base.¹¹⁵ He was also a religious Jew who covered his head at all times¹¹⁶ in compliance with Jewish law, and in contradiction of an Air Force regulation. The regulation stated that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police."¹¹⁷

Goldman encountered no problems¹¹⁸ while wearing his yarmulke until he testified at a court-martial in 1981, at which time opposing counsel filed a complaint with Goldman's hospital commander.¹¹⁹ Thereafter, his commander ordered him not to violate the regulation outside the hospital.¹²⁰ After Goldman protested to the Air Force General Counsel, his commander prohibited him from wearing his yarmulke even in the hospital, and he was refused permission to report for duty in civilian clothes.¹²¹ He was also "warned that failure to obey AFR 35-10 could subject him to a court-martial."¹²²

A sharply divided Supreme Court upheld the Air Force regulation on its face and as applied to Goldman, without giving actual considera-

¹¹³ 475 U.S. 503 (1986).

¹¹⁴ See text accompanying notes 1-7 *supra*. A more recent decision, *United States v. Stanley*, 107 S. Ct. 3054 (1987), in which a soldier who was, without his knowledge, used in an LSD experiment was denied relief, illustrates the extent to which the Supreme Court will allow the military to violate the integrity of the person. Recovery by military personnel for torts committed by their superiors is governed by *Feres v. United States*, 340 U.S. 135 (1950), and is beyond the scope of this Note.

¹¹⁵ *Goldman*, 475 U.S. at 505.

¹¹⁶ *Id.* at 504; see note 2 *supra*.

¹¹⁷ *Id.* at 505 (quoting Air Force Reg. 35-10, ¶ 1-6.h(2)(f)(1980)).

¹¹⁸ Goldman served as a chaplain in the Navy from 1970-1972 without incident, and had no problem during his first three-and-a-half years in the Air Force. See *Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C. Cir. 1984), *aff'd*, 475 U.S. 503 (1986).

¹¹⁹ *Goldman*, 475 U.S. at 505.

¹²⁰ *Id.*

¹²¹ *Id.* If he had been allowed to report in civilian clothes, then he would have been exempt from the uniform requirements and permitted to wear his yarmulke.

¹²² *Id.*

tion to Goldman's substantial constitutional claim.¹²³ The Court did not proceed through a conventional first amendment analysis, which would have looked at Goldman's claim and decided whether it was of constitutional magnitude, and then decided whether the military's claim was compelling enough to outweigh Goldman's claim.¹²⁴ Instead, the Court deferred to the "professional judgment of the Air Force," and never substantively reviewed the military's interest in uniformity. The Court wrote:

[W]hether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.¹²⁵

Without declaring it explicitly, the Court implied that any decision of the military, as long as the military authorities labeled it necessary for some military need, would be immune from judicial scrutiny.¹²⁶

A concurrence by Justice Stevens approved of the regulation because it was "based on a neutral completely objective standard—visibility."¹²⁷ The Air Force did not promulgate the regulation for the purpose of discriminating against any religious group; it chose an arbitrary criterion that seemed as good as any other. The significance of a uniform regulation is that everybody dresses the same way; it does not matter the specific dress that is chosen.¹²⁸

The problem with Justice Stevens's analysis is that facial neutrality can be misleading. If the neutral dress requirement had included hats, Goldman would have had no trouble complying with the regulation.¹²⁹ As Justice Brennan pointed out: "The practical effect of [Justice Stevens's] categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority

¹²³ See *id.* at 515-16 (Brennan, J., dissenting).

¹²⁴ See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

¹²⁵ *Goldman*, 475 U.S. at 509.

¹²⁶ *Id.*

¹²⁷ *Id.* at 513 (Stevens, J., concurring).

¹²⁸ *Id.* at 512.

¹²⁹ For the government to allow all people the free exercise of religion, the assumption that Christianity is neutrally American must be recognized and rejected. Although *Goldman* presents a subtle example, the principle here is no different than in mandatory Sunday rest cases. See *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987) (Seventh-Day Adventist constitutionally entitled to exemption from availability for work on Saturday to qualify for unemployment benefits); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same). In these cases, it was clear that the particular day of rest was chosen by the state—deliberately or not—because it was the day observed by most Americans. The "neutral" dress is consistent with Christianity, and anyone who does not dress like a Christian dresses non-neutrally. The bias is built into the analysis.

faiths. . . . Under the Constitution there is only *one* relevant category—*all* faiths.”¹³⁰

Justice Brennan’s dissent argues that the *Goldman* Court shirked its responsibility by refusing to review substantively a case in which the military interfered with service personnel’s constitutional rights.¹³¹ He would require the military to prove, in a case like *Goldman*, that the challenged regulation is “a narrowly tailored means of promoting important military interests.”¹³² Justice Brennan argued that the military had not even offered a rational basis in this case.¹³³

Justice Blackmun argued in his dissent that the Air Force would have been justified in refusing *Goldman*’s exception to the regulation if it had shown that it had “reason to fear that a significant number of enlisted personnel and officers would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would impair the overall image of the service.”¹³⁴ Although Justice Blackmun noted that decisions of the military generally deserve respect, in this case, the military failed to present the evidence necessary to override a constitutional right, and therefore its decision did not merit enforcement.¹³⁵

Justice O’Connor’s dissent is the most interesting because it is the only one that attempts to establish a standard for courts reviewing military decisions that implicate the free exercise of religion rights of service personnel. By drawing on existing precedent in free exercise adjudication, she concluded that the government must demonstrate an “unusually important interest” to deny a free exercise claim, and in addition, “the government must show that . . . the means adopted is the ‘least restrictive’ or ‘essential,’ or that the interest will not ‘otherwise be served.’ ”¹³⁶ The test used in free exercise claims outside of the military context, she argued, “is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending.”¹³⁷ Had the Court adopted Justice O’Connor’s view, there would be a standard of adjudication for free exercise claims against the military, and for claims of unconstitu-

¹³⁰ *Goldman*, 475 U.S. at 521 (Brennan, J., dissenting) (emphasis in original).

¹³¹ *Id.* at 515 (Brennan, J. dissenting).

¹³² *Id.* at 521 (Brennan, J., dissenting).

¹³³ *Id.* at 516 (Brennan, J., dissenting).

¹³⁴ *Id.* at 527 (Blackmun, J., dissenting).

¹³⁵ *Id.* at 527-28 (Blackmun, J., dissenting).

¹³⁶ *Id.* at 530 (O’Connor, J., dissenting). Justice O’Connor cited the following cases as existing precedent: *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). *Goldman*, 475 U.S. at 529.

¹³⁷ *Goldman*, 475 U.S. at 530-31 (O’Connor, J., dissenting).

tional applications of military regulations to speech.¹³⁸ This standard would help develop a body of law in the military sphere, along with the vagueness and overbreadth standards already articulated in *Parker v. Levy*.¹³⁹

The implications of the majority's holding are sad and serious.¹⁴⁰ There is little, after *Goldman*, left to Chief Justice Warren's assertion that "citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."¹⁴¹ One consequence of this decision is that the military can effectively limit its ranks to only a few segments of society, making it even less representative of the American people than it is now,¹⁴² and needlessly prevent dedicated and able people from serving their country unless they compromise their religious convictions. Furthermore, if the draft is reinstated,¹⁴³ it is unclear whether draftees in Goldman's position will be forced to contravene their faith, or will be granted an exemption from service similar to the one granted to conscientious objectors.¹⁴⁴ Either solution is an unfortunate answer to a problem that could easily have been avoided by more judicious foresight.

The automatic acceptance of the military's claim of necessity in *Goldman* precluded the Court from evaluating the actual weight of the claim that the military presented. *Goldman* established the precedent that when the military states the necessity of a certain practice, the courts end their inquiry without determining whether the practice is actually necessary—or even if it has any connection at all to the goal to be achieved. If the federal courts defer to the constitutional judgment of the

¹³⁸ The same balancing test is used to determine free exercise claims and free speech claims. Once a constitutional right is established, the state must show a compelling government interest to override that right. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (free speech).

¹³⁹ See notes 77-84 and accompanying text *supra*.

¹⁴⁰ Luckily, Congress may prevent the otherwise likely consequences of *Goldman*. The Senate has approved a proposal that would allow religious apparel to be worn by military personnel. See *Vote Eases Stand on Religious Wear*, N.Y. Times, Sept. 26, 1987, at A7.

¹⁴¹ Warren, *supra* note 62, at 188.

¹⁴² In his dissent in *Parker v. Levy*, 417 U.S. 733, 770 (1974), Justice Douglas disparagingly wrote, "The military, of course, tends to produce homogenized individuals who think—as well as march—in unison."

¹⁴³ Liberal supporters of the reinstatement of the draft think that it is necessary for the unity of the American people to require individuals from every economic and social class to serve their country. See, e.g., Lamar, *Enlisting with Uncle Sam*, Time, Feb. 23, 1987, at 30. There is a great injustice in placing the entire responsibility for this nation's security on the poor and minorities. A bill pending in Congress, H.R. 2225, 100th Cong., 1st Sess. (1987), introduced by Rep. Robert Torricelli (Dem., N.J.), would require all youths to perform one year of civil or military service. See Lamar, *supra*. Recent commentary has suggested that it will be necessary to reinstate the draft in order to guarantee a viable fighting force. Davis, *Bring Back the Draft*, N.Y. Times, Feb. 5, 1987, at A27.

¹⁴⁴ See 50 U.S.C. app. § 456(j) (1982).

military,¹⁴⁵ there is nothing left for the civilian courts to do. As Justice Brennan wrote: "[The] Court abdicates its responsibility to safeguard free expression when it reflexively bows before the shibboleth of military necessity."¹⁴⁶

What began in *Parker* as a weak but substantive review of the issues and a decision about the weight to be given to Congress's judgment in a facial challenge to legislation has degenerated into deference without analysis¹⁴⁷ and complete acceptance of military judgment. For, as *Goldman* shows, there no longer exists any substantive review of constitutional challenges to the military in the federal courts.¹⁴⁸

The government should present factual proof of military necessity in cases where it contends that such necessity overrides the constitutional right of the individual.¹⁴⁹ The government is required to do exactly this in the context of other constitutional claims.¹⁵⁰ There is no principle to explain why the courts are less able to evaluate the relationship between a military regulation and its purported aim, than the relationship between a securities regulation and its purported aim.¹⁵¹ A substantive review of the merits does not mean that the courts must become military experts any more than it means they must be scientific experts to decide patent cases. In satisfying its burden of proof, the government should always be responsible for presenting evidence to the court.¹⁵²

¹⁴⁵ See *Goldman*, 475 U.S. at 509. Before *Goldman*, the Supreme Court was explicit about deferring to the constitutional judgment of Congress. See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975). But see *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975) (circuit court deferring to constitutional judgment of military authorities).

¹⁴⁶ *Brown v. Glines*, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting).

¹⁴⁷ See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (merely listing quotations from earlier opinions about deference to military).

¹⁴⁸ Justice O'Connor wrote in her dissent in *Goldman*:

The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress No test for Free Exercise claims in the military context is even articulated, much less applied.

475 U.S. at 528.

¹⁴⁹ This is the reason why Justice Blackmun dissented in *Goldman*. See *id.* at 527; notes 134-35 and accompanying text *supra*.

¹⁵⁰ See, e.g., *Connick v. Myers*, 461 U.S. 138, 149-52 (1983) (government firing); *Roe v. Wade*, 410 U.S. 113, 147-50 (1973) (laws restricting abortion); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (laws restricting speech).

¹⁵¹ See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987).

¹⁵² It is not the job of the courts to redefine military necessity in accordance with the reality of today's armed forces. It is the military establishment, along with Congress, that should undertake this reevaluation because they are responsible for legislation concerning the military. Unfortunately, because Congress has not drawn new standards for the courts since the Uniform Code of Military Justice, the legislation that exists today does not reflect the character of today's armed forces. For example, today's armed forces are comprised mostly of technicians—less than 10% of total personnel are trained for combat. *Sherman*, *supra* note 39, at 45. Furthermore, today's armed forces are volunteer, making it a military necessity to attract

The development of first amendment law for the military shows how the civil courts' standard of review has degenerated into blind acceptance of the military's position. The unfortunate, but understandable, coincidence of a war and the beginning of judicial definition of the first amendment rights of service personnel¹⁵³ may have resulted in a more restrictive body of law than peacetime would have produced. The subsequent over-application by the Court of the first case to discuss the right has resulted in further constriction and the present failure of the Court to recognize any real first amendment rights for service personnel.

III

A TWO-TIERED STANDARD AND ITS APPLICATION

As a review of the major cases concerning the first amendment rights of military personnel shows, there is no clear standard by which these cases are adjudicated, and there is little protection for the first amendment rights of service personnel. A standard provides a test and a principled ground upon which courts can make decisions, and thereby establishes the fairness of the judicial system. While the military has special needs and functions that require special consideration, the general body of first amendment law should be a model for issues that arise in the military context. Because the lower courts have no clear directive from the Supreme Court on what the proper standard of substantive review should be in any particular case,¹⁵⁴ reference to other areas of first amendment precedent would provide lower courts with a source of law.

This Note proposes that the federal courts adopt a two-tiered approach to reviewing decisions from the military that implicate first amendment rights of service personnel. When the country is at war, national security interests are so compelling that service personnel involved in, and decisions made about, combat should be outside the reach of the federal courts. In wartime, the foreign policy prerogative of the executive and the appropriations and declaration interests of Congress dimin-

committed young people to the armed forces; the shrinking population of young people exacerbates this problem. See Davis, *supra* note 143. The military is slowly changing its disciplinary patterns to reduce coercion and increase manipulative and civilian-like controls. See L. Radine, *The Taming of the Troops: Social Control in the United States Army* x (1977). If Congress passed new legislation in light of the changing necessities, it would be a much easier task to prove a connection between the legislation and the necessity that can be proved by empirical military evidence. Part of the problem confronting the courts in their attempts to evaluate military necessity is that Congress and the Department of Defense have never advanced the reasoning behind the regulations now in force.

¹⁵³ See notes 68-72 and accompanying text *supra*.

¹⁵⁴ Indeed *Goldman v. Weinberger*, 475 U.S. 503 (1986), may send a message to the lower courts that no substantive review is appropriate and that the courts should rubber stamp any decision made by Congress, the Department of Defense, or military commanders.

ish the relative institutional importance of the judiciary. In the small class of cases concerning wartime combat decisions, the federal courts should refuse to exercise jurisdiction, following the mandate explicated in the Supreme Court's decision in *Baker v. Carr*.¹⁵⁵ These cases present nonjusticiable political questions¹⁵⁶ because they involve important foreign policy decisions, which the judiciary is particularly unqualified to make,¹⁵⁷ and which have been entrusted to the other branches of government.¹⁵⁸

In peacetime, however, the military interacts with the rest of American society more than it does with foreign nations, and therefore is not primarily an instrument of foreign policy. Service personnel should be treated similarly to other people performing governmental functions; the military should be required to present compelling justification for abridging the first amendment rights of personnel in a peacetime force.¹⁵⁹ The institutional interests that restrain the courts from substantively reviewing military decisions are weak in peacetime, and therefore the individual interests of the serviceperson must be addressed by the courts.¹⁶⁰

Since periods of war are infrequent compared with periods of peace, the compromise of service personnel's rights during emergencies is not a large price for national security. On the other hand, the deferential review that is presently being applied to cases concerning the military substantially compromises the liberty of service personnel, and therefore violates the first amendment tenet requiring the narrowest possible regulation of constitutionally protected activity.¹⁶¹ Substantive review in situations outside of wartime combat would accord with the policy of restricting rights only to the extent absolutely essential because the great majority of cases would be justiciable. In addition, the courts would not have to create a test so vague as to respond to every possible military circumstance. If one standard were to be established for both peace and war situations, it would have to be so elastic that it would be useless.

¹⁵⁵ 369 U.S. 186, 217 (1962).

¹⁵⁶ See Henkin, *supra* note 24, at 599. The political question doctrine, unlike a very deferential standard of review, prevents the courts from placing a constitutional stamp of approval on a legislative or executive action. The judgment is in the hands of a coordinate branch.

¹⁵⁷ See, e.g., *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (Court will not review executive order concerning involvement of U.S. citizens in foreign air transportation); *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923) (legislature determines dates of hostilities).

¹⁵⁸ See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (executive and legislature control foreign affairs); notes 162-68 and accompanying text *infra*.

¹⁵⁹ See notes 190-95, 227-41 and accompanying text *infra*.

¹⁶⁰ See notes 181-89 and accompanying text *infra*.

¹⁶¹ See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

A. *Claims Arising In Combat*

In wartime, the problems of judicial review of military decisions are most acute. The immediate needs of the military in the midst of hostilities are hard to understand and even harder to judge in retrospect.¹⁶² Military leaders must—at crucial moments in battle—use their judgment. In addition, the price of judicial error during a war may be paid in the lives of American soldiers.¹⁶³

The political question doctrine exists for situations where the separation of powers calls for judicial restraint.¹⁶⁴ Foreign policy decisions are the quintessential political questions to which many commentators refer,¹⁶⁵ and which courts have for years refused to adjudicate.¹⁶⁶ One theory behind the political question doctrine is that foreign policy should be in the hands of the government branches directly responsible to the people for their actions.¹⁶⁷ Another argument favoring political question status for foreign policy is the simple constitutional argument that the power was expressly delegated to the executive and Congress and not the judiciary.¹⁶⁸

In 1962, the Supreme Court defined the political question doctrine in *Baker v. Carr*,¹⁶⁹ and clearly established it as a justiciability doctrine. Writing for the majority, Justice Brennan stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by

¹⁶² See Hirschhorn, *supra* note 22, at 202-07, 240; see also Warren, *supra* note 62, at 187 ("[C]ourts are ill-equipped to determine the impact . . . that any particular intrusion upon military authority might have. Many of the problems of the military society are . . . alien to the problems with which the judiciary is trained to deal.").

¹⁶³ See Hirschhorn, *supra* note 22, at 240; see also Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517, 567 (1966) (arguing that difficulty in obtaining information justifies not deciding a case).

¹⁶⁴ C. Wright, *Law of Federal Courts* § 14, at 75 (4th ed. 1970).

¹⁶⁵ See, e.g., Henkin, *supra* note 24, at 610; Scharpf, *supra* note 163, at 541.

¹⁶⁶ As early as 1839, the executive was entrusted with the exclusive power of determining who was the sovereign of a foreign nation. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (President has exclusive power in external relations).

¹⁶⁷ See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

¹⁶⁸ See *Curtiss-Wright*, 299 U.S. at 319-20; U.S. Const. art. II, § 2; note 10 *supra*.

¹⁶⁹ 369 U.S. 186 (1962).

various departments on one question.¹⁷⁰

These criteria are not susceptible of mechanical application, and courts deciding whether to abstain from review because of these factors must weigh their importance against the interests in favor of review. These factors show that the political question doctrine is a combination of jurisdictional limits and prudential discretion,¹⁷¹ because some factors address the constitutional role of the courts in a tripartite system, while some factors address the practical limitations of judicial review.

During wartime, the textual commitment to other branches is particularly strong—Congress is explicitly granted the power to declare war and to support armies.¹⁷² Consistent with the function of the representative body, Congress makes the policy decisions concerning a war, and judicial review of aspects of a war would likely implicate review of these broader decisions.

The President is Commander in Chief of the armed forces,¹⁷³ and while this role belongs to him in both peacetime and wartime, the relative importance of the role to the President and the American people in wartime strengthens the importance of the textual commitment and requires more solicitude from the other branches. Thus, in wartime, there is a particularly strong combination of “textually demonstrable constitutional commitment[s] . . . to coordinate political department[s].”¹⁷⁴

Because of the importance of these particular powers in wartime, combined with the fact that the expression of these powers is making an important international statement, the last three factors¹⁷⁵ in the *Baker* test are more important during times of war than in times of peace. During war, there is an unusual need to have a unified national policy. Because the military functions of the executive and legislature take on increased gravity and public attention, a judicial pronouncement contrary to the political branches in such a circumstance would likely show disrespect and embarrass a coordinate branch. Further, there are not judicially manageable standards for war. The political branches, because they have superior fact-finding machinery and responsibility to the people through the democratic process, are better able than the judiciary to

¹⁷⁰ *Id.* at 217.

¹⁷¹ See Scharpf, *supra* note 163, at 538-49; Tigar, *Judicial Power, the “Political Question Doctrine” and Foreign Relations*, 17 *UCLA L. Rev.* 1135, 1135 (1970).

¹⁷² U.S. Const. art. I, § 8. The constitutionally required two-year appropriations limit requires that Congress review the actions of the armed forces at least that often. The courts will not review the constitutionality of a war. *Cf. Mora v. McNamara*, 389 U.S. 934 (1967) (Court refused to review constitutionality of American involvement in Vietnam).

¹⁷³ U.S. Const. art. II, § 2.

¹⁷⁴ *Baker*, 369 U.S. at 217.

¹⁷⁵ These are: (1) respect due coordinate branches of government, (2) unusual need to adhere to political decision, and (3) embarrassment to other departments. *Id.*

make determinations about war.¹⁷⁶ Furthermore, war, waged against another sovereign nation itself not subject to the constraints of the Constitution, does not fit within the constitutional structure; therefore, the Constitution can offer no guidance about how it should be conducted.¹⁷⁷ The Constitution describes who has power, but says nothing about the manner in which that power should be exercised.

If a court refuses to adjudicate an issue because it is a political question, the court is not condoning the action of the political branches but is merely saying that it is not the judiciary's role to judge the constitutionality of the action.¹⁷⁸ This places a special constitutional responsibility on the political branches to review their own decisions.¹⁷⁹ In times of war the representatives of the people can be trusted with representing the interests of individuals serving their country because a wartime draft involves enough people to make the democratic political system react.¹⁸⁰

B. Claims Arising During Peace

1. Balance of Interests

In times of peace, the emergency interests of a country at war are absent, and the maintenance of the military is less of a foreign policy matter, and more of an internal matter. The factors that the Court enunciated in *Baker*¹⁸¹ are simply not as pressing in peacetime as they are during war.

The textual commitments¹⁸² remain the same during war and peace, but their practical and political importance diminish in peacetime; this reduces the possibility of embarrassing a coordinate branch of government.¹⁸³ In peacetime, there is less need for a nonjudicial policy determination,¹⁸⁴ and it is more appropriate to provide a constitutional

¹⁷⁶ Hirschhorn, *supra* note 22, at 246.

¹⁷⁷ *Id.* at 252.

¹⁷⁸ See Scharpf, *supra* note 163, at 535.

¹⁷⁹ See P. Brest, *Processes of Constitutional Decisionmaking* 1-46 (1975).

¹⁸⁰ The interests of the members of the military will be properly represented on the political scene if there is a draft, because a military comprised of all elements of society is capable of acting through the representative democracy without special solicitude from the antimajoritarian branch of the judiciary. See J. Ely, *Democracy and Distrust* 73-104 (1980) (judicial review allows purification of political process and activism by nonpolitical branch on behalf of minorities who are powerless in that process). However, service personnel during times of peace are powerless to pursue their interests. This is the assumption that partially underlies the two-tiered scrutiny of equal protection jurisprudence. Suspect classes, which cannot protect themselves with majoritarian politics, require judicial protection. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁸¹ See text accompanying note 170 *supra*.

¹⁸² See *Baker v. Carr*, 369 U.S. 189, 217 (1962).

¹⁸³ See *id.*

¹⁸⁴ See *id.*

determination.¹⁸⁵ Judicial standards are more manageable¹⁸⁶ during peace than during war because emergency military needs do not arise during peacetime. Conventional first amendment standards can easily be adapted to consider peacetime interests. Judicial mistakes are also less dangerous in peacetime because lives will not be lost as a result of them, and there is less need to adhere to political decisions already made¹⁸⁷ because those decisions have not been invested with the lives of Americans. When the political question interests are weak, the interest in having the judiciary available to adjudicate cases and controversies¹⁸⁸ argues for justiciability.¹⁸⁹

Standard first amendment law requires the state to justify restrictions on free expression and free exercise of religion by showing that the state has an important interest that cannot be served without the restrictions.¹⁹⁰ With the exception of the narrow class of constitutionally unprotected speech such as obscenity,¹⁹¹ speech cannot be curtailed unless it presents a "clear and present danger" as that phrase is defined in *Brandenburg v. Ohio*.¹⁹² Any time that the state wants to abridge an individual's constitutional right, it must show a compelling state interest.¹⁹³ The regulation must also be narrowly tailored to achieve the state's goal without abridging more protected activity than is necessary,¹⁹⁴ and any regulation that the state proposes for speech that does not present a clear and present danger must be content-neutral.¹⁹⁵ Therefore, the proper

¹⁸⁵ Constitutional determinations are part of the special function of the judiciary. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁸⁶ See *Baker*, 369 U.S. at 217.

¹⁸⁷ See *id.*

¹⁸⁸ See U.S. Const. art. III, § 2.

¹⁸⁹ In *Baker* itself, the Court held that the requirements of the political question doctrine were not sufficiently fulfilled, and proceeded to adjudicate the issue, which was apportionment of a state legislature. 369 U.S. at 208-37.

¹⁹⁰ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (free speech).

¹⁹¹ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957).

¹⁹² 395 U.S. 444 (1969).

¹⁹³ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (state's interest in protecting potential life not great enough to outweigh woman's right to abortion until third trimester); *Yoder*, 406 U.S. at 215 ("only those interests of the highest order . . . not otherwise served" can outweigh free exercise claim); *NAACP v. Button*, 371 U.S. 415, 444 (1963) (state must demonstrate "substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed").

¹⁹⁴ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (state may not discharge all employees who are members of communist organization but may differentiate based on nature of their membership and sensitivity of their positions).

¹⁹⁵ See *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (city cannot choose to allow picketing on particular subject and not others). The state can regulate the time, place, and manner of speech without constitutional infirmity, but may not regulate the content. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding regulation restricting sleeping in public park, even though persons sleeping were protesting for homeless); *Kovacs v.*

standard for adjudication of peacetime cases involving first amendment claims of service personnel should be the established judicial standard for first amendment claims of civilians.

2. *Application of First Amendment Protection to Government Employees as a Model for the Military*

Even if military personnel cannot expect the robust protection that the first amendment provides civilians, there must be a limit on the restrictions imposed on their rights. Groups other than military personnel have special restrictions on their first amendment rights, but those restrictions are limited for certain purposes. Prisoners, for example, do not enjoy the full expressive rights of the rest of the citizenry.¹⁹⁶ Broadcasters can be limited in what they air on the radio.¹⁹⁷ Children also have a less robust first amendment right than adults,¹⁹⁸ particularly as regards their right to receive information.¹⁹⁹

The law as applied to government employees and benefits recipients is a particularly good model for how the law should be applied to military personnel. Government employees have a more restricted first amendment right than the rest of society,²⁰⁰ and their position, relative to the federal government, is analogous to service personnel.²⁰¹ Government employees carry out the will of the American people in the domestic sphere, and military employees do the same in the international sphere; both groups are the means to accomplish the collective national end.²⁰² Both must sometimes sacrifice personal goals for the good of the country.²⁰³ Both are part of a democratic process that does not always function smoothly without safeguards to monitor the process.²⁰⁴ The

Cooper, 336 U.S. 77 (1949) (upholding ordinance that regulated, but did not prohibit, use of loudspeakers).

¹⁹⁶ See *Hudson v. Palmer*, 468 U.S. 517 (1984) (prisoners are entitled to first amendment protection as long as their expression does not interfere with penological objectives); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (prohibition of solicitation for prisoners' union constitutional).

¹⁹⁷ See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (government can regulate indecent language on the radio).

¹⁹⁸ See *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159 (1986) (school may sanction student for making sexual allusions during speech at school assembly).

¹⁹⁹ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (state can control availability of erotic material to youths).

²⁰⁰ See notes 210-26 and accompanying text *infra*.

²⁰¹ See J. Jacobs, *supra* note 40, at 28 (implying civilian workplace is proper model for volunteer armed forces).

²⁰² See Hirschhorn, *supra* note 22, at 234 (on military employees).

²⁰³ Military employees sometimes sacrifice their lives. Civil employees sacrifice their political activism. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

²⁰⁴ See *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (limiting political activities of

major difference between civil service and military employees is often only the government entity that employs them because the content of their work is often the same.²⁰⁵ Therefore, it is logical to treat their claims the same way.

It has been argued that military personnel must be restricted in their political speech to guarantee their military effectiveness.²⁰⁶ However, there is little merit in the argument that the rights of enlisted personnel must be restrained to prevent military encroachment on political decisions. The real danger to democracy comes from the powerful senior military officials who actually are in a position to vie with the civil authorities for power.²⁰⁷ The serviceperson being denied first amendment rights is merely a cog in the military machine. Furthermore, persons entering the armed forces have already been civilian citizens, and it is naive to think the military can erase the political memories of an enlistee.²⁰⁸

The Court has established standards and reasons for restricting the first amendment rights of government employees, and has done so in a limited and principled way.²⁰⁹ These limits and principles should guide the courts in developing a standard of review for military personnel alleging military infringement of their constitutional rights.

a. Permissible restrictions on government employees. The government can place restrictions on the constitutional expression of its employees if it has a compelling reason to do so.²¹⁰ For example, in *United Public Workers v. Mitchell*,²¹¹ the Supreme Court upheld a statute restricting political activity by classified federal employees. It balanced the

government employees to promote integrity and efficiency in civil service).

²⁰⁵ Only 10% of service personnel have jobs involving combat skills, while 54% have jobs involving technical specialties. The rest perform service jobs. "In short, today's military is a big business, with a substantial portion of its members being non-career civilian-soldiers who serve their country in a service job or at a desk." Sherman, *supra* note 39, at 45.

²⁰⁶ See *Greer v. Spock*, 424 U.S. 828, 841 (1980) (Burger, C.J., concurring) ("Permitting political campaigning on military bases cuts against a 200-year tradition of keeping the military separate from political affairs, a tradition that in my view is a constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution."); *Dash v. Commanding Gen.*, 307 F. Supp. 849, 856 (D.S.C. 1969) ("[T]o organize meetings on base, to seek to create of and within the military itself a cohesive force for the purpose of compelling political decisions . . . would undermine civilian government, especially civil control of the military . . ."), *aff'd*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

²⁰⁷ See L. Boudin, *The Army and The First Amendment, in Conscience and Command* 66 (J. Finn ed. 1971) (noting that Truman-MacArthur clash "illustrates the potential danger" of independent judgment of military officials).

²⁰⁸ See Finn, *supra* note 22, at 14-16.

²⁰⁹ See notes 210-26 and accompanying text *infra*.

²¹⁰ This is the standard test in first amendment adjudication. See note 25 *supra*.

²¹¹ 330 U.S. 75 (1947).

"requirements of orderly management of administrative personnel"²¹² against the right of free expression, and found that the balance weighed in favor of the government because political partisanship among certain employees could destroy the democratic process.²¹³ In reviewing congressionally imposed restrictions on the first amendment rights of federal employees, the Court construed the statutes as constitutional on their faces, and respected Congress's evaluation of the interests to be served. However, the Court also inquired into the connection between the government's means and ends to decide if Congress was justified in passing the legislation.²¹⁴

The Court has not always found that the governmental interest justified contraction of government employees' first amendment rights. For example, in *Pickering v. Board of Education*,²¹⁵ the Court held that the discharge of a public school teacher for writing a letter to a local newspaper criticizing the use of funds by the local school board violated his constitutional right of free speech. The Court balanced the first amendment rights of the teacher as citizen against the state's interest in promoting the efficiency of the public services it performs through its employees,²¹⁶ and held that a teacher could not be dismissed for expressing his views on important public issues.²¹⁷

It would be entirely possible for the Court to apply the *Pickering* balancing test in the military context. The Court could allow service personnel to exercise their first amendment rights unless such exercise undermined the services that the military is organized to perform²¹⁸ or the internal organization of the military.²¹⁹ Like all balancing tests, this test gives the courts broad discretion in weighing governmental and individual interests, but any test that requires a compelling state interest places a heavy burden on the government.²²⁰

²¹² Id. at 94.

²¹³ Id. at 96.

²¹⁴ See id. at 101; *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). In upholding the Hatch Act, 5 U.S.C. § 7324(a)(2), the Court wrote:

Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.

413 U.S. at 564.

²¹⁵ 391 U.S. 563 (1968).

²¹⁶ Id. at 568.

²¹⁷ Id. at 574; see also *Mount Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977) (discussing burden of proof in challenging discharge on first amendment grounds).

²¹⁸ See *Connick v. Myers*, 461 U.S. 138, 147 (1983). For example, the military's interest would outweigh the individual's interest if a serviceperson divulged military secrets to a newspaper.

²¹⁹ See id.

²²⁰ It can be argued that military employment is a privilege that the government can deny to

In the teacher dismissal cases,²²¹ a special government employee situation with which the courts have dealt, the Court stressed the equivalent chilling effect that criminal sanctions and threats of removal from employment would have on willing speakers.²²² However, when criminal sanctions are actually involved, as is true for military personnel, the penalties for exercising rights are even greater than in the teacher dismissal cases, and therefore the courts should be more careful in allowing criminal sanctions to be applied. In the military context, a serviceperson is subject to the double penalty of court-martial and involuntary discharge.²²³

individuals. The increasingly contractual nature of the armed forces supports granting the government discretion to bargain for any requirements it desires. See J. Jacobs, *supra* note 40, at 13-17 (describing contractual character of modern volunteer armed forces). Under such a theory, the serviceperson who volunteers for the armed forces waives whatever rights for which he did not bargain. Not only is this argument inapplicable to the draft, it is also inconsistent with established precedent outside the military context. Whether something is considered a personal right or a government benefit, the Supreme Court has held that neither rights nor privileges may be conditioned on waiver of constitutional rights. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963). The one exception to the consistent treatment of rights and privileges has been implicit in the privilege of military employment. In a case upholding a regulation barring single parents with dependent children from the Army, the court wrote, "It is well established that there is no right to enlist in this country's armed services." *Lindenau v. Alexander*, 663 F.2d 68, 72 (10th Cir. 1981).

However, in the civilian sphere, the Supreme Court has explicitly stated, "[T]he theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) (quoting case below, 345 F.2d 236, 239 (1965)). In *Sherbert*, the Court required South Carolina to offer unemployment benefits to people who could not fully comply with the availability-for-work requirements for religious reasons—the state had denied benefits to a Seventh Day Adventist who refused to work on Saturdays—allowing limitations only if the religious actions pose a "substantial threat to public safety, peace, or order." *Sherbert*, 374 U.S. at 403. The Court held that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406.

The Court could have applied the *Sherbert* analysis in *Goldman* and held that because the uniform regulations required Goldman to "violate the tenets of his faith virtually every minute of every work day," *Goldman*, 475 U.S. at 514 (Brennan, J. dissenting), as applied to him they were unconstitutional burdens on free exercise. As the Court stated in *Sherbert*: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404 (footnote omitted). Whether or not military employment is a right or a privilege, it should certainly not be conditioned upon repudiation of religious practice.

²²¹ *Mount Healthy*, 429 U.S. 274, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Keyishian*, 385 U.S. 589, are all included in this category, as are many others. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969).

²²² *Pickering*, 391 U.S. at 574.

²²³ In the armed forces, the kind of discharge a person gets determines pension benefits, and a bad conduct discharge seriously hampers a person's efforts in finding a job in the civilian realm. See *Stapp v. Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970) ("There can be no doubt that a military discharge on other than honorable grounds is punitive in nature, since it stigma-

Although teacher dismissal cases can be distinguished from military cases because the teacher cases involve federal court review of state law, not federal court review of federal law, the teacher dismissal cases are still a sound model for adjudication.²²⁴ Notwithstanding the federalism issue, the theory of constitutional adjudication is the same in both realms: the Constitution is a limit on what government may do. In *Elrod v. Burns*,²²⁵ the Supreme Court explicitly adopted an ultra vires approach to governmental power and stated: "[T]here can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power."²²⁶

The guidelines that these government employee cases establish are good general guidelines for protecting the first amendment rights of all government employees, military or civil. The government should be allowed to restrict first amendment rights if such restriction is necessary for the functioning of government. That restriction, however, should be as narrow as possible, and the Bill of Rights should be considered a limitation on the government's power to control its servants.

b. Application to the military. Conventional first amendment law, as applied to government employees, should guide the federal courts in judging the first amendment rights of military personnel in peacetime. The standard that Justice O'Connor suggested in her dissent in *Goldman v. Weinberger*²²⁷ provides an excellent starting point. It is an explication of classic free exercise law²²⁸ as applied to military personnel. Her stan-

tizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against the serviceman's character, patriotism, or loyalty.").

²²⁴ Pursuant to the supremacy clause of the Constitution, the federal government is able to require the states to enforce federal laws and policies. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; see also *Testa v. Katt*, 330 U.S. 386, 393-94 (1947) (describing states' duties to enforce federal laws).

²²⁵ 427 U.S. 347 (1976).

²²⁶ *Id.* at 352. The *Elrod* court held that government power is limited to what a government may command directly. *Id.* at 359. Therefore, if the military forbids yarmulkes because it cannot constitutionally forbid enlistment of orthodox Jews, the prohibition on yarmulkes would be unconstitutional under *Elrod*. The *Elrod* Court also noted that the government's justification for impairing constitutional rights "must survive exacting scrutiny The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* at 362. The Court explicitly stated that a rational relation between purpose and means is insufficient. *Id.* at 362.

²²⁷ 475 U.S. 503, 530-31 (1986); see text accompanying notes 136-39 *supra*.

²²⁸ Because the case before the Court concerned a free exercise claim, Justice O'Connor used the language of free exercise jurisprudence in her analysis. Because the application of the free exercise clause is essentially the same as that of the free speech clause, see note 26 *supra*, Justice O'Connor's standard may be appropriately applied to free speech analysis as well.

dard would treat all Americans consistently, both in and out of uniform. Under Justice O'Connor's standard,

when the government attempts to deny a Free Exercise claim, it must [first] show that an unusually important interest is at stake, whether the interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served."²²⁹

Any special needs of the military can be taken into account under the "government interest"²³⁰ prong of the test in the same way that courts balance government interests in government employee first amendment adjudication.²³¹ While it is certainly true that the military serves a unique function in our government,²³² so do the local sheriff,²³³ the district attorney's office,²³⁴ the postal service,²³⁵ and the public schools.²³⁶ All these other organizations have been subject to balancing test analysis when their members have raised first amendment claims; only in military cases does the Court accept the government's claim at face value.²³⁷

If the courts had used the *Pickering* balancing test that has been used for government employees²³⁸ in cases involving military personnel, many of the military decisions would have upheld the free speech and free exercise rights of those in the service. For example, in *Goldman*,²³⁹ because the government offered no "explanation of how the contested practice is likely to interfere with the proffered military interest,"²⁴⁰ the regulation forbidding him from wearing a yarmulke while on duty would not have passed muster under a *Pickering* balancing test.²⁴¹

²²⁹ *Goldman*, 475 U.S. at 530 (O'Connor, J., dissenting).

²³⁰ The interests that some courts have taken into account to determine jurisdiction over a claim from the military are more appropriately balanced under the government interest part of the substantive test. See note 57 *supra* for relevant factors.

²³¹ See notes 210-26 and accompanying text *supra*.

²³² This is the argument proffered in support of the separate community doctrine, in the face of which the Court has considered itself completely paralyzed. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981).

²³³ See *Elrod v. Burns*, 427 U.S. 347 (1976).

²³⁴ See *Connick v. Myers*, 461 U.S. 138 (1983).

²³⁵ See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

²³⁶ See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

²³⁷ See notes 124-26, 145-48 and accompanying text *supra*.

²³⁸ See notes 215-17 and accompanying text *supra*.

²³⁹ *Goldman v. Weinberger*, 475 U.S. 503 (1986); see notes 113-44 and accompanying text *supra*.

²⁴⁰ *Id.* at 516. (Brennan, J., dissenting).

²⁴¹ The military did not present any evidence tending to show that the yarmulke exception

Under the O'Connor test, guided by the *Pickering* government employee model,²⁴² the government may have prevailed in *Parker v. Levy*²⁴³ because Dr. Levy was actively undermining the internal command structure²⁴⁴ by encouraging his inferiors to refuse to obey orders.²⁴⁵ However, the Court would have recognized that a serious first amendment problem existed because Dr. Levy was expressing his opinion on matters of the utmost public interest, just as the teacher was doing in *Pickering*.²⁴⁶ Nonetheless, Justice O'Connor's first amendment analysis would require a compelling showing by the government once Levy established that his speech was covered by the first amendment.²⁴⁷ Justice O'Connor's standard requires the military to present evidence proving the importance of the regulation that it wants upheld. " 'Rules are rules' is not by itself a sufficient justification" ²⁴⁸

The second part of the O'Connor test—showing substantial harm or least restrictive means—would place a heavier burden on commanders making decisions than it would upon Congress in legislating.²⁴⁹ This is because many military regulations grant the power to commanders to make exceptions to the regulations,²⁵⁰ and many regulations give commanders great leeway in defining the meaning of the congressional standards.²⁵¹ While a slightly over- or underinclusive congressional mandate might be sufficiently narrow to pass muster under this prong of the test,

would harm the military. See *Goldman v. Secretary of Defense*, 29 Empl. Prac. Dec. (CCH) ¶ 32,753 (D.D.C. 1982) ("[D]eference can only be given to the decision maker regulating the military when its decision was a reasoned and deliberate one."), vacated, 734 F.2d 1531 (D.C. Cir. 1984), aff'd, *Goldman v. Weinberger*, 475 U.S. 503 (1986).

²⁴² See notes 215-17 and accompanying text *supra*.

²⁴³ 417 U.S. 733 (1974); see notes 66-87 and accompanying text *supra*.

²⁴⁴ In *Connick v. Myers*, 461 U.S. 138 (1983), the Court upheld a dismissal of a government worker because the fired individual had undermined a positive working environment.

²⁴⁵ See notes 71-74 and accompanying text *supra*.

²⁴⁶ See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); notes 215-17 and accompanying text *supra*.

²⁴⁷ Although the *Parker* Court held that Levy's speech was not protected by the first amendment, had the Court applied first amendment standards for claims outside of the military, the speech would most certainly have been protected. See *Parker v. Levy*, 417 U.S. 733, 772 (1973) (Douglas, J., dissenting). Political speech is at the core of the first amendment tradition. See, e.g., *Federal Election Comm'n v. Massachusetts Citizens for Life*, 107 S. Ct. 616 (1986); *Perry v. Sindermann*, 408 U.S. 593 (1972); see also Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (1971) (arguing that explicit political speech deserves special first amendment status).

²⁴⁸ *Goldman v. Weinberger*, 475 U.S. 503, 525 (1986) (Blackmun, J., dissenting).

²⁴⁹ Case law indicates that the Court is more often concerned about respecting Congress's judgments than those of commanders. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (congressional decision about registration requirements); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (congressional decision about mandatory discharge).

²⁵⁰ See, e.g., *Goldman*, 475 U.S. at 509 (citing Air Force Reg. 35-10 (1980)); note 45 and accompanying text *supra*.

²⁵¹ See note 47 and accompanying text *supra*.

each commander exception or denial of an exception would have to be legitimated by demonstration of substantial harm. Under this standard, for example, the government would have had to show that granting the requested exemption to Goldman would have undermined the purpose of the uniform regulations, or interfered with the health and safety of Goldman or other service personnel, or have been entirely impractical to administer.

Furthermore, as regards the discretionary decisions of commanders, there is less constitutional tension because the judiciary would not be directly reviewing a decision made by another branch of government, but would be reviewing the decision of someone two levels of power removed from a co-equal branch. Unlike decisions of Congress, commander decisions have not been reviewed by representatives of the electorate, and are not subject to political pressure from the public.²⁵² There are no political checks on the decisions of commanders, as there are for decisions of Congress, and therefore there is a special need for review by the judiciary.²⁵³

As applied, the standard proposed in this Note would accommodate all of the Court's interests in the military area. It would allow the military to pursue an effective and unfettered policy in wartime combat. It would show Congress great respect in its power to legislate for the military, assuming that Congress can support the decisions it makes with factual evidence. And most important, it would greatly increase the first amendment protections for military personnel, reinforcing the courts' role as the guardians of constitutional rights for all Americans.

CONCLUSION

Military personnel suffer much greater abridgment of their first amendment rights than other Americans, and the federal courts are partially responsible because they accept the judgment of the military in-

²⁵² In peacetime, the political process does not check congressional actions affecting the military as well as it does in wartime. The soldiers in a small, peacetime, volunteer armed force are an underrepresented group, and as such need more judicial solicitude than draftees during a war. When the majority is not subject to the consequences of legislation, it would be more likely for the legislature to strike an unjust balance—most voters and legislators would gladly sacrifice someone else's liberty for their own security. Therefore, the serviceperson is not properly protected in the political process during peace. Cf. J. Ely, *supra* note 180. Commanders are not scrutinized by the electorate every two or six years, like members of Congress.

²⁵³ Commander decisions are particularly suspicious because studies have shown that "[t]he armed forces are not always rational; superiors frequently develop emotional attachment to military practices that do not enhance efficiency but do alienate the men subject to them." Hirschhorn, *supra* note 22, at 228. Military authorities have always resisted change that gives servicepersons more autonomy, even though changes have made the armed forces more able and efficient. *Id.* at 243. A few examples of these changes have been: (1) abolition of corporal punishment; (2) racially integrated troops; (3) more legal rights in court-martial; and (4) less formal, more manipulative control. *Id.*

stead of substantively reviewing the merits of each party's claims. Unqualified deference to the professional judgment of the military not only undervalues the rights of service personnel, but also undermines the adjudicative role of the federal courts. By allowing the military to decide when its institutional interests outweigh the interests of the individual serviceperson, the courts allow the military to usurp their role in the American constitutional system.

Throughout history, the federal courts have developed a vast and flexible body of first amendment law, and they have considered themselves fit to review first amendment claims of people in different situations. With proper evidence before a court, it is able to balance the interests of the parties to achieve a just solution. If the courts begin to draw on this body of law and how it has been applied to government employees, then they will have a model against which to adjudicate first amendment claims of military personnel.

In *Goldman v. Weinberger*, the Supreme Court reached its most deferential extreme, and now it should reevaluate that position and recognize the necessity for some standard of review for first amendment claims arising against the military in peacetime. While special concerns during times of war may convince the federal courts that cases arising in combat situations are nonjusticiable pursuant to the political question doctrine, in times of peace, it is not only institutionally appropriate, but constitutionally necessary for the courts to substantively review first amendment claims of military personnel.

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