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Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law

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INTRODUCTION

Late in the election campaign of 1972, People's Party presidential candidate Benjamin Spock and his running mate, Julius Hobson, notified the commander of Fort Dix Military Reservation in New Jersey that they intended to hold a campaign event on the post.[1] Fort Dix was an "open post," and civilians were permitted to drive or walk freely throughout the unrestricted areas of the post.[2] Spock expressed an interest in talking to servicemembers "about the issues that concern them,"[3] which, at the time,

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1. Greer v. Spock, 424 U.S. 828, 832-33 (1976).

2. *Id.* at 830.

3. *Id.* at 858 n.7 (Brennan, J., dissenting) (providing pertinent parts of Spock's letter to

certainly would have included the role of the United States in the ongoing Vietnam War. The Fort Dix commander initially denied the candidates access to the post, but a campaign event was eventually held, just a few days before the election, under a preliminary injunction issued by the Third Circuit Court of Appeals. Spock's rally took place in a Fort Dix parking lot on post property customarily open to the public.[4]

In *Greer v. Spock*,[5] the United States Supreme Court reversed, holding that the military had appropriately exercised its discretion in barring partisan political activity within the confines of Fort Dix.[6] Despite the military's general grant of access to civilians—the opinion contains a fuzzy photograph of the Fort Dix "Visitors Welcome" sign[7]—the post remained fundamentally a military training installation and was not intended to be a public forum open to First Amendment activity.[8] The reasoning underlying the result in *Greer*, however, was the most significant aspect of the opinion. It represented a perspective of civilian-military relations under the Constitution that was destined to dissolve within the next generation. That perspective would dissolve so thoroughly that a reader in the year 2002 might find the language of *Greer* odd, laughable, or perhaps simply obsolete in the modern political age.

In the Court's view, the military's choice to prohibit all politically partisan speech on post was justified by the military's corresponding obligation to remain politically neutral. The military had a unique responsibility to avoid "both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates,"[9] a constitutional mandate different from, and perhaps higher than, the mandate of the First Amendment. It had imposed restrictions on political speech for the stated purpose of maintaining political neutrality, and this was a purpose the Court found "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."[10] Under *Greer*, therefore, the obligation of political neutrality imposed on members of the military was grounded in more than just a traditional understanding of military ethics, which had always expected a neutral—and distant—stance with respect to political matters.[11] More important, political neutrality was now understood as a *constitutional* obligation of the military,

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the Fort Dix commander).

4. *See id.* at 833-34.

5. 424 U.S. 828 (1976).

6. *Id.* at 839-40.

7. *Id.* at 871 (Brennan, J., dissenting).

8. *See id.* at 838 (stating that "it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum"); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (holding that there is no right to face-to-face solicitation in an airport terminal under the public forum doctrine).

9. *Greer*, 424 U.S. at 839.

10. *Id. See generally* Donald N. Zillman & Edward J. Imwinkelried, *The Legacy of* Greer v. Spock*: The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 GEO. L.J. 773 (1977) (arguing that *Greer v. Spock* may not have gone far enough in banning partisan political activities from military installations).

11. *See* MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT 233 (1971). "According to the definitions of military honor, the professional soldier is 'above politics' in domestic affairs. . . . [G]enerals and admirals do not attach themselves to political parties or overtly display partisanship." *Id.*

one mandated by the constitutional understanding of civilian control of the military.[12]

The idea of a politically neutral military now seems somewhat out of place, two years after a presidential election in which the military was portrayed to be—and tended to portray itself as—a political force in clear alignment with the Republican Party's candidate.[13] The 2000 election capped a decade in which the exercise of military discretion increasingly dovetailed with the interests of social conservatism, particularly with respect to issues concerning sexual morality and the advancement of women. Significantly, these questions have been treated as political questions, subject to the judgment of the military or of Congress on the military's behalf, but not as judicial questions. Courts have increasingly deferred to assertions of military necessity, adjusting constitutional expectations as necessary to meet military expectations. The bedrock premise underlying this judicial deference to the military has been that the military's purpose to fight and win wars was so singular and so fundamentally important to the nation's security that standard judicial review of military-based decisions imposed unacceptable risk. The military was simply a different constitutional animal, an institution that, by necessity, required a generous deference to discretionary choice. There now seems to be an accepted understanding that the military is not bound by constitutional requirements in the same way that other governmental institutions are bound, and the principle itself, if not its application, is relatively uncontroversial.[14] Consequently, legal scholarship on military issues, a

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12. *See Greer*, 424 U.S. at 841 (Burger, C.J., concurring) (military's political neutrality is "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").

13. *See* Steven Lee Myers, *When the Military (Ret.) Marches to Its Own Drummer*, N.Y. TIMES, Oct. 1, 2000, § 4, at 4. The military was treated as a "friendly force" for the Republican Party during the controversy concerning Florida overseas absentee ballots cast during the 2000 presidential election. *See* David Barstow & Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, § 1, at 1. The Pentagon provided email addresses of overseas military personnel to representatives of the Republican Party as part of a public relations effort to persuade Florida officials to count nonconforming absentee ballots in Bush-identified counties. *See* C.J. Chivers, *House Republicans Pressed Pentagon for E-Mail Addresses of Sailors*, N.Y. TIMES, July 15, 2001, § 1, at 19.

Coincidentally, the only Supreme Court case other than *Bush v. Gore*, 531 U.S. 98 (2000), to apply federal equal protection principles to state regulation of voting rights concerned the voting rights of military personnel. *See* Carrington v. Rash, 380 U.S. 89 (1965) (invalidating a provision of the Texas Constitution that prohibited out-of-state military personnel who were assigned to a military installation in Texas from ever acquiring voting residency).

14. For contemporary analyses of judicial deference to the military, see C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts"*, 56 U. CIN. L. REV. 779 (1988) (criticizing deference). *See also* Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1 (1992) (criticizing deference); James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (generally approving of the practice of judicial deference to the military); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 563-81 (1991) (criticizing deference); Stephanie A. Levin, *The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1057 (1990) (criticizing deference); John F. O'Connor, *The Origins and Application of the*

strong component of all the best law reviews a generation ago,[15] has dwindled in quantity and quality. That loss of academic focus should be no surprise, as law professors will quickly lose interest when courts no longer see themselves as playing much of a role in evaluating the constitutionality of military decisions.[16]

This Article argues that judicial deference to the military, at least as the principle is understood in contemporary decisions of the Court, is surprisingly recent and not at all constitutionally established. In fact, this deference departs from constitutional text and from a line of Supreme Court precedent concerning civilian-military relations extending back before the Civil War. Broad judicial deference to military discretion is only a creation of the post-Vietnam, all-volunteer military and, more specifically, only a creation of one single Justice of the Supreme Court, William H. Rehnquist.

Rehnquist enlisted the military as a combatant in the culture wars of the Vietnam era, engineering a convergence of military culture and social conservatism that would reach its peak in the decade following the Persian Gulf War. He dismantled a well-established constitutional understanding of civilian control of the military by disabling the judiciary from substantive review of military policy, even under circumstances in

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Military Deference Doctrine, 35 GA. L. REV. 161 (2000) (approving, without reservation, the practice of judicial deference to the military); Ellen Oberwetter, Note, *Rethinking Military Deference: Male-Only Draft Registration and the Intersection of Military Need with Civilian Rights*, 78 TEX. L. REV. 173 (1999) (criticizing deference).

15. *See, e.g.*, Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964); Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40 (1961) [hereinafter Bishop, *Collateral Review*]; Richard E. Blair, *Court-Martial Jurisdiction Over Retired Regulars: An Unwanted Extension of Military Power*, 50 GEO. L.J. 79 (1961); Robinson O. Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366; Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961); Grant S. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of* O'Callahan v. Parker, 54 MINN. L. REV. 1 (1969); Edward F. Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirements*, 55 VA. L. REV. 483 (1969); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

16. The primary exception would be the large body of scholarship critical of the policy excluding gay citizens from military service. For a representative list (as of 1996), see Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 223-24 nn.1-2 (1996). *See also* JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999) (criticizing, in part, the "don't ask, don't tell" policy as being worse for heterosexuals and homosexuals due to its arbitrary nature). This scholarship, however, focuses on the policy in isolation and not in the more general context of military law or civilian-military relations under the Constitution. Even under circumstances in which academic context would seem to require some discussion of civilian-military relations, the subject never appears. In 1988, *The Yale Law Journal* published a very celebrated and much-cited symposium issue on emerging legal theories of civic republicanism, a principle based in large part on a citizen's obligation in defense of country. *See* Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). Nonetheless, only one article in the issue mentioned military service at all, and then, only tangentially. *See* Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1635-36 (1988).

which military policy imposed significant, collateral effects on civilians and on civilian society. Under Rehnquist's leadership on military issues, the Court became increasingly comfortable with a military that was constitutionally separate and constitutionally immune. Judicial deference to matters of military concern has allowed Congress to use claims of military necessity—whether rational or irrational—as a means of resistance to evolving constitutional expectation. It has allowed Congress to use its power to govern the military as a way of influencing social policy within civilian America—and without the limitations otherwise imposed by the Constitution. A generation ago, the reality of the draft made our constitutional understanding of civilian-military relations acutely relevant. Today, in an all-volunteer era, our attention to the subject has diminished. The relevance of civilian-military relations under the Constitution, however, has only grown; its effects are just more stealth.

I. THE CONSTITUTIONAL TRADITION OF CIVILIAN-MILITARY RELATIONS

When President Nixon nominated William H. Rehnquist to the United States Supreme Court on October 21, 1971,[17] a resolution to the conflict in Vietnam was still not in sight. In the last twelve months, the United States had invaded Laos and intensified its bombing raids throughout North Vietnam.[18] Twelve thousand antiwar protesters were arrested during "May Day" protests in Washington, D.C., as Assistant Attorney General Rehnquist advised the President on the potential deployment of military personnel to protect the city.[19] Although ground combat troops were gradually being withdrawn from Vietnam throughout 1972, aerial offensives continued with renewed B-52 strikes against Hanoi and Haiphong.[20] President Nixon vowed that "[t]he bastards have never been bombed like they're going to be bombed this time."[21] Student antiwar protests—often violent—spread across the country, shutting down a number of campuses in April 1972.[22] The military feared that morale and discipline among servicemembers were deteriorating to dangerous levels, and problems related to race, drugs, and mutiny were growing concerns.[23]

These events forged the context in which Rehnquist joined the Court, and the context in which he approached issues concerning the constitutional relationship between the military and civilian society. The legal context in which Rehnquist joined the Court was also a significant factor in explaining the transformation of constitutional precedent soon to come. An instructive place to begin is *O'Callahan v. Parker*,[24] a 1969 Supreme Court decision that represents the height of judicial

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17. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 327 (2d ed. 1996) (describing Senate action on Supreme Court nominees). Rehnquist served as an enlisted man in the Army Air Force during World War II. *See id.* at 282.

18. *See* TOM WELLS, THE WAR WITHIN: AMERICA'S BATTLE OVER VIETNAM 476-77, 531-32 (1994).

19. *See id.* at 486, 512.

20. *See id.* at 533, 536-37.

21. *Id.* at 536.

22. *See id.* at 537-41, 542-43.

23. *See id.* at 474-76, 556-57.

24. 395 U.S. 258 (1969).

willingness to test the constitutionality of decisions made in the exercise of military discretion. *O'Callahan* also illustrates the careful line the Court once attempted to draw in defining the scope of military powers granted to Congress and to the Commander-in-Chief under the Constitution. This is the careful line that Rehnquist would later cross in recasting the constitutional relationship between the military and the civilian society it serves.

Although *O'Callahan* was decided in 1969, during the height of the Vietnam conflict, the case concerned an incident that occurred in the post-Korean, Cold War world of 1956.[25] James O'Callahan was an Army sergeant stationed in the then Territory of Hawaii.[26] While authorized to be off-duty, off-post, and out of uniform, Sergeant O'Callahan assaulted a civilian female at a local hotel.[27] Civilian authorities apprehended a fleeing O'Callahan, but apparently released him to military control once they verified he was a servicemember.[28] O'Callahan was tried by court-martial on charges of attempted rape, housebreaking, and assault with intent to rape. He was convicted on all counts, and both the Army Board of Review and the United States Court of Military Appeals upheld his conviction on appeal.[29]

On a petition for writ of habeas corpus filed in the civilian setting of a federal district court, O'Callahan alleged that the court-martial was without jurisdiction to try him for the offenses charged.[30] Similar petitions for collateral review of court-martial determinations have had a long and largely unsuccessful history, at least when the defendant was a member of the armed forces. Why, then, did the military's exercise of court-martial jurisdiction over O'Callahan raise particular concern, prompting the Court to caution that "expansion of military discipline beyond its proper domain carries with it a threat to liberty"?[31] Understanding why O'Callahan's collateral challenge was distinguishable from the line of deferential decisions preceding *O'Callahan* requires an understanding of the Court's historical treatment of civilian-military relations under the Constitution.

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25. *Id.* at 259.

26. *Id.*

27. *See id.* at 259-60.

28. *Id.* at 260. Servicemembers are subject to the concurrent jurisdiction of military criminal law and the criminal law of the various states. *See* Coleman v. Tennessee, 97 U.S. 509, 513-15 (1878). Under the specific facts of *Coleman*, however, the Court held that the military had exclusive jurisdiction over a servicemember charged with the 1874 murder of a civilian while in military service within Tennessee, an "insurgent" state still under military occupation by the United States. *Id.* at 515, 517. "[T]here would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded." *Id.* at 516. *Compare Coleman with* Grafton v. United States, 206 U.S. 333, 354-55 (1907) (holding that acquittal by court-martial provides constitutional protection against double jeopardy arising from subsequent civil prosecution under the authority of the United States; defendant servicemember could not be re-tried in courts of the United States-controlled Philippine Islands).

29. *O'Callahan*, 395 U.S. at 260-61.

30. *Id.* at 261.

31. *Id.* at 265.

A. Constitutional Text and the Uniform Code of Military Justice

Although the President of the United States serves as the Commander in Chief of the armed forces,[32] the Constitution delegates to Congress much of the routine, day-to-day responsibility for raising, equipping, supporting, disciplining, and governing military forces. Under Article I, section 8, Congress exercises the following military powers:

> 1."To raise and support Armies";[33]
> 2."To provide and maintain a Navy";[34] and
> 3."To make Rules for the Government and Regulation of the land and naval Forces."[35]

The Bill of Rights also makes one important reference concerning the rights of servicemembers under the Constitution. The Fifth Amendment seems to acknowledge and enlarge congressional power to make rules for the government and regulation of the armed forces when it excepts military prosecutions from its requirement for grand jury indictment or presentation. The military exception is specifically worded (and punctuated) to apply only to the grand jury requirement and not to the other trial rights—protections against double jeopardy, self-incrimination, and deprivation of due process—enumerated within the Fifth Amendment.[36] Under the traditional

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32. U.S. CONST. art. II, § 2, cl. 1.

33. U.S. CONST. art. I, § 8, cl. 12 (including the restriction that "no Appropriations of Money to that Use shall be for a longer Term than two Years").

34. U.S. CONST. art. I, § 8, cl. 13.

35. U.S. CONST. art. I, § 8, cl. 14.

36. *See* U.S. CONST. amend. V. The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. (emphasis added). The phrase "when in actual service in time of War or public danger" modifies "[m]ilitia" and not "land or naval forces," which permits peacetime court-martial of members of the active duty armed forces. *See* Johnson v. Sayre, 158 U.S. 109, 114-15 (1895) (quoting U.S. CONST. amend V.).

Given the careful drafting of the Fifth Amendment to provide a military exception to the grand jury clause, and to that clause only, it would seem clear that the remaining protections of the amendment were intended to apply to prosecutions of servicemembers. "What reason is there for making one specific exception for cases arising in the land or naval forces or in the militia if none of the Fifth Amendment is applicable to military trials?" Burns v. Wilson, 346 U.S. 137, 153 (1953) (Douglas, J., dissenting). That conclusion, however, has been less than clear in practice. *Compare* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958) [hereinafter Wiener, *Original Practice I*] *and* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*

practice in place at the time, military defendants were prosecuted by court-martial within the military and not by civilian courts,[37] so it would have made sense to exempt the military from the only command of the Fifth Amendment that required the involvement of an arm of the civilian legal system, the grand jury. Rights of servicemembers under the Sixth Amendment have been measured by the same principle. Although the Sixth Amendment contains no military exception, and in fact fails to mention the military at all, the Court has assumed by implication that a defendant subject to trial by court-martial has, by definition, no right to a civilian trial "by an impartial jury of the State and district wherein the crime shall have been committed."[38]

Congressional power under Article I to raise and support, to provide and maintain, and to govern and regulate the armed forces is at the heart of civilian-military relations under the Constitution. The manner in which Congress has historically exercised these powers—particularly its power to govern and regulate—provides a necessary context for evaluating questions of constitutional structure underlying civilian control of the military. This section offers a short description of the manner in which the military administers its internal system of justice. A sense of the distinctiveness of military law, in comparison to its civilian counterpart, is essential to understanding the limited constitutional role that military justice is designed to play.

The Uniform Code of Military Justice[39] ("UCMJ") is the statutory product of congressional power to make rules for the government and regulation of the armed forces.[40] The UCMJ, enacted in 1950 in an effort to modernize military law, is a criminal and procedural code that applies to all military personnel serving in the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.[41] It provides a comprehensive code of conduct for military life, with a scope far broader than that of state criminal codes. Although the UCMJ does punish instances of misconduct that would constitute criminal offenses under civilian law, it also regulates conduct that

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II, 72 HARV. L. REV. 266 (1958) (arguing that the Bill Of Rights was not intended to apply to trials by court-martial), *with* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (arguing that the Bill of Rights was intended to apply to trials by court-martial).

37. *See* Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 440-49 (1960) (explaining the constitutional basis for court-martial jurisdiction).

38. U.S. CONST. amend. VI; *see Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) (stating that the Framers intended to limit the right of trial by jury under the Sixth Amendment "to those persons who were subject to indictment or presentment in the [F]ifth").

39. 10 U.S.C. §§ 801-946 (2000).

40. *See* Weiss v. United States, 510 U.S. 163, 166-69 (1994) (describing the structure of the military justice system; distinguishing the military's various trial and appellate courts; and explaining the duties of military judges); FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE (2d ed. 1999) (discussing military criminal law and procedure as codified in the UCMJ); Michael I. Spak & Jonathan P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481 (1999) (containing an extensive discussion of court-martial procedure).

41. *See* 10 U.S.C. § 802. Before enactment of the UCMJ in 1950, military criminal codes were service-specific. The UCMJ applies to all military personnel and is therefore "uniform." *See* Spak & Tomes, *supra* note 40, at 482-83.

would otherwise not be subject to criminal sanction in civilian society.[42] Despite their comprehensive reach, however, military rules of discipline are not quite as draconian and intrusive, in comparison to civilian laws, as they may initially appear to be.[43] The nature of the consequences for improper conduct tends to differ more than either the severity of the consequences or the standard of behavior expected. Misbehavior that would be "disciplined" in the civilian world by the filing of a lawsuit or by an unfavorable employment action—firing or demotion, for example—is instead disciplined in the military by means of a criminal code, the UCMJ. Most minor offenses under the UCMJ, however, are resolved without prosecution through nonjudicial forms of discipline.[44] The range of criminal sanction available within the military criminal justice system is extremely flexible, designed for purposes of discipline and education to a much greater degree than civilian rules of criminal sanction.

The flexibility of the military justice system is its most distinctive feature. Although by necessity it addresses serious criminal offenses committed by servicemembers, the vast majority of its function relates to the maintenance of good order and discipline. When used most effectively, the military justice system teaches and corrects as much as it punishes, with the goal of returning the offender to duty as a better servicemember.[45] Violators of the UCMJ are subject to trial by court-martial, an

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42. *Compare* 10 U.S.C. § 918 (murder) *and id.* § 919 (manslaughter), *with id.* § 889 (disrespect toward a superior commissioned officer) *and id.* § 915 (malingering).

43. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 749 (1974) (stating that the UCMJ "regulate[s] aspects of the conduct of members of the military which in the civilian sphere are left unregulated"). Those who emphasize the greater reach of the military's criminal justice system inevitably fail to note the reduced scope of civil remedies available to servicemembers. For example, a servicemember who commits an act of sexual harassment against a colleague is subject to criminal punishment, but his employer, the United States government, is immune from a civil suit for that conduct. *See* Feres v. United States, 340 U.S. 135 (1950) (barring suit under the Federal Tort Claims Act for servicemember's injury sustained incident to military service).

44. *See* 10 U.S.C. § 815. Military commanders have authority to impose a minor, nonjudicial form of punishment in lieu of court-martial, with the servicemember's consent (nonjudicial punishment is commonly termed an "Article 15" for the controlling UCMJ section number). The commander determines guilt summarily without formal trial, but punishment is limited in severity and no record of conviction attaches. Eligible forms of punishment include short detentions, small reductions in pay or rank, extra duties, and restrictions. *See id.*

45. One of the instances in which the UCMJ may not have been used very effectively concerned the court-martial of Sergeant Major Gene McKinney by the United States Army. Sergeant Major McKinney, the highest-ranking enlisted person in the Army, was charged with a series of offenses arising out of several relatively minor acts of sex-related assault, such as unwelcome kissing, hugging, and sexual remarks. Rather than seeking a form of discipline that fit the severity of the offense, the Army sought convictions on charges punishable by up to fifty-five years in prison. McKinney was acquitted on all charges except one relating to an attempt to influence the testimony of a witness, and the unintended legacy of the failed prosecution was the public impression that (1) the Army did not take sexual harassment seriously; (2) that servicewomen were not credible; or (3) both. *See generally* Lara A. Ballard, *The Trial of Sergeant Major McKinney: An After Action Report*, 3 GEO. J. GENDER & L. 1 (2001) (describing in detail the McKinney prosecution and arguing that a nonjudicial

Article I proceeding that is completely unrelated to the concept of a federal court contemplated by Article III of the Constitution.[46] A court-martial is not a permanent trial court, but is, instead, an ad hoc military tribunal convened as necessary by the order of military authorities. Military judges and military defense counsel are similarly detailed to courts-martial as necessary, although they report to superior officers through a legal chain of command, not through the operational chain of military command responsible for the initial decision to prosecute the defendant.[47] Military judges and military defense counsel were separated from the usual military hierarchy as a small acknowledgment of a larger issue: the danger of inappropriate "command influence" in the administration of military justice.[48] Nonprosecutorial officers of the court will never have the degree of independence taken for granted in civilian courts, because military judges and defense counsel will eventually rotate through a variety of legal duties and are ultimately dependent upon command approval for promotion and assignment. Military trial judges do not have life tenure; they do not even serve for a fixed term of years.[49]

Court-martial procedures vary in both formality and adversariness, depending upon the severity of the offense charged and the level of punishment that can be imposed. First, a summary court-martial is the least formal, designed for minor offenses and limited forms of punishment.[50] Its presiding officer, who need not even be a lawyer, proceeds in the fashion of an inquisitorial tribunal and "acts as judge, factfinder,

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resolution would have strengthened the Army community and provided more effective relief to the victims).

46. *See* O'Callahan v. Parker, 395 U.S. 258, 261 (1969) (commenting on "a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply").

47. *See* 10 U.S.C. §§ 826-27 (2000) (requiring the Secretary of each service to prescribe regulations for the assignment of counsel and placing military judges under the authority of the individual service's Judge Advocates General); Weiss v. United States, 510 U.S. 163, 175-76, 180 (1994) (noting that military judges are temporarily "detailed" to judicial functions).

48. *See* 10 U.S.C. § 837 (2000) (prohibiting any person from attempting to influence a court-martial or its members); 1 GILLIGAN & LEDERER, *supra* note 40, §§ 8-16.00, 14-80.00 (discussing command influence issues); 2 GILLIGAN & LEDERER, *supra* note 40, § 15-90.00 (same); Lieutenant Colonel Lawrence J. Morris, *"This Better Be Good": The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49.

49. *See Weiss*, 510 U.S. at 170, 176, 181 (holding that due process did not require military trial judges to have a fixed term of office, and that the Appointments Clause did not require separate appointment as a military judge in addition to appointment as a commissioned military officer). An independent commission that reviewed the Uniform Code of Military Justice on the occasion of its fiftieth anniversary recently recommended several reforms designed to strengthen the independence of military judges within the court-martial system. The commission recommended (1) the creation of standing judicial circuits to replace ad hoc tribunals; (2) fixed terms of office for military judges; and (3) a system of random selection of court-martial members (jurors), rather than selection of members by the same convening authority (military commander) who initiated the investigation and prosecution. *See* REPORT OF THE COX COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE §§ III.B-C (May 2001), http://www.nimj.org.

50. *See* 10 U.S.C. §§ 816(3), 820 (limiting sentences of confinement to a maximum of one month).

prosecutor, and defense counsel."[51] Second, a special court-martial, an intermediate proceeding, usually consists of a military judge and a jury ("members," in military parlance) of at least three, although the defendant can choose to proceed before a judge alone.[52] Unlike a summary court-martial, the defendant in a special court-martial is entitled to appointed counsel.[53] In comparison to civilian state and federal courts, however, the severity of punishment that a special court-martial can impose is minimal.[54] Third and finally, a general court-martial is the proceeding most equivalent in formality to a civilian criminal trial. It can impose any lawful sentence, including the death penalty. The minimum jury size increases to five, and the court-martial must be conducted under the supervision of a military judge.[55]

Appeals from court-martial convictions are heard by the military's own two-tier system of appellate courts.[56] Four Courts of Criminal Appeals—one each for the Army, Air Force, Coast Guard, and the Navy/Marine Corps—review all cases in which the defendant received a "bad" discharge from the military or was sentenced to at least one year of confinement.[57] Judges of the Courts of Criminal Appeals ("CCA") are normally senior, active-duty military lawyers or retired military lawyers, and they are selected for the court by each service's lead lawyer, the Judge Advocate General.[58] The CCA's review of court-martial findings is much more searching and intrusive than that of a civilian appellate court, allowing the judges to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact" in addition to the usual questions of law reviewed on appeal.[59]

The highest court in the military justice system is the United States Court of Appeals for the Armed Forces ("USCAAF"), which generally accepts cases on a discretionary basis.[60] The USCAAF is the most "civilianized" and independent

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51. Middendorf v. Henry, 425 U.S. 25, 31, 32 (1976).

52. *See* 10 U.S.C. § 816(2) (2000).

53. *See id.* § 827(a).

54. *See id.* § 819 (limiting sentences of confinement to a maximum of one year).

55. *See id.* §§ 816(1), 826(a).

56. Before entering the military appellate process, court-martial findings are reviewed by the military commander who convened the court-martial—with the advice of legal counsel for the command—and by the appropriate Judge Advocate General, the most senior lawyer in each of the service branches. *See id.* §§ 860, 864.

57. *See id.* § 866(a), (b); *see also* 2 GILLIGAN & LEDERER, *supra* note 40, § 25-51.00, at 529.

58. See 10 U.S.C. § 866(a); *see also* 2 GILLIGAN & LEDERER, *supra* note 40, § 25-51.00, at 530 n.111.

59. 10 U.S.C. § 866(c).

60. *See id.* § 867(a). The USCAAF reviews all death penalty cases automatically. *See id.* The most extensive treatment of the military's highest court can be found in a two-volume history authored by Jonathan Lurie. *See generally* JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950 (1992); JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980 (1998). *See also* Jonathan Lurie, *The Role of the Federal Judiciary in the Governance of the American Military: The United States Supreme Court and "Civil Rights and Supervision" Over the Armed Forces*, *in* THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989 (Richard H. Kohn ed., 1991).

component of the military justice system, composed entirely of civilian judges appointed by the President and confirmed by the Senate for fixed terms of fifteen years.[61] In practice, however, judges of the USCAAF will most often be nominated on the basis of their prior experience as lawyers and judges within the military justice system, so they are likely to have a substantial military pedigree.[62] USCAAF judges are not Article III judges and do not have lifetime tenure; the civilian influence that the USCAAF brings to military justice, such that it is, arises only from the fact that its judges are not subject to military evaluation, promotion, and assignment. From top to bottom, the military appellate system is completely separate and apart from the federal appellate system, just as courts-martial operate independently from federal district courts and state trial courts.[63] As a result, military discipline is governed in its entirety outside the bounds of the civilian legal system. Civilian courts have no appellate jurisdiction to supervise the administration of military criminal justice, except in the rare circumstance in which the United States Supreme Court reviews a decision of the USCAAF by writ of certiorari.[64] Congress's choice on that matter was a deliberate one.[65]

B. Collateral Challenges to Court-Martial Rulings

The Supreme Court has issued a remarkable number of decisions ruling on petitions for habeas corpus (or other avenues of collateral relief) filed by servicemembers who have been convicted of various offenses by court-martial. The number is remarkable primarily because the rulings in these cases have been so uniformly unfriendly to military petitioners. *Dynes v. Hoover*[66] established the deferential posture assumed by civilian courts in relation to their military counterparts before the beginning of the Civil War.[67] Naval seaman Frank Dynes first argued that his court-martial conviction for "attempting to desert" was void because Congress had enumerated a specific naval offense only for the completed act of desertion, but not for its mere attempt.[68] The

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61. *See* 10 U.S.C. § 942(b).

62. *Cf.* 2 GILLIGAN & LEDERER, *supra* note 40, § 25-61.00, at 543 n.202. Persons who retire after twenty or more years of active duty in the military, however, do not qualify as "civilians" and are not eligible for appointment to the USCAAF. *See* 10 U.S.C. § 942(b)(4).

63. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857) (stating that Congress's constitutional power to provide for trial and punishment of military offenses "is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other").

64. *See* 10 U.S.C. § 867a(a). The Supreme Court may not review the USCAAF's refusal to grant a petition for review. *Id.*

65. *See* Noyd v. Boyd, 395 U.S. 683 (1969). The Court stated:

> When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

Id. at 694.

66. 61 U.S. (20 How.) at 65.

67. *Id.*

68. *Id.* at 70.

seaman's second, and more specious, contention was that his offense and subsequent six-month incarceration also failed to fall within a more general article governing naval personnel, one mandating that "crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs at sea."[69]

The Court wanted no part of Dynes's challenge to his confinement. By virtue of legislative power to "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces,"[70] Congress had the authority to provide for trial and punishment of military offenses by court-martial. That power arose under Article I of the Constitution, not under the judicial function of Article III; the two powers were "entirely independent of each another."[71] Congress had designated the Secretary of the Navy as Dynes's sole source of appeal from conviction by court-martial, and, therefore "civil courts have nothing to do, nor are [court-martial convictions] in any way alterable by them."[72] "[N]o appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."[73] Only when the court-martial itself was convened without jurisdiction could civilian courts interfere. The Court stated:

> When confirmed [within the military chain of command], it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the *subject-matter or charge*, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise.[74]

The Court's choice to defer to an exercise of military discretion in *Dynes* made sense, not only with respect to the text of the Constitution, but also in terms of more pragmatic considerations. Article I, Section 8, Clause 14 authorizes Congress to "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces," expressly intending the military to be controlled by a system of discipline that is separate and distinct from the criminal prohibitions that control conduct in civilian society. The military may criminally prosecute acts of desertion, for example, based on the military's particular need to compel performance of duty under the most arduous circumstances, even though civilian criminal law fails to prohibit any analogous offense.[75] Furthermore, civilian courts enjoy no special expertise in

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69. *Id.* at 70-71. It is difficult to imagine the reasoning behind the petitioner's belief that an attempted act of *desertion* would not violate some fairly well-established naval custom. *Id.* at 74. "Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army. . . ." *Id.* at 82. "Absence" offenses—desertion, absence without leave ("AWOL"), or missing movement—are uniquely military offenses that remain subject to criminal sanctions under the present-day Uniform Code of Military Justice. *See* 10 U.S.C. §§ 885-87 (2000).

70. *See* U.S. CONST. art. I, § 8, cl. 14.

71. *Dynes*, 61 U.S. (20 How.) at 79.

72. *Id.* at 82.

73. *Id.*

74. *Id.* at 81 (emphasis in original).

75. *See id.* at 82-83.

evaluating whether, under what circumstances, or to what degree, an instance of desertion affects military discipline. Neither do they have any practical means of determining the degree or the method of punishment necessary to compel attention to military duty. The Court recognized there was little to gain in condoning a practice of judicial review under which "the civil courts would virtually administer the rules and articles of war."[76]

Subsequent decisions by the Court followed the same standard of deference to military discretion. Typically, these cases declined to review specific factual determinations related to court-martial or other military administrative procedure, weight of the evidence, severity of punishment, or the quality and worthiness of an individual's record of military service. Over the next century the Court upheld, without any substantive review, the following military determinations: fraudulent manipulation of naval contracts constituted "scandalous conduct, tending to the destruction of good morals";[77] a conviction for desertion was warranted despite an allegation of invalid enlistment;[78] nonpayment of indebtedness constituted conduct unbecoming an officer and a gentleman;[79] a naval paymaster's clerk had been served

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76. *Id.* at 82.

77. *See* Smith v. Whitney, 116 U.S. 167, 186 (1886).

78. *See In re* Grimley, 137 U.S. 147, 156-57 (1890). Grimley was forty years old, but had represented himself to be twenty-eight. Only "effective and able-bodied men . . . between the ages of sixteen and thirty-five years" were permitted by law to enlist. *Id.* at 150. The Court, nonetheless, held his enlistment valid in accordance with the law of contract, finding that Grimley had undertaken a voluntary obligation. *Id.* at 151. Grimley's military career was a short one; he apparently changed his mind within minutes after taking an oath of allegiance. He had time to put on a military cap, but not the rest of the uniform. *Id.* at 154.

Interestingly, the Court offered the analogy of a individual who falsely represents that he is of Anglo-Saxon descent in order to obtain the benefit of a contract which was limited to individuals of that race. *See id.* at 151. It seems unlikely that the Court would have considered misrepresentation of race to be merely "incidental" (as it described Grimley's misrepresentation of age), if the consequence of finding a valid enlistment was to compel integrated military service. In *Grimley*, the government's only purpose was to preserve Grimley's military status and, therefore, maintain court-martial jurisdiction.

As a more modern example, consider gay servicemembers who have misrepresented sexual orientation in order to enlist. The military would most likely rely on that misrepresentation for the purpose of assessing punishment or determining the character of discharge; it would not argue the contractual immateriality of the misrepresentation for the purpose of compelling continued service. One often overlooked benefit of the failed "Don't Ask, Don't Tell" policy is that it eliminated the possibility of fraudulent enlistment prosecutions against gay servicemembers, because they are no longer asked to declare sexual orientation or recite their sexual histories upon enlistment. *See* U.S. Department of Defense, Directive 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION E1.2.8.1 (Dec. 21, 1993), http://www.dtic.mil/whs/directives/corres/html/130426.htm ("Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual."). A servicemember who "procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment" is subject to criminal prosecution under the Uniform Code of Military Justice. *See* 10 U.S.C. § 883 (2000) (prohibiting fraudulent enlistment, appointment, or separation).

79. *See* United States v. Fletcher, 148 U.S. 84, 91-92 (1893).

with a copy of the charge and specification against him in a timely fashion;[80] additional or alternate jurors in a court-martial could not have been appointed "without manifest injury to the service";[81] evidence of fraud and embezzlement was sufficient to support a verdict;[82] an artillery officer was not entitled to medical retirement pay for nervous exhaustion;[83] an infantry captain was in fact a member of the armed services, although that fact did not appear in the original trial record;[84] certain officers were eligible to sit as members of a court-martial jury;[85] and a particular servicemember should be discharged as part of the peacetime reduction in force following World War I.[86]

The common factor in this mass of seemingly trivial detail is the Court's tremendous reluctance to manage the infinite number of individualized decisions necessary to govern and regulate military personnel. The Constitution provides for rules of military discipline that operate independently of the laws that "discipline" civilian life, and Article III courts have not been granted any direct supervisory or appellate role concerning this exercise of military discretion. The Court has consistently declined to second-guess the intensely factual and contextual determinations that inevitably arise in the administration of these separate rules of military discipline:

> Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise.[87]

The willingness of Article III courts to second-guess the actions and decisions of courts-martial is no greater when the challenge seems based in a more fundamental

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80. *See* Johnson v. Sayre, 158 U.S. 109, 117-18 (1895).

81. Swaim v. United States, 165 U.S. 553, 559 (1897). For those who assume that general officers would never face trial by court-martial, Swaim demonstrates an early exception to the rule. Not only was Brigadier General [one star] David G. Swaim a general, he was also the Judge Advocate General, the most senior lawyer in the entire United States Army. *Id.* at 554. General Swaim was convicted on the basis of conduct "to the prejudice of good order and military discipline" that remained unspecified throughout the Court's opinion. *Id.* at 561.

Over half of the officers who sat in judgment of General Swaim were colonels, one grade lower in rank than the defendant. The applicable article of war provided that "no officer shall, when it can be avoided, be tried by officers inferior to him in rank." *Id.* at 559. General Swaim also objected to the failure to strike one allegedly biased court-martial member. Other errors in the admission of evidence were alleged as well. *Id.* at 560-61.

82. *See* Carter v. McClaughry, 183 U.S. 365, 394 (1902).

83. *See* Reaves v. Ainsworth, 219 U.S. 296, 299-300 (1911).

84. *See* Givens v. Zerbst, 255 U.S. 11, 19-20 (1921).

85. *See* Kahn v. Anderson, 255 U.S. 1, 6 (1921).

86. *See* United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 342 (1922); *see also* United States *ex rel.* French v. Weeks, 259 U.S. 326, 327 (1922).

87. *French*, 259 U.S. at 335.

unfairness or lack of due process. Some collateral challenges allege that a court-martial proceeding was nothing more than a sham—a military "railroading" of a defendant without regard to justice or impartiality. In these cases, the Supreme Court has maintained its deferential stance concerning administration of the military's separate and distinctive system of justice under the Constitution. In the Court's view, military rules for the regulation of the armed forces are not Article III rules, and the civilian courts have no constitutional business in telling the military how to conduct a court-martial.

In *Burns v. Wilson*,[88] a 1953 decision still cited in support of judicial deference to military discretion,[89] servicemembers argued they had been subjected to court-martial in an atmosphere of hysteria following commission of a brutal crime. Petitioners were convicted of rape and murder and sentenced to death. Their collateral challenge in federal district court raised issues of coerced confessions, inadequate representation, fabricated evidence, and intimidation of witnesses by the prosecution.[90] The seriousness of the allegations, however, did not change the fact that military appeals start and end within the military, as a matter of congressional choice. "This grant to set up military courts is as distinct as the grant to set up civil courts. Congress has acted to implement both grants. Each hierarchy of courts is distinct from the other."[91] As long as the military gives its servicemembers an opportunity to be heard and to establish their claims, civil courts cannot reevaluate a court-martial's determination.[92] The military concept of due process is, in the Court's view, a simple one. "To those in the military or naval service of the United States the military law is due process."[93]

The underlying interest that explains and justifies this distinctive set of rules to govern and regulate military personnel—rules "separate and apart from"[94] civilian law—is the military's distinctive need for discipline. *Burns v. Wilson* emphasized that constitutional rights must "be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck."[95] It would be easy to assume this same deferential

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88. 346 U.S. 137, 137 (1953) (plurality opinion).

89. Solorio v. United States, 483 U.S. 435, 440 (1987); *see also* Chappell v. Wallace, 462 U.S. 296, 300 (1983); Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

90. *Burns*, 346 U.S. at 138. Future Justice Thurgood Marshall participated on the briefs. *Id.* at 137.

91. *Id.* at 147 (Minton, J., concurring).

92. *See id.* at 144-45. Civil courts had power to review only if "military courts manifestly refused to consider those claims." *Id.* at 142; *see also* Hiatt v. Brown, 339 U.S. 103, 110-11 (1950) (affirming without substantive review a court-martial proceeding in which the "law member" appointed was a "Colonel from the Field Artillery," not an officer from the "Judge Advocate General's Department"; assignment was within the discretion of the appointing authority).

93. Reaves v. Ainsworth, 219 U.S. 296, 304 (1911). *But see* Bishop, *Collateral Review*, *supra* note 15, at 70-71 (favoring civilian collateral review of court-martial determinations). "Congress may have made the Court of Military Appeals [(today's Court of Appeals for the Armed Forces)] the final arbiter of the meaning of the Uniform Code of Military Justice, but the Supreme Court of the United States is the final arbiter of the meaning of the Constitution of the United States." *Id.* at 58.

94. *Burns*, 346 U.S. at 140.

95. *Id.*

judicial posture would apply with respect to all matters of military discretion undertaken with a view toward maintaining military discipline, but such an assumption would be inaccurate, at least prior to the Rehnquist era.

The most distinctive and noteworthy aspect of the Court's traditional view of civilian-military relations under the Constitution was the bright line drawn between military-related decisions that were deserving of judicial deference and those that were not. Military decisions were not worthy of deference simply because they were military. Military decisions were worthy of deference only when those decisions fell uniquely within the particular grants of power awarded to Congress and delegated to the military under the Constitution, and when substantive judicial review would be destructive of the effective exercise of that power. Collateral judicial review of the individualized determinations of military tribunals was unnecessary and even inappropriate when those individualized determinations were made under a separate and distinctive means of disciplining and regulating members of the armed forces.

The Court's reliance on disciplinary necessity as a basis for judicial deference to military choice has also extended to circumstances outside the narrow parameters of court-martial jurisdiction. The most prominent example of deference to the disciplinary needs of the military appears in the *Feres* line of cases. *Feres v. United States*[96] barred servicemembers from filing suit against the government for injuries incurred if "the injuries arise out of or are in the course of activity incident to service."[97] Waiver of sovereign immunity under the Federal Tort Claims Act ("FTCA") did not permit a private cause of action for servicemembers because, in the Court's view, servicemembers have never had a private cause of action for harms suffered within the scope of military duty.[98] The Court was unaware of any law allowing "a soldier to recover for negligence, either against his superior officers or the Government he is serving."[99] The relationship of a civilian to a government actor under the FTCA was inapposite to the relationship of a servicemember to the sovereign, because "no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of

96. 340 U.S. 135 (1950).

97. *Id.* at 146. The circumstances leading to the servicemembers' injuries in the three cases consolidated for review were not particularly related to military duty except for the fact that each servicemember suffered harm as the result of a fellow servicemember's culpable act. *Id.* at 138. Two of the cases involved alleged medical malpractice by a military physician; in the third case, a servicemember was killed in a barracks fire allegedly caused by the military's negligent maintenance and supervision. *Id.* at 137. The injuries were "incident to service" not because the military considers mistreatment by colleagues to be a natural component of military service, but because the mistreatment occurred in the course of activity that was otherwise related to military service, such as receiving medical treatment or sleeping in the barracks. *Compare Feres*, 340 U.S. at 146, *with* Brooks v. United States, 337 U.S. 49, 51 (1949) (permitting recovery by servicemembers who were on leave, away from their place of assignment, and driving on a public highway, for injuries caused by negligent operation of government-owned and government-operated vehicle), *and* United States v. Brown, 348 U.S. 110, 112 (1954) (permitting recovery by veteran injured by postdischarge medical malpractice, although medical treatment related to injury suffered while on active duty).

98. *Feres*, 340 U.S. at 142-43.

99. *Id.* at 134.

command."[100]

Much of the reasoning behind *Feres* appeared (or, in Justice Scalia's view, was invented[101]) in later cases. The Court's denial of a cause of action under the FTCA was grounded in the military's particular need to maintain good order and discipline, the same reason earlier cases had denied jurisdiction over court-martial determinations to Article III courts.[102] *Feres* rests on the military's interest in identifying and correcting misconduct by methods that may differ from those used in civilian society. It expresses a reluctance to enforce discipline by lawsuit, which is, in essence, the ultimate way in which civilian society enforces expectations of appropriate conduct. In contrast, the military's interest in the maintenance of effective command relationships between superiors and subordinates counsels an "in-house" means of correcting misconduct that does not rely on the filing of lawsuits:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.[103]

Although the *Feres* cases are not constitutional in nature, they are consistent with

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100. *Id.* at 141-42.

101. *See* United States v. Johnson, 481 U.S. 681, 694-98 (1987) (5-4 decision) (Scalia, J., dissenting) (contending that concerns for military discipline were a "later-conceived-of" rationale for *Feres*).

102. *See id.* at 691 (stating that servicemember lawsuits would "necessarily implicate[] the military judgments and decisions that are inextricably intertwined with the conduct of the military mission" and might undermine "duty and loyalty to one's service and to one's country"). Academic commentary, including academic commentary by military lawyers, has generally been critical of the idea that the *Feres* bar enhances military discipline. *See id.* at 701 n.* (Scalia, Brennan, Marshall, & Stevens, JJ., dissenting) (compiling authority critical of the *Feres* doctrine). As currently formulated, *Feres* sweeps within its holding a broad range of activities that have only the most indirect effect on command relationships, although they involve military personnel. *See, e.g., id.* at 681 (denying recovery for negligence of civilian air traffic controllers employed by the Federal Aviation Administration); *Feres*, 340 U.S. at 137 (denying recovery for medical malpractice).

103. United States v. Brown, 348 U.S. 10, 112 (1954). It would be possible to misinterpret the shorthand "incident to service" phrase of the *Feres* holding as indicating that mistreatment by friendly forces is simply part of what it means to be in the military. *Feres*, 340 U.S. at 146. The criticism is particularly acute in the case of sexual misconduct against female servicemembers, raising the concern that *Feres* transforms sexual assault into an expected component of military life, a harm that women are expected to endure simply because they have chosen to serve in the military.

This particular characterization of *Feres* would be inaccurate. *Feres* does not bar suit by servicemembers because sexual assault is a traditional expectation of military life any more than it bars suit because medical malpractice is a traditional expectation of military life. *See id.* at 145. *Feres* bars suit by servicemembers under the assumption that discipline by lawsuit is not the most effective way to maintain discipline in a military environment. *See id.* at 141-43; *see also* Brown, 348 U.S at 112.

the constitutional core that underlies the Court's analysis of judicial deference to exercises of Article I military powers. That constitutional core rests in the internal disciplinary and managerial needs of the military institution, and the Court's task has been to define those military-related decisions that properly fall within that singular purpose.

C. Court-Martial Jurisdiction Over Civilians

A principal example of careful line-drawing between military choices that are deserving of deference and military choices that are not so deserving is found in the Court's opinions limiting the jurisdiction of military courts over civilians.[104] When the exercise of Article I power to govern and regulate the armed forces has an effect on civilians, the Court historically (again, before the Rehnquist era) has acted decisively to confine military discretion to its proper, constitutional scope.[105]

The Civil War and World War II raised distinctive legal questions involving civilian-military relations because both those wars were fought, at least in part in the case of World War II, on American territory. Under those circumstances, military authorities have sought to regulate and criminally prosecute the activities of civilians when their conduct interfered with military effectiveness. Such blurring of the jurisdictional lines between civilian and military authority is often termed "martial law," an obscure description of an extraordinary set of circumstances. Under martial law in time of war, a military commander theoretically has the discretion, if exigencies require, "to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will."[106] The gravity of a military attempt to enforce martial law cannot be underestimated. If martial law is truly warranted, then "republican government is a failure, and there is an end of liberty regulated by law."[107] Martial law "destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power.'"[108]

In the Civil War-era *Ex parte Milligan*,[109] a civilian citizen of the state of Indiana

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104. *See e.g.*, Kinsella v. Unites States, 361 U.S. 234 (1960); McElroy v. United States, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957).

105. *See e.g.*, *Kinsella*, 361 U.S. 234; *McElroy*, 361 U.S. 281; *Reid*, 354 U.S. 1.

106. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124 (1866). Subsequent to World War II the Court was still attempting to refine various definitions of the state of affairs that constituted "martial law":

> [T]he term "martial law" carries no precise meaning. The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some it has been identified as "military law" limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but denotes simply some kind of day to day expression of a general's will dictated by what he considers the imperious necessity of the moment.

Duncan v. Kahanamoku, 327 U.S. 304, 315 (1946).

107. *Milligan*, 71 U.S. (4 Wall.) at 124.

108. *Id.*

109. *Id.* at 2.

was arrested, tried, and sentenced to death by a "military commission," a military tribunal convened by the military commandant of the military district encompassing Indiana.[110] The charges filed against Milligan involved conduct alleged to be a direct threat to the effectiveness of the United States Army: conspiracy against the government of the United States; affording aid and comfort to rebels; inciting insurrection; disloyalty; and violation of the laws of war.[111] More specifically, Milligan was considered a Confederate collaborator who conspired to "seize munitions of war," "liberate prisoners of war," and "resist[] the draft."[112] His alleged crimes were without doubt injurious to military effectiveness.

Despite the intense and understandable interest of the military in controlling Milligan's conduct and deterring others from following his lead, the Court held that the military commission had no jurisdiction over a civilian offender. The argument that some form of "martial law" permitted the military to bypass civilian judicial authority was found to be completely without merit:

> It can serve no useful purpose to inquire what those laws and usages [of martial law] are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service.[113]

The Court did note that the Constitution provides for a legislative grant of jurisdiction to military tribunals over the criminal offenses of servicemembers.[114] This limited grant of jurisdiction was rooted in military exigency, acknowledging that the "discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts."[115] The fact, however,

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110. *Id.* at 107.

111. *Id.* at 6.

112. *Id.* at 5.

113. *Id.* at 121-22. Neither can the military impose martial law in anticipation of potential civil discord, even when its actions are based on military judgment and expertise. "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." *Id.* at 127.

114. *Id.* at 123.

115. *Id.* at 123. The Fifth Amendment expressly exempts "cases arising in the land or naval forces" from the requirement that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." *Id.* at 119. The exception is consistent with the power of Congress to "make rules for the government and regulation of the land and naval forces." U.S. CONST. art. I, § 8, cl. 14. A separate system of discipline for servicemembers would not be possible if the military was required to initiate proceedings through the civilian courts. The Supreme Court has also interpreted the Sixth Amendment consistently with the Fifth Amendment, assuming that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to

that a particular matter affects military discipline does not transform it into a matter solely within the military's discretion to decide. The fundamental lesson of *Milligan* is that if the exercise of military discretion affects civilians, the military has exceeded the limits of any constitutional immunity from judicial review.[116] This lesson is so important that Eugene Rostow once termed *Milligan* "a monument in the democratic tradition," a decision that should be "the animating force of this branch of our law."[117]

Almost a century later, the Court similarly invalidated the convictions of civilians who had been tried and sentenced by military tribunals convened in Hawaii in the months and years following the attack on Pearl Harbor.[118] Unlike *Milligan*, the offenses at issue had only the most tenuous connection to military preparedness;[119] however, the offenses were committed in a territory that remained, in the military's judgment, "an active battle field"[120] in imminent danger of further invasion by the enemy. Nonetheless, the Court found the military was without power to supplant civilian judicial authority and impose martial law.[121] The only reason civilian courts were not open and functioning was because the military had ordered them closed.[122]

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those persons who were subject to indictment or presentment in the fifth." *Milligan*, 71 U.S. (4 Wall.) at 123.

116. The Court had previously denied the military discretionary power over civilian property, absent immediate danger. In *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), an American merchant was compelled by the military to accompany its forces on a march into hostile Mexican territory, resulting in the loss of the merchant's goods. *Id.* at 116. Although the military believed its commander had acted in the best interests of the military operation, the Court affirmed the judgment of trespass. *Id.* at 137. The military did not have the discretion to commandeer private property just because it was the military, or because the taking was judged to be a military necessity. *Id.* at 135. The Court described the limits of military discretion in this way:

> Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

Id. at 135.

117. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 524 (1945).

118. *See* Duncan v. Kahanamoku, 327 U.S. 304, 305 (1946) (plurality opinion).

119. One of the civilian defendants, a stockbroker, was convicted of embezzling stock from another civilian. He was arrested eight months after the Pearl Harbor attack. *Id.* at 309. The other, a shipfitter, had brawled with military guards at his ship yard more than two years after the attack. *Id.* at 310.

120. *Id.* at 342 (Burton, J., dissenting). In addition to protestations of military necessity, senior military officials argued that military prosecution of civilian offenders was necessary because military tribunals, unlike civilian courts, would not be required to impanel juries. Juries in Hawaii would have included citizens of Japanese ancestry. *See id.* at 333 (Murphy, J., concurring). "The Government adds that many of the military personnel stationed in Hawaii were unaccustomed to living in such a [mixed-race] community and that 'potential problems' created in Hawaii by racially mixed juries in criminal cases have heretofore been recognized . . . ." *Id.*

121. *See id.* at 324.

122. *Id.* at 311.

In *Duncan v. Kahanamoku*, the concurrence of Justice Murphy, who provided the necessary fifth vote to release the defendants from military custody, emphasized the constitutional core that controls civilian-military relations.[123] Relying on *Milligan*, he wrote that the "supremacy of the civil over the military is one of our great heritages."[124] Claims of military necessity were simply immaterial when offered as reasons to disregard that proper constitutional order, absent foreign invasion or civil war that "actually closes the courts and renders it impossible for them to administer criminal justice."[125] While the military may have had a good faith belief that compliance with constitutional expectations would interfere with good order and discipline and disadvantage the war effort, the military deserved no special deference when its judgment carried consequences for civilian citizens.[126] "Constitutional rights are rooted deeper than the wishes and desires of the military."[127]

The years bracketed by the Korean and Vietnam conflicts saw a judicial trend to curb the scope of constitutional power to govern and regulate the armed forces under circumstances in which the use of that power had significant consequences for civilians.[128] It is important to note that the Court continued to chip away at the military's authority (or Congress's authority on the military's behalf) to make decisions affecting civilians despite the military's continued insistence that its actions were motivated by military necessity.[129] The Court limited the military's exercise of discretion although, in the judgment of the military or in the judgment of Congress, those limitations would degrade military readiness.[130] Military necessity alone never carried the day.

This trend was seen most clearly in the Court's limitation of persons who would be subject to court-martial prosecution under the UCMJ. *United States ex rel. Toth v. Quarles*,[131] a product of the near-universal mobilization of male citizens during World War II, represented the most significant postwar statement by the Court. Robert Toth was held for court-martial on a charge of murder committed while Toth was a member of the Air Force stationed in Korea.[132] He was not arrested on that offense, however, until five months after his discharge from the military.[133] The question for the Court was whether Toth would be considered a civilian or a servicemember for purposes of Congress's constitutional power to govern and regulate the armed forces.[134] If considered a civilian for constitutional purposes, he could not be subjected to trial by court-martial and could only be prosecuted in an Article III venue, which in practical terms meant that Toth could not be prosecuted at all.[135]

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123. *See id.* at 324-35 (Murphy, J., concurring).
124. *Id.* at 325.
125. *Id.* at 326.
126. *See id.* at 330-31.
127. *Id.* at 332.
128. *See* Lurie, *supra* note 60, at 419-21.
129. *See, e.g., id.* at 418-19.
130. *See e.g.*, Reid v. Covert, 354 U.S. 1 (1957).
131. 350 U.S. 11 (1955).
132. *Id.* at 11.
133. *Id.* at 13.
134. *Id.* at 11.
135. The Court seemed unmoved by the argument that Toth might escape prosecution for

Congress had expressly provided for court-martial jurisdiction over ex-servicemembers for certain crimes committed while in service.[136] The government argued that this was Congress's choice to make, based on a reasonable belief that military discipline would be enhanced if servicemembers understood that misconduct would always be judged by a single standard, whether discovered before or after separation from service.[137] It seems plain that Congress's judgment in this instance was reasonable or rational in constitutional terms.[138] Reasonable or rational judgment alone, however, was not sufficient, even though the judgment at issue was one of military discretion. The power of Congress to regulate the armed forces did not extend so far as to permit denial of constitutional rights to civilians, even if those civilians were once servicemembers and even if their offenses were connected to their military service. "Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury."[139]

In subsequent cases the Court continued to refine what would become, at least for a few short years, a bright-line rule prohibiting Congress and the military from exercising military power under the Constitution in ways that impacted civilians. While *Milligan* and *Duncan v. Kahanamoku* prohibited court-martial jurisdiction over civilians who were unaffiliated with the armed services, certain civilians with an active relationship to the armed forces remained subject to court-martial by congressional enactment of the UCMJ.[140] For example, family members who accompanied servicemembers to military installations overseas were at one time subject to court-martial for criminal offenses.[141] In *Reid v. Covert*,[142] a civilian wife was tried and convicted by court-martial for the murder of her Air Force husband at an airbase in England.[143] In defending the military's exercise of jurisdiction, the government argued that the Constitution's assignment of power to Congress to make rules for governing and regulating the armed forces, in conjunction with the Necessary and Proper Clause,[144] enabled the military to court-martial persons accompanying servicemembers

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murder. *Id.* at 20-21. When Congress considered the legislation subjecting ex-servicemembers to trial by court-martial, the Judge Advocate General of the Army asked Congress to provide jurisdiction in civilian federal court instead. *Id.* at 21. He testified, "If you expressly confer jurisdiction on the Federal courts to try such cases, you preserve the constitutional separation of military and civil courts, you save the military from a lot of unmerited grief, and you provide for a clean, constitutional method for disposing of such cases." *Id.* at 21. Congress rejected his advice. *Id.* If ex-servicemembers were able to walk away from their crimes, therefore, the Court concluded it was only because "Congress has not seen fit to subject them to trial in federal district courts." *Id.*

136. *Id.* at 13 n.2.

137. *See id.* at 28 (Reed, J., dissenting).

138. *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949).

139. *Toth*, 350 U.S. at 22-23.

140. *See e.g.* Reid v. Covert, 354 U.S. 1 (1957).

141. *See id.* at 3-4 (plurality opinion) (subjecting to court-martial under the UCMJ "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States").

142. 354 U.S. at 1.

143. *Id.* at 3.

144. "[The Congress shall have Power] To make all Laws which shall be necessary and

when necessary to the maintenance of military discipline.[145]

The government's position was not unreasonable. Criminal or disruptive conduct by family members, particularly when committed on a military installation in a foreign nation, could be extremely damaging to military discipline and morale, not to mention the political relations between the United States and a military ally.[146] As a concurring Justice noted, "these civilian dependents are part of the military community overseas, are so regarded by the host country, and must be subjected to the same discipline if the military commander is to have the power to prevent activities which would jeopardize the security and effectiveness of his command."[147] Application of a double standard within a small, closely-knit community, with servicemembers subject to one code of conduct but their spouses to another, could interfere with a commander's

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proper for carrying into Execution the foregoing Powers . . . ." U.S. CONST. art. I, § 8, cl. 18; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

145. *Reid*, 354 U.S. at 20.

146. Servicemembers have traditionally been held responsible for the behavior of their family members, whether stationed within the United States or overseas. While a servicemember is not normally criminally liable for the misconduct of his or her military dependents, such misconduct would make promotion and retention much less likely. Military commanders have traditionally insisted that their subordinates "control their dependents." *See* Lieutenant Colonel Arthur A. Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97, 106-07 (1964) (outlining the traditional view of a servicemember's responsibility for the behavior of his family); *see also* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 234 (1960):

> It points out that such dependents affect the military community as a whole; that they have, in fact, been permitted to enjoy their residence in such communities on the representation that they are subject to military control; and that realistically they are a part of the military establishment. It argues that, from a morale standpoint, the present need for dependents to accompany American forces maintained abroad is a pressing one; that their special status as integral parts of the military community requires disciplinary control over them by the military commander; that the effectiveness of this control depends upon a readily available machinery affording a prompt sanction and resulting deterrent present only in court-martial jurisdiction . . . .

Id. at 238-39.

Although the offenses in *Reid v. Covert* were committed against a servicemember, even more serious concerns may arise when a civilian family member of a servicemember stationed overseas harms a foreign national. In 2000, three teenage sons of American servicemembers killed two German residents and injured four others by hurling small boulders from a bridge at passing cars. Edmund L. Andrews, *Germans Convict 3 U.S. Youths of Murder in Highway Stonings*, N.Y. TIMES, Dec. 23, 2000, at A8. The boys were tried in German courts and convicted of murder. *See id.*

147. *Reid*, 354 U.S. at 72 (Harlan, J., concurring). Furthermore, denial of court-martial jurisdiction over civilian dependents leaves the question of a practical alternative. Prosecution of offenders in an Article III court within the United States raises issues of expense, availability of witnesses, and disruption of military personnel. If the last alternative is trial in the courts of the host country, a defendant may in some cases prefer a court-martial. *See id.* at 87-89 (Clark, J., dissenting).

ability to maintain good order and discipline within the military community.[148] These concerns were more than just judicial speculation; officers in charge of the major overseas commands all filed statements to the same effect.[149]

The facts were favorable to a decision giving the benefit of the doubt to the military, allowing it to exercise jurisdiction over civilians only in the narrowest circumstances and only when necessary to military preparedness. That would not, however, be the result in *Reid v. Covert*. The Court reversed the court-martial conviction, holding that the above-described line of cases going back to the time of the Civil War prevented the military, and Congress, from using the Constitution's military powers to justify the denial of constitutional protections to civilians. "Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority."[150] "We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution."[151]

Within just a few years the Court had extended the holding of *Reid v. Covert*, incrementally invalidating each of the remaining circumstances in which court-martial jurisdiction had been brought to bear on civilians. Military dependents who had committed noncapital offenses would no longer be subject to prosecution by military tribunals (answering any question potentially left open in the capital case of *Reid v. Covert*);[152] and civilian employees accompanying military forces were also removed from the jurisdiction of courts-martial.[153]

D. Constitutional Power to Draft Citizens into Military Service

While the pre-Rehnquist Court had strictly policed the boundaries of the constitutional power to govern and regulate the armed forces, ensuring that this power could not be used to impose consequences on civilians, other constitutional powers inevitably join the military and the citizenry in a common venture. The Constitution delegates to Congress the power to raise and support armies, and obviously armies cannot be raised without transformation of some civilians into servicemembers. Under the "raise and support armies" clause,[154] the military will have an unavoidable and direct impact on the lives of civilians, whether the military involuntarily conscripts

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148. Interestingly, similar concerns of a double standard affecting servicemembers and their civilian spouses may have arisen during the much-publicized court-martial proceeding against Lt. Kelly Flinn on a charge of adultery, among other charges. *See generally* Major William T. Barto, *The Scarlet Letter and the Military Justice System*, ARMY LAW., Aug. 1997, at 3; Diane H. Mazur, Book Review, 26 ARMED FORCES & SOC'Y 670 (2000) (reviewing KELLY FLINN, PROUD TO BE (1997)). While married servicemembers would be subject to criminal prosecution under the UCMJ for adultery, their civilian spouses would not.

149. *Reid*, 354 U.S. at 86. (Clark, J., dissenting).

150. *Id.* at 30.

151. *Id.* at 40.

152. *See* Kinsella v. United States, 361 U.S. 234, 249 (1960).

153. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 287 (1960) (noncapital offenses); *see also* Grisham v. Hagan, 361 U.S. 278, 280 (1960) (capital offenses).

154. U.S. CONST. art. I, § 8, cl.12.

civilians into service or accepts their voluntary enlistment. The Court has characterized the transformation of citizen into soldier as a fundamental change in that individual's status: "By enlistment the citizen becomes a soldier. His relations to the State and the public are changed."[155]

The military, therefore, has the constitutional latitude to affect the lives of civilians under the "raise and support armies" clause that it lacks under the "govern and regulate the military" clause.[156] The fact that the military has the power to act, however, does not mean that it has the power to act with an unlimited discretion that is shielded from judicial review. Neither does it allow the military to disregard constitutional limitations merely *because* it is the military, or because particular decisions are made in the interests of military necessity or discipline. In raising armies, the military is still acting outside the carefully circumscribed core function distinguishable by the special deference it receives from civilian courts. The military is not merely governing and regulating its own in the interests of internal good order and discipline; it is reaching outside the military and engaging in activity that broadly affects the civilian citizenry. The military has never had a "weekend pass" from judicial review and constitutional observance when filling its own ranks, at least not before Rehnquist's appointment to the Court.

Mandatory national service in the military—the draft—was first held constitutional during the First World War. In the *Selective Draft Law Cases*,[157] the Court disposed of arguments that the military draft violated the First Amendment's establishment and free exercise protections or the Thirteenth Amendment's right to be free of involuntary servitude.[158] It not only disposed of them, but also disposed of them brutally and with a fair amount of ridicule for those who raised them.[159] No response was offered to the contention that mandatory military service either established or

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155. United States v. Grimley, 137 U.S. 147, 152 (1890); *see also* Kinsella, 361 U.S. at 243 (defining military jurisdiction in terms of defendant's status as a servicemember).

156. The best student note written on the subject of judicial deference to military judgment centers its analysis on the distinction between the "raise and support Armies" clause and the "govern and regulate the military" clause. *See* Oberwetter, *supra* note 14, at 196-97. Oberwetter persuasively argues that judicial deference is appropriate only with respect to the latter clause, under the assumption that judgments made to govern and regulate the military will affect only servicemembers. *Id.* In contrast, judgments made in the interests of raising and supporting armies, such as the sex-based selective service policy at issue in *Rostker v. Goldberg*, 453 U.S. 57 (1981), inevitably have their greatest impact on civilians. *See* Oberwetter, *supra* note 14, at 204-08. I would agree with her general emphasis on the importance of assessing collateral effects on civilians, but would disagree that judgments made under the "govern and regulate the military" clause affect only servicemembers. As will be discussed later in this article, congressional power to govern and regulate the military not only can affect, but is sometimes used *for the purpose of* affecting, civilian social policy. *See* discussion *infra* Parts II.C.2, III.B.

157. 245 U.S. 366 (1918). *See generally* Forrest Revere Black, *The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism*, 11 B.U. L. REV. 37, 37-53 (1931); Harrup A. Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40, 56-59 (1944); Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1494-1507 (1969).

158. Selective Draft Law Cases, 245 U.S. at 390.

159. *Id.*

interfered with religious practice; "its unsoundness is too apparent to require us to do more."[160] The Court was "unable to conceive upon what theory" military obligation might constitute involuntary servitude, given a citizen's "supreme and noble duty of contributing to the defense of the rights and honor of the nation."[161] Finally, it termed "frivolous" the plaintiffs' contention that the constitutional power to raise and support armies contemplated only a voluntary force and not a conscripted one, declaring that "the mind cannot conceive an army without the men to compose it."[162]

The *Selective Draft Law Cases* might be viewed as declaring a healthy judicial deference toward matters of the military's draft and recruitment of the armed forces. The opinion's scope, however, is much narrower, affirming the constitutional power to draft but not necessarily ceding discretion to the military to exercise that power in any manner deemed necessary to military effectiveness. With respect to matters that impose direct or even collateral consequences on civilians, the exercise of military discretion is a judicial question, not a military question.[163] Subsequent cases demonstrated that the Supreme Court had no intention of creating a protected zone of military discretion related to the draft in the same way it had acquiesced in the military's administration of its own rules of internal discipline.

Resistance to the draft, naturally, is what creates draft-related law. *United States v. MacIntosh*[164] concerned draft resistance that was more theoretical than real, but the distinction held little significance for the Court.[165] When Douglas Clyde MacIntosh, a citizen of Canada, applied for naturalization as a United States citizen, he was asked to affirm that he was "willing to take up arms in defense of this country."[166] Rather than answering with the simple "yes" sought by the federal district court, MacIntosh wrote a statement reflecting the apparently considerable amount of thought he gave the question:

> I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support "my country, right or wrong" in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defense of this country," however necessary the war may seem to be to the Government of the day.[167]

The Supreme Court upheld the denial of his petition for naturalization, finding his

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160. *Id.*

161. *Id.*

162. *Id.* at 377.

163. *See* Sterling v. Constantin, 287 U.S. 378, 404 (1932) (holding that the governor of Texas could not call state militia into service to restrict complainants' production of oil, absent immediate danger). "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Id.* at 401.

164. 283 U.S. 605 (1931).

165. *Id.*

166. *Id.* at 617.

167. *Id.* at 618.

pledge to support and defend the Constitution insufficient without an unqualified promise to bear arms in the country's defense.[168] The holding is unsurprising, given that the Court had already endorsed criminal prosecution of draft protest activities under the Espionage Act of 1917.[169] The Court's more general discussion of constitutional power to compel military service, however, offers a small elaboration on the historical relationship between civil and military concerns. By virtue of Congress's constitutional authority to raise and support armies, it has plenary power, in the Court's language, "to say who shall serve in them and in what way."[170] This statement is extraordinarily broad and, to a modern reader aware of controversies concerning military service by gay and female citizens, seems to award Congress an equally extraordinary degree of discretion in deciding any issue related to the recruitment or draft of military personnel. The Court's opinion fails to extend that far. The power to raise armies, while plenary in the sense of Congress's general authority to act, is subject to certain specific limitations in the same way all constitutionally delegated powers are subject to specific limitation. As the Court concluded, "[f]rom its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, *unless found in the Constitution* or in applicable principles of international law."[171]

At most, the Court's observation can be considered only a small nugget of concern for the appropriate order of civilian-military relations. At the same time it recognized that Congress's constitutional power to compel military service cannot be employed in a manner that subverts constitutional protections, it embraced the idea that speech critical of the military can be restricted "so that the morale of the people and the spirit of the army may not be broken by seditious utterances."[172] Nevertheless, the nugget was still there, and the Court would continue to build a consistent approach to defining the constitutional limits of exercises of military-based discretion. The debilitating fear of war protest that prevailed in the first third of the twentieth century resulted in a rocky start for the First Amendment; that same fear initially prevented the

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168. *Id.* at 624-25. Interestingly, the Court previously denied a female applicant's petition for naturalization for the same reason. Despite the fact that the military never would have permitted a woman to actually bear arms in defense of the nation, she was denied citizenship because, as a conscientious objector, she would not pledge to do so. *See* United States v. Schwimmer, 279 U.S. 644, 653 (1929), *overruled by* Girouard v. United States, 328 U.S. 61, 69-70 (1946). The *MacIntosh* Court described this petitioner with derision: "She was an uncompromising pacifist, with no sense of nationalism, and only a cosmic sense of belonging to the human family." *MacIntosh*, 283 U.S. at 620.

169. Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219 (1917) (making it a crime, in time of war, to "obstruct the recruiting or enlistment service of the United States"); *see also* Debs v. United States, 249 U.S. 211, 214 (1919) (upholding conviction based on speech stating that draftees were "fit for something better than slavery and cannon fodder"); Frohwerk v. United States, 249 U.S. 204, 204-10 (1919) (upholding conviction for publishing newspaper article critical of the draft); Schenck v. United States, 249 U.S. 47, 52 (1919) (upholding conviction for sending leaflet to draftees arguing that conscription violated the Thirteenth Amendment; leaflet constituted a "clear and present danger," akin to "falsely shouting fire in a theatre and causing a panic").

170. *MacIntosh*, 283 U.S. at 622.

171. *Id.* (emphasis added).

172. *Id.*

Court from seeing the need to impose limitations on the "raise and support armies" power[173] in the same way that it imposed limitations on the "govern and regulate the military" power.[174] When governing and regulating the military, congressional or military power ends at the point at which the exercise of military discretion affects civilians. Under both constitutional clauses, certainly any benefit of judicial deference should end at the same point.

Trop v. Dulles[175] examined the reverse of the question raised in *MacIntosh*: can a citizen of the United States be stripped of his citizenship and rendered stateless as punishment for inadequate performance of a military obligation? The defendant had been convicted by court-martial of desertion during World War II while serving in French Morocco.[176] He served three years at hard labor and received a dishonorable discharge, but discovered years later, when he applied for a passport, that he had lost his United States citizenship as well.[177] Congress had enacted a statute imposing loss of citizenship on servicemembers convicted of desertion in time of war and dishonorably discharged, although the military had discretion to offer reenlistment and prevent loss of citizenship.[178]

To no surprise, Congress justified this citizenship penalty in terms of "the needs of the military in maintaining discipline in the armed forces."[179] An act of desertion was "plainly destructive,"[180] and the military believed serious measures were necessary in order to control serious misconduct. Under the Court's general practice of deference to congressional choice in governing and regulating the military, the military's word on maintaining good order and discipline would have been the last word. In this case, however, the Court gave no deference whatsoever to the military's judgment on a disciplinary issue. The military had crossed the line in choosing its methods of internal discipline, imposing consequences on servicemembers that reached well beyond the military's proper sphere. Forfeiture of citizenship for military misconduct was beyond the power of government to accomplish.[181] If the military could exercise discretion in ways that affected the citizenship of citizens of the United States, it would raise "important questions bearing on the proper relationship between civilian and military

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173. U.S. CONST. art. I, § 8, cl. 12.

174. U.S. CONST. art. I, § 8, cl. 14.

175. 356 U.S. 86 (1958) (plurality opinion).

176. *Id.* at 87. The Court's description of the facts suggests that the charge of "desertion" may have been excessive. The defendant escaped from military detention, but then boarded military transportation and returned to the post. He had been absent less than a day. *See id.* at 87-88.

177. *Id.* at 88.

178. In the Court's view, giving the military discretion to choose whether convicted servicemembers would lose their citizenship created an even larger problem. "By deciding whether to issue and execute a dishonorable discharge and whether to allow a deserter to re-enter the armed forces, the military becomes the arbiter of citizenship." *Id.* at 90.

179. *Id.* at 107 (Brennan, J., concurring).

180. *Id.*

181. *Id.* at 92-93. The Court also offered an alternate basis for its ruling. Even if punishment by forfeiture of citizenship was within the government's power, it constituted cruel and unusual punishment prohibited by the Eighth Amendment. *See id.* at 101.

authority in this country."[182] "Nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen."[183]

The Court has been sensitive to the concern that constitutional power to decide who shall serve in the military might be used to "brand" some individuals as unworthy or undesirable citizens. For example, the military cannot issue a servicemember a less-than-honorable discharge from military service when the poor character of discharge is based on the individual's preinduction, civilian conduct.[184] Limitations on the scope of military discretion under these circumstances—even when based on the needs of military discipline—are consistent with the Court's historical understanding of civilian-military relations under the Constitution. The military departs from its core constitutional function when it imposes its official disapproval upon matters of civilian concern which are unrelated to a servicemember's record of military service.

E. O'Callahan v. Parker*: The Last Word Before Rehnquist's Vietnam*

O'Callahan v. Parker,[185] decided in 1969, was the natural progression of the Supreme Court's efforts to define the scope of constitutional powers concerning the military: the power to govern and regulate, and the power to raise and support. This Part opened with a discussion of this case and fittingly closes with it as well, because *O'Callahan* represents the height of the Court's sensitivity to the issue of civilian supremacy over the military under the Constitution. As discussed earlier, O'Callahan had been convicted by court-martial of offenses related to an attempted sexual assault.

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182. *Id.* at 91. The three concurring Justices, whose votes were necessary to the result, all emphasized the importance of civilian control of the military under the Constitution. Justices Black and Douglas believed the military should never have the power to denationalize, even if other governmental authorities did have that power. *See id.* at 104-05 (Black & Douglas, JJ., concurring). Justice Brennan concluded that Congress had failed to establish any rational basis grounded in rehabilitation, deterrence, or retribution for the forfeiture of citizenship under these circumstances.

> I simply cannot accept a judgment that Congress is free to adopt any measure at all to demonstrate its displeasure and exact its penalty from the offender against its laws. It seems to me that nothing is solved by the uncritical reference to service in the armed forces as the "ultimate duty of American citizenship."

Id. at 113 (Brennan, J., concurring).

Brennan's opinion is the more remarkable of the concurrences. It is one thing to find that the military is without constitutional power to employ a particular means of maintaining discipline. It is another to say that the military fails to realize it is acting irrationally. Brennan's opinion also includes language evocative of a controversy still decades away. He seems to understand the tremendous power of the military to shape issues of inclusion and exclusion within our society, a central factor in the debate concerning military service by gay citizens. "The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment." *Id.* at 111 (Brennan, J., concurring).

183. *Id.* at 105 (Black & Douglas, JJ., concurring).

184. *See* Harmon v. Brucker, 355 U.S. 579 (1958). The servicemember had been discharged as a security risk on the basis of preinduction associations with "Communist sympathizers." *See* Harmon v. Brucker, 243 F.2d 613, 616 (D.C. Cir. 1957), *rev'd*, 355 U.S. 579 (1958).

185. 395 U.S. 258 (1969).

Although the military argued that court-martial jurisdiction over O'Callahan was necessary to the maintenance of military discipline, O'Callahan's conduct had only a tangential connection to the military. The only military connection was by virtue of O'Callahan's status as a servicemember; the circumstances surrounding his offenses were completely unrelated to military activities. He committed a crime while off-base, off-duty, and wearing civilian clothes, and was apparently unidentifiable as a member of the armed forces. His offense took place in a time of peace and within the territorial limits of the United States. His victim was a civilian who was targeted for reasons having no connection to O'Callahan's military duties.[186]

Under these factual circumstances, the Court held, in an opinion authored by Justice Douglas, that Congress had exceeded its constitutional power to make rules for the government and regulation of the armed forces.[187] If the need for military discipline was the justification for permitting a constitutionally separate system of justice, then that distinctive system of justice should apply only when matters affecting military discipline are at issue. The Court noted that "the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."[188] Without some "service connection," or articulated relationship to military discipline, a case cannot be one "arising in the land or naval forces" under the military exception to the Fifth Amendment.[189] The defendant, therefore, was entitled to prosecution by indictment and trial by a civilian jury, rather than prosecution by order of military authority and trial by military members of a court-martial.[190]

Douglas's opinion was controversial because, in addition to curbing the military's constitutional discretion to prosecute servicemembers, it sharply questioned the military's expertise to consider constitutional issues. Its pointed criticism included the comment that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[191] Its holding, however, consolidated the Court's progressive approach over the previous century in defining the scope of military-based discretion under the Constitution. Several clear principles concerning military powers appear. The power to govern and regulate the armed forces cannot be used in ways that carry significant collateral consequences for civilians, even if it would be helpful,

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186. *Compare O'Callahan*, 395 U.S. 258 *with* Relford v. United States Disciplinary Commandant, 401 U.S. 355 (1971) (finding service-connection sufficient to support court-martial jurisdiction; defendant servicemember committed offenses of kidnaping and rape within military enclave and victims were kin of servicemembers and engaged in post-related activities when attacked).

187. *See O'Callahan*, 395 U.S. at 273.

188. *Id.* at 265.

189. *Id.* at 272-73; *cf.* Duke & Vogel, *supra* note 37, at 457 (supporting a service-connection requirement for court-martial jurisdiction, but basing the argument in lack of constitutional power under Article I, Section 8, Clause 14 rather than the "arising under" exception of the Fifth Amendment).

190. *O'Callahan*, 395 U.S. at 274.

191. *Id.* at 265; *see also id.* at 266 n.7 (referring to "so-called military justice"); Nelson & Westbrook, *supra* note 15, at 3, 57 (noting that the Douglas opinion is "full of troublesome and often gratuitous comments on military justice" and that "its tone is consistently hostile and condescending").

even necessary, to do so in the interests of military discipline.[192] The asserted need for good order and discipline within the military is never sufficient, standing alone, to immunize Congress or the military from compliance with constitutional requirements or the scrutiny of judicial review. The military acts within the limits of its constitutional discretion only when making decisions that affect the lives of servicemembers, and even with respect to servicemembers, only when those decisions are related to the maintenance of good order and discipline.[193] Such was the state of the Court's jurisprudence of civilian-military relations under the Constitution before President Nixon nominated Justice William H. Rehnquist to the Supreme Court in 1971.[194]

II. HOW REHNQUIST FOUGHT THE VIETNAM WAR

Rehnquist joined the Court in the midst of protest against the Vietnam War.[195] Just three years earlier, resistance to the draft had generated one of the most notable decisions to arise out of the war, *United States v. O'Brien*.[196] *O'Brien* was the infamous "draft card" case, in which a potential inductee burned his Selective Service registration certificate on the steps of a Boston courthouse before a sizable (and unfriendly) crowd.[197] The defendant was convicted of knowingly destroying or mutilating his draft card in violation of a federal statute apparently adopted—even on the majority's presentation of the facts—for the very purpose of eliminating a popular form of draft protest.[198] In dismissing his claim for protection of "symbolic speech"

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192. *See O'Callahan*, 395 U.S. at 267.

193. *See id.* at 272-73.

194. *Cf.* Major Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 6 (1980) (noting that while *O'Callahan* "marked a high point in judicial intervention with military law," the Court would "reverse[] itself completely within the short span of five years").

195. *See* WELLS, *supra* note 18, at 522-41 (chronicling protest activities against the Vietnam War during fall of 1971 and spring of 1972).

196. 391 U.S. 367 (1968); *see also* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (denying the government's motion for an injunction against publication of the "Pentagon Papers," a classified history of the Vietnam War); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (upholding the right of high school students to wear black armbands in school in protest of the United States' involvement in Vietnam).

197. *See O'Brien*, 391 U.S. at 369.

198. By a 1965 amendment to the Selective Service Act of 1948, Congress added the additional offense of knowing destruction or mutilation of certificates. *See* Pub. L. No. 89-152, 79 Stat. 586 (1965) (codified at 50 App. U.S.C. § 462 (1994)). Before the amendment, the statute prohibited various fraudulent uses of the certificate for the purpose of false identification. *See* Selective Service Act of 1948, Pub. L. No. 80-759, § 12(b)(1)-(6), 62 Stat. 604, 622-23. Applicable regulations promulgated under the Act also prohibited a failure to possess the certificate. Selective Service System, 32 CFR § 1617.1 (1962). The majority noted that the reports of both the Senate and the House Armed Services Committees demonstrated a concern with the "defiant" destruction of draft cards and the "apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System." *O'Brien*, 391 U.S. at 385-86. The opinion quoted from the Senate Report as follows: "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident

under the First Amendment, the Court relied substantially on the government's assertion that it needed to prohibit destruction or mutilation for reasons of military necessity, not the suppression of speech.[199] One might agree or disagree with (or roll one's eyes at) some of the factual assertions offered by the government and accepted by the Court,[200] but there likely was a minimal rationality to preservation of the cards under the Court's standard of review.[201]

What was most important, in the context of civilian-military relations, was that the Court formulated a test for First Amendment protection of expressive conduct that was designed to apply generally, whether in or out of a military context. There would have been room for the Court to take the decision in a deferential direction. While O'Brien was still a civilian at the time of his offense and could not have been tried by court-martial, his draft registration gave him a quasimilitary status. The Court remarked, in fact, on the possibility of "immediate induction" in explaining why it was so important not to destroy the draft card.[202] The opinion, however, contains no mention of a need for judicial deference to military choice, despite the necessity of the draft to the constitutional power to raise and support armies. It applied a standard, even if factually questionable, form of First Amendment review.

The absence of any statement of special deference to military concerns was perfectly consistent with the limits the Court had placed on exercises of military discretion under the Constitution. O'Brien's conduct was outside the narrow band of military affairs to which civilian courts should defer without substantive review. Not only was he a civilian, but the statute, by definition, could affect only civilian draft registrants. The destruction or mutilation of draft cards held by civilians did not directly affect good order and discipline within the military, and therefore could not fall within the constitutional power to govern and regulate the armed forces. O'Brien did not question Congress's power to draft under its power to raise and support armies;[203] he only questioned its power to punish draft protest under the First Amendment. All this is not to say, of course, that the Court could not find in the government's favor. What it means is that the Court did so in accordance with a standard it presumably would have applied to any other government entity. It did not find in the government's favor based on some judicial obligation to defer to

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persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." *Id.* at 387. Defiance, of course, only disrupts smooth functioning because it offends those who are defied.

199. *See O'Brien*, 391 U.S. at 378-80.

200. For example, does a draft card become a military necessity because it helps a registrant remember the address of his local draft board? *See id.* at 379.

201. It is important to remember that *O'Brien* was decided in a largely computer-free world. The government argued that draft cards served as a portable, always accessible, record of an individual's Selective Service information. *See id.* at 378-80. *But see* Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 23 (characterizing the government's factual contentions as "dispensable convenience").

202. *O'Brien*, 391 U.S. at 379.

203. Justice Douglas, however, did. He unsuccessfully sought reargument on the issue of whether conscription was constitutional in the absence of a declaration of war. *See id.* at 389-91 (Douglas, J., dissenting).

congressional or to military choice on matters of military concern.[204]

A. Expanding the Scope of the Military's Discretion

If a Justice of the Supreme Court were to embark on a mission to broaden the scope of military powers granted to Congress under the Constitution, the logical place to begin would be at the constitutional core of military discretion. The discretion to manage and discipline military personnel has always been exercised within the separate system of military justice contemplated by the Article I power to govern and regulate the military. Decisions related to internal military discipline have received at the very least a generous degree of judicial deference, and with respect to individual determinations of courts-martial, a blanket immunity from review based on the constitutional separateness of Article III courts. Therefore, if a particular determination, decision, or exercise of discretion related to military affairs can be classified as part of this constitutional latitude necessary for the maintenance of military discipline, then it effectively can be shielded from judicial review. The task, then, would be to define the scope of this constitutional core in conclusory terms, as broadly and as generally as possible, with the objective of incorporating almost any decision made for military purposes within its protection.

If the objective were to enhance the influence of the military within civilian society, it would be helpful to avoid specific reference to or reliance on more recent decisions of the Court concerning civilian-military relations. Throughout the twentieth century, the Court has progressively curbed the scope of military powers under the Constitution, limiting the degree to which military choice can carry consequences for civilian society. The most effective strategy might be to build on a prior decision written without extensive reference to controlling authority. The best candidate would be a brief, conclusory opinion, perhaps written in that fashion because the matter at hand was so clearly an appropriate exercise of military discretion and one that the

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204. Six months after the decision in *O'Brien*, the Court made clear that the power of Congress to raise and support armies was subject to judicial review; special deference to the needs of the military was unnecessary. Despite a federal statute that barred judicial review of draft classifications (except as a defense to criminal prosecution for draft avoidance), the Court construed the statute as inapplicable to the retaliatory reclassification of a theology student who engaged in draft protest, permitting his judicial challenge to go forward. *See* Oestereich v. Selective Serv. Bd., 393 U.S. 233 (1968). The concurrence distinguished facial challenges to the unconstitutionality of a regulatory scheme, which should be subject to judicial review, from the "discretionary, factual, and mixed law-fact determinations" the Selective Service inevitably makes in classifying draft registrants. *See id.* at 240 (Harlan, J., concurring).

First Amendment challenges to draft-related legislation were sometimes successful and sometimes unsuccessful, but in all cases the Court evaluated the plaintiff's claim under the assumption that military powers were subject to the specific restraints of the Bill of Rights. *Compare* Gillette v. United States, 401 U.S. 437 (1971) (upholding Congress's choice to deny conscientious objection to those who opposed a particular war, but not all wars; the distinction did not burden free exercise or establish religion), *with* Schacht v. United States, 398 U.S. 58 (1970) (overturning a conviction for the unauthorized wearing of a military uniform as part of a "street skit" intended to protest the Vietnam War; federal statute permitting actors to wear uniforms in theatrical productions, but only if the portrayal did not "discredit" the military, violated the First Amendment).

Court had no practical means to review. It would provide a blank slate, a means of constructing a new line of authority unconnected to the prevailing jurisprudence of civilian-military relations. Such a case might be the 1953 decision in *Orloff v. Willoughby*.[205]

Orloff v. Willoughby has never been the subject of a law student's note or a professional scholar's analysis. In the most stealth fashion, however, it formed the basis for fundamental change in the constitutional law of civilian-military relations. The case concerned a dissatisfied draftee during the Korean War era, an individual conscripted into the Army not for his potential as a combat soldier, but for his skills as a physician.[206] Members of the Medical Corps customarily served as commissioned officers, but Orloff and the Army soon arrived at a point of irreconcilable conflict over commissioning requirements.[207] Orloff disclosed some, but not all, of the information the Army requested concerning his association with organizations identified as "subversive."[208] Because of his disposition, in the Court's language, to "haggle about questions concerning his loyalty,"[209] the Army denied Orloff an officer's commission. Rather than discharge him, however, the Army put him to work in the noncommissioned, enlisted position of medical lab technician. Orloff contended that if the Army was not going to commission him as an officer and assign him to a doctor's duties, he should be relieved of his military obligation and discharged.[210] The Army countered with its belief that it had the discretion to assign an otherwise lawfully inducted individual to any military duties that it desired.[211]

Not surprisingly, the Court had little interest in stepping into the middle of what was essentially an argument about individual duty assignments within a military environment. The commission was not the issue, because the commissioning of military officers was within the appointing power of the President as Commander-in-Chief.[212] In the majority's words, "[w]hether Orloff deserves appointment is not for

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205. 345 U.S. 83 (1953).

206. *Id.* at 84.

207. *Id.* at 84-86.

208. *See id.* at 89-90.

209. *Id.* at 90-91. The Court rejected the claim that Orloff had been punished for claiming the protection of the First Amendment. While he had the right to withhold information concerning his associations, he did not have the right to withhold information and then insist that the President "appoint him to a post of honor and trust." *Id.* at 91. *But see id.* at 97 (Black, Frankfurter & Douglas, JJ., dissenting) ("Dr. Orloff is being held in the Army not to be used as a medical practitioner, but to be treated as a kind of pariah in order to punish him for having claimed a privilege which the Constitution guarantees.").

210. *See id.* at 86.

211. *See id.* at 85.

212. In the Court's view, there was no "right" to a military commission:

> It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.

Id. at 90; *see also* U.S. CONST. art. II, § 2, cl. 2 (appointment of officers); Weiss v. United States, 510 U.S. 163, 170 & n.5 (1994) (stating that military officers are appointed by the President with the advice and consent of the Senate). Advice and consent of the Senate is

judges to say."[213] The question at hand was whether the military could assign duties to a draftee as it wished, even if the draftee considered himself overqualified for them. These circumstances were so clearly within the Article I power to govern and regulate the military that the Court cited but a single authority (and one off the point)[214] in ruling against Orloff. The Court repeatedly shared its belief that it did not want to be involved in intramilitary disputes such as the choice of an appropriate work detail for one individual draftee, especially a draftee it considered surly, uncooperative, and ungrateful as well.[215] Orloff would have to bend, not the military, because "the very essence of compulsory service is the subordination of the desires and interests of the individual to the needs of the service."[216] It awarded complete discretion to the military, stating that "judges are not given the task of running the Army."[217] Individual duty assignments are "affairs peculiarly within the jurisdiction of the military authorities."[218]

The Court alluded to the constitutional basis for its deference to military discretion, noting that the military operates under a system of governance separate from the rules

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necessarily accomplished en masse for the tens of thousands of military officers requiring appointment as inferior officers of the United States. *See Weiss*, 510 U.S. at 182 (Souter, J., concurring).

Although I agree in general terms that there is no "right" to receive an officer's commission, I am uncomfortable with the manner in which that phrase is sometimes used. The statutory codification of the "Don't Ask, Don't Tell" policy refers to a congressional "finding" that there is "no constitutional right to serve in the armed forces." 10 U.S.C. § 654(a)(2) (2000). In the minds of the drafters, lack of a "right" to serve meant that citizens could be excluded from the military for any reason, including those that would otherwise violate the Constitution. In my mind, lack of any "right" to serve should entitle the military to make discretionary decisions to exclude some individual citizens from service, provided it exercises rational and nonarbitrary discretion in accordance with the Constitution.

213. *Orloff*, 345 U.S. at 92.

214. *See id.* at 90 (citing United States v. Mouat, 124 U.S. 303 (1888), for the proposition that one cannot be an officer of the Army without a commission from the President).

215. Orloff received medical training during World War II at government expense. Under the priority system established by the draft laws, he would be called for induction before any doctors who had already served at least ninety days in the military. *See id.* at 84. It was apparent that the majority was annoyed with Orloff's intransigence. "Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place." *Id.* at 94.

The military's effort to compel service in exchange for funding Orloff's medical education is parallel in some respects to current efforts to compel gay citizens to repay the costs of their military-funded education following discharge. Of course, in *Orloff* the military sought to compel service; in the modern recoupment cases, the military resists service by gay citizens but demands repayment of educational costs incurred. In most cases, the individual wants to fulfill his or her service obligation, and the only barrier to compliance is the military's policy banning gay servicemembers. In rare circumstances, a gay citizen accepts military-funded education but then violates "Don't Ask, Don't Tell" *for the purpose of* avoiding a contractual service obligation. *See* Hensala v. Dep't of the Air Force, 148 F. Supp. 2d 988 (N.D. Cal. 2001).

216. *Orloff*, 345 U.S. at 92.

217. *Id.* at 93.

218. *Id.* at 95.

that control in Article III courts.[219] It referred to this constitutionally separate system of discipline in observing that the military "constitutes a specialized community governed by a separate discipline from that of the civilian."[220] The military constitutes a "specialized community" in the sense that it is the only community in our society subject to an express constitutional grant of authority for its governance. Its distinctive set of internal rules for the maintenance of good order and discipline warrant a generous judicial deference, and the circumstances of *Orloff* fell squarely within the military's constitutional core of discretion. The Court's opinion was as conclusory as its result was uncontroversial. Twenty years later, however, the Court would rely on *Orloff*'s casual generality to alter fundamentally the direction of civilian-military relations in this country.

When Justice Robert Jackson wrote the majority opinion in *Orloff v. Willoughby* in 1953, William Rehnquist was his law clerk.[221] Whether or not Rehnquist drafted the opinion himself, he would have had close familiarity with a decision that would otherwise have been completely unremarkable. Frank Michelman once described Rehnquist as "preoccupied with the question of the judiciary's proper posture towards the military,"[222] and that characterization is a fair one, given Rehnquist's focused effort to reconstitute civilian-military relations as a member of the Court. Before Rehnquist's appointment, the question of judicial deference to military discretion was unrelated to social conservatism. Deference to the military was a question of constitutional structure and separation of powers, not a means of resisting cultural change. Today, in contrast, judicial deference to the military serves only as a vehicle for social conservatism, and nothing more.

During his first two terms on the Court, Rehnquist's influence on the balance of power between military discretion and civilian oversight was relatively small. He joined the majority in one decision related to military affairs, *Gilligan v. Morgan*[223] in 1973, and dissented in two others, *Flower v. United States*[224] in 1972 and *Frontiero*

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219. *See id.* at 93-94.

220. *Id.* at 94.

221. *See* Karst, *supra* note 14, at 565.

222. Frank I. Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 8 (1986). Professor C. Thomas Dienes noted Rehnquist's "insensitivity" or "lack of attention to and concern with" individual constitutional rights in a military context. Dienes, *supra* note 14, at 808. Dienes's observation is somewhat ironic, because "attention to detail" is one of the hallmarks of military discipline. *See* Diane H. Mazur, *A Call to Arms*, 22 HARV. WOMEN'S L.J. 39, 74-75 (1999) (asserting that military training teaches a "'Zen-like fetish for minor details'" because "the smallest failure to observe detail can have immediately catastrophic consequences in a military environment") (quoting THOMAS E. RICKS, MAKING THE CORPS 63 (1997)).

223. 413 U.S. 1 (1973).

224. 407 U.S. 197 (1972) (per curiam). *Flower* overturned the conviction of a civilian arrested by military police for distributing leaflets on a public avenue within the limits of the Army's Fort Sam Houston in San Antonio, Texas. Fort Sam Houston was an "open" post, which meant that civilians could enter and leave the post without approval by a gate sentry. The public avenue on which the leafleteer was arrested was used as a traffic artery through San Antonio by both civilians and military personnel. Over 15,000 vehicles a day used the avenue. *See id.* at 197-98. The Court held that the military had no interest in regulating speech activity along that public corridor; its arrest of the petitioner violated the First Amendment. *See id.* at 198-99.

v. Richardson[225] in 1973. *Gilligan v. Morgan* was by far the most significant decision, and it was no coincidence that the case arose out of one of the defining events of the Vietnam era, the fatal shooting of four Kent State University students by the Ohio National Guard in May 1970.[226] The petitioners, acting on behalf of all Kent State students, sought a comprehensive and structural form of injunctive relief against the Guard.[227] They asked the federal district court to evaluate "the appropriateness of the 'training, weaponry and orders' of the Ohio National Guard"; to "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard"; and to "assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court."[228]

Not one of the Justices would have awarded any part of the remedy sought. The decision turned on whether the controversy was now moot and the claim should simply be dismissed. Four Justices dissented on that basis, noting that the Ohio National Guard had already adopted new methods of training and "use of force" rules in response to the incident.[229] Two additional Justices seemed to concede that the controversy was moot, yet they chose to join the majority in making a statement concerning the relationship of the military and the judiciary.[230] Although *Gilligan v.*

Rehnquist dissented in an opinion joined by Chief Justice Burger. He did not seem to understand the fairly common concept of an "open" post, *id.* at 199 n.*, but was clearly frustrated by the effect it had in limiting the commander's discretion. Rehnquist argued that "the unique requirements of military morale and security" may justify First Amendment limitations against civilians "even while normal traffic flow through the area can be tolerated." *Id.* at 200-01. Rehnquist does not explain why the need for military morale is unique or how it is weakened by the presence of leaflets.

225. 411 U.S. 677 (1973) (plurality opinion). *Frontiero v. Richardson* was one of the earliest cases applying equal protection principles to legal distinctions on the basis of sex. The petitioner challenged a Department of Defense policy that paid a higher level of compensation to married male servicemembers (a marriage "bonus") under all circumstances, but to married female servicemembers only if their spouses were in fact financially dependent on them. *See id.* at 679-80. The Court invalidated the policy as a violation of equal protection, finding the military's asserted need for "administrative convenience" in dependency determinations to be insufficient. *See id.* at 690-91. The Court made no mention of a need for judicial deference to military discretion in the management of its personnel, but the military did not offer any distinctive military justification for the sex-based policy, other than a general plea of convenience. Rehnquist was the sole dissenter. *See id.* at 691 (Rehnquist, J., dissenting); *see also infra* note 352 (discussing *Frontiero v. Richardson* in greater detail).

226. *See Morgan*, 413 U.S. at 3.

227. *Id.*

228. *Id.* at 5-6 (quoting in part from the issue remanded to the district court by the court of appeals, Morgan v. Rhodes, 456 F.2d 608, 612 (6th Cir. 1972)).

229. *See id.* at 4, 12 (Douglas, Brennan, Stewart & Marshall, JJ., dissenting) ("For many of the reasons stated in Part I of the Court's opinion, they are convinced that this case is now moot.").

230. Blackmun and Powell joined the majority but also filed a concurring opinion. *See id.* at 12, 14 (Blackmun & Powell, JJ., concurring) ("This case relates to prospective relief in the form of judicial surveillance of highly subjective and technical matters involving military training and command.").

Morgan concerned the activities of the militia or, in modern vernacular, the National Guard,[231] the constitutional underpinning of the case was parallel to the provisions that control the active military forces. In both instances, the Constitution has set aside a protected core of military discipline and governance subject to the control of Congress.[232] A court that assumed the sort of "continuing regulatory jurisdiction"[233] over the Ohio National Guard urged by the petitioners would not only infringe upon, but would supplant, the Article I governance of core military functions intended by the Constitution.[234] The Court's choice to forego a supervisory role was the only one that reasonably could have been made. The idea that a federal district court should select specific weapons for the Guard, establish standards for their use, and exercise continuing surveillance of weapons training activities approaches frivolousness.

The majority opinion, however, did not stop there. It took the opportunity to plant a seed, in the most general terms, that might later grow to discourage judicial review of military discretion under a much broader range of circumstances than those at hand. The contribution of Rehnquist may tip its hand in the Court's citation of the obscure *Orloff v. Willoughby* from twenty years before,[235] as well as in the Court's insistent protestations of its own incompetence in any matter of a military nature:

> Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian

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231. *See* Perpich v. Dep't of Def., 496 U.S. 334, 342-43 (1990) (explaining that the constitutionally designated militia forces are now known as the National Guard of the various states).

232. The militia clauses provide as follows:

> [The Congress shall have Power]
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

U.S. CONST. art. I, § 8, cls. 15-16.

233. *Morgan*, 413 U.S. at 5; *see also* Laird v. Tatum, 408 U.S. 1, 14, 15 (1972) (stating, in dicta, that judicial evaluation of Army intelligence-gathering activities "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action"; ruling on the basis that petitioners lacked standing because they failed to allege a "specific present objective harm or a threat of specific future harm").

234. The Court alternatively relied on the political question doctrine as analyzed in *Baker v. Carr*, 369 U.S. 186 (1962). Although the majority opinion failed to explain in any specific sense why *Gilligan v. Morgan* should be considered a nonjusticiable political question under *Baker v. Carr*—it merely quoted a list of possible factors to consider, relevant and irrelevant alike—the most applicable factor was probably the "lack of judicially discoverable and manageable standards for resolving [the question]." *Morgan*, 413 U.S. at 8 (quoting *Baker*, 369 U.S. at 217).

235. *See Morgan*, 413 U.S. at 12 (citing Orloff v. Willoughby, 345 U.S. 83 (1953)).

> control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.[236]

The opinion fails to note, however, that military judgments are not beyond judicial review just because they are military judgments. Only those core military activities related to internal governance and discipline of the armed forces are deserving of special deference. Even when the military acts in the interests of maintaining discipline, moreover, its decisions become judicial questions when they carry collateral consequences for civilians. The above-quoted language conveniently disregarded every limitation the Court had crafted for exercise of the military powers under the Constitution, and it would soon become the most lasting judicial legacy of the Kent State shootings. In the Court's next Term, it would serve as the foundation for the final break from the Court's jurisprudence of civilian-military relations.

B. The Battle That Would Win the War: Rehnquist and Parker v. Levy

In the last major Vietnam-era decision of the Supreme Court, *Parker v. Levy*,[237] Rehnquist finally realized the opportunity to transform the prevailing culture war concerning the military. He authored a majority opinion that would forever change the constitutional relationship between the military and the judiciary, granting Congress much greater latitude to use military necessity as a means of shaping the nature of civilian society. In contrast to the stealth *Orloff v. Willoughby*, *Parker v. Levy* has received a significant degree of scholarly attention.[238] Its notoriety, however, has always been for its treatment of Vietnam War protest. Rehnquist's opinion has never been fully studied for its impact on civilian-military relations.

Howard Levy was, in some respects, the "Hawkeye Pierce"[239] of the Vietnam War, only perhaps even less suited than Hawkeye to the military practice of medicine. He was a dermatologist drafted in 1965 and assigned to the Army's Fort Jackson in South Carolina.[240] Less than two years later, he was court-martialed and sentenced to three years at hard labor in a federal prison.[241] Levy clashed with the Army because he

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236. *Id.* at 10.

237. 417 U.S. 733 (1974); *see also* Sec'y of the Navy v. Avrech, 418 U.S. 676 (1974) (per curiam opinion) (companion case to *Parker v. Levy*).

238. *See, e.g.*, Robert Batey, Parker v. Levy*: A Primer in Judicial Persuasion*, 49 J. LEGAL EDUC. 97 (1999); Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839; Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on a Society Apart*, 51 NOTRE DAME LAW. 397 (1976).

239. Hawkeye Pierce was the lead character on the television show "M*A*S*H," a sensitive comedy that was set in an Army surgical unit during the Korean War. Hawkeye, a drafted surgeon, chafed at the military side of his medical duties. "He accepts an order only if it seems reasonable and not because *any* authority carries any weight with him whatsoever, and Hawkeye *never* salutes." DAVID S. REISS, M*A*S*H: THE EXCLUSIVE, INSIDE STORY OF TV'S MOST POPULAR SHOW 19 (updated ed. 1983) (emphasis in original).

240. *Levy*, 417 U.S. at 735-36.

241. *See id.* at 736.

ardently opposed the war in Vietnam. He aggravated his superiors with his resistance to doing things "the military way" and found many of the traditional customs and expectations of an officer's life—saluting, joining the officer's club, and the like—to be silly.[242] The specific court-martial charges filed against Levy were based on various statements Levy made to Army enlisted personnel concerning his opposition to the war and the manner in which it was being conducted. According to the court-martial specification, Levy was alleged to have made statements[243] to the following effect:

> 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 the casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children . . . .[244]

Levy was prosecuted under two sections of the Uniform Code of Military Justice that prohibited 1) "conduct unbecoming an officer and a gentleman" and 2) "disorders and neglects to the prejudice of good order and discipline" and "conduct of a nature to bring discredit upon the armed forces."[245]

Parker v. Levy illustrates some of the difficulty that can arise in distinguishing free speech concerns from disciplinary concerns in a military environment. When the speaker is a servicemember, does protest constitute dissent protected under the First Amendment, or does it constitute insubordination punishable as a breach of military discipline?[246] At least under the facts of *Parker v. Levy*, the answer seems reasonably to fit within the latter. Dr. Levy's statements concerning the activities of the Special Forces were more than just the expression of a political viewpoint. His duties as a

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242. For accounts of Dr. Levy's civilian background, military experience, and court-martial, see James Finn, *Personal Testimony: Howard Levy, M.D., in* CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY 161 (James Finn ed., 1971); ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970).

243. The extremely stilted nature of the military's specification of the charged offense suggests that these are not the words Levy actually used.

244. *Levy*, 417 U.S. at 739 n.5. Robert Strassfeld has argued that *Parker v. Levy* became a case about servicemembers' rights only through the Court's evasion of the true substance of the court-martial. Beneath the surface, in Strassfeld's view, was a case fundamentally about war and about race, both Black and Vietnamese. *See* Strassfeld, *supra* note 238, at 951-52. Rehnquist's opinion offered only the "relative coolness of a constitutional debate over two statutory provisions." *Id.* at 952.

245. 10 U.S.C. §§ 933-934 (2000).

246. *See* Donald N. Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423, 436 n.49 ("The discipline and order cases of the Vietnam War were often viewed more as battles over the court's intrusion on command prerogatives rather than as disputes over the precise first amendment issue involved.").

military physician required him to provide specialty training to Special Forces "aidmen," or medics. His objection to this training requirement was at the core of the statements for which he was court-martialed.[247] Dr. Levy argued he would be violating his medical ethics if he offered specialized information to soldiers who lacked the medical expertise, or the inclination, to use it for appropriate purposes. From the Army's perspective, however, Dr. Levy did not merely speak *about* his beliefs. He used his status as a commissioned officer and as a military doctor to speak directly to subordinates who might be influenced by his beliefs, thereby undermining military discipline and morale.[248]

There was nothing surprising about Rehnquist's treatment of this case as one concerning primarily discipline and not speech. Government employees have never enjoyed the protection of the First Amendment to speak without limitation while actually engaged in service to the government.[249] The principle applies even more strictly in the context of authoritarian institutions, such as the public schools, prisons, police forces, or the military.[250] Dr. Levy was insubordinate in the performance of his military duty, and the fact that his insubordination also involved speech, or even was accomplished by means of speech, did not change that equation. The Court upheld the convictions, holding that military custom with respect to conduct considered "unbecoming," "to the prejudice of good order and discipline," or "of a nature to bring discredit" was not unconstitutionally vague or overbroad.[251] If Rehnquist had gone no

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247. Dr. Levy was also charged and convicted under Article 90 of the Uniform Code of Military Justice, 10 U.S.C. § 890 (2000), which provided for punishment "as a court-martial may direct" of any person who "willfully disobeys a lawful command of his superior commissioned officer." *See Levy*, 417 U.S. at 737-38 & n.2. The charge arose from Dr. Levy's alleged refusal to obey the hospital commander's order to train Special Forces personnel. *See id.* at 736.

248. *See* Batey, *supra* note 238, at 120 (identifying "the very real differences between a private citizen's criticizing American participation in the Vietnam War and a military officer's openly urging his subordinates not to follow orders to fight in it").

249. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (upholding the First Amendment right of a public school teacher to criticize the school board's allocation of funds by writing a letter to the local newspaper). The Court distinguished the circumstances that would arise just a few years later in *Parker v. Levy*:

> [Pickering's] statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships . . . are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 569-70. One might reasonably ask why Rehnquist did not decide *Parker v. Levy* on the basis of standard First Amendment precedent. *See* Zillman, *supra* note 246, at 448-55 (applying *Pickering* analysis to speech by servicemembers). Reliance on precedent would have, of course, failed to offer the additional benefit of altering the constitutional scope of military discretion.

250. *See generally* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999).

251. *See Levy*, 417 U.S. at 734 n.4, 746, 757-58. "While there may lurk at the fringes of the

further, grounding the decision in the military's need to exercise discretion within its core constitutional function of governance and discipline, the case would have had little lasting significance.

The one understanding that did change in *Parker v. Levy*, however, fundamentally altered the Court's precedent of civilian-military relations. Rehnquist reached back to the *Orloff v. Willoughby* of his clerkship and rewrote—in fact misrepresented—the language of that opinion in order to substantiate a presumption of judicial deference to all exercises of military discretion. Rehnquist took a case that had relied on uncontroversial principles of constitutional separation of powers and transformed it into one that relied instead on the Vietnam-era cultural division between those who supported the military and those who did not. In *Orloff v. Willoughby*, Justice Jackson had made the relatively simple observation that the military was a "specialized community governed by a separate discipline," referring to the Article I delegation of power that permits Congress to make rules for the internal governance of the military.[252] Rehnquist cited the authority but changed its language, stating that the Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society" and "a society apart from civilian society."[253] Not that the military's system of disciplinary rules is separate and distinct from the rules that control in civilian courts, *but that military society itself is separate from civilian society*, and that this in and of itself requires civilian courts to forego review of military decisions.[254] The words themselves may seem insignificant, standing alone. This simple assertion in *Parker v. Levy*, however, would be relied upon repeatedly over the next generation to establish and extend a cultural divide between servicemembers and civilian citizens of the United States. It would also facilitate a trend of court-sanctioned social conservatism, one that would be justified by claims of military necessity.

Rehnquist discovered his "separate society" rationale in the frontier military of the nineteenth century. He resurrected a pre-World War I (and in two instances, pre-Civil War) line of authority respecting the constitutional core of military discretion in matters related to good order and discipline.[255] In each of the cases Rehnquist relied

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articles . . . some possibility that conduct which would be ultimately held to be protected by the First Amendment could be included within their prohibition, we deem this insufficient to invalidate either of them at the behest of appellee." *Id.* at 760-61.

252. *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

253. *See Levy*, 417 U.S. at 743, 744.

254. Robert Batey has noted other instances of misrepresentation of law and fact within Rehnquist's majority opinion in *Parker v. Levy*. *See* Batey, *supra* note 238, at 109, 112-13. For example, Rehnquist suggested that Dr. Levy was given training on the provisions of the Uniform Code of Military Justice, *see Levy*, 417 U.S. at 751-52, although there was no evidence to support such a finding. Batey concluded as follows: "It is likely that the chief justice would deny that this paragraph was intentionally misleading, but I would doubt any such disclaimer. . . . Rehnquist adroitly manages to create an impression of the facts that is fundamentally false." Batey, *supra* note 238, at 109.

255. *See Levy*, 417 U.S. at 743-52 (citing Swaim v. United States, 165 U.S. 553 (1897); United States v. Fletcher, 148 U.S. 84 (1893); *In re* Grimley, 137 U.S. 147 (1890); Smith v. Whitney, 116 U.S. 167 (1886); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827)). Edward Sherman has described Rehnquist's recitation of

upon—the most recent decided in 1897—an Article III court had declined to review the individualized determinations of military tribunals. Each case concerned a servicemember's conviction by court-martial for violation of one of the "general articles" at issue in *Parker v. Levy*, offenses inherently defined by military tradition and linked by their tendency to disrupt military discipline and morale. As discussed in Part I, Article III courts have no authority to review or supervise a court-martial's enforcement of the military's Article I rules for the government and regulation of the armed forces. Provided the military acts within the narrow disciplinary scope of this constitutional grant of power, and does so in a manner that avoids collateral consequences for civilians, the maintenance of military discipline begins and ends within the military chain of command. All of this would be unremarkable, except for the fact that Rehnquist offered these cases in support of the novel idea that the military is somehow separate from civilian society in a way that is constitutionally significant.

Rehnquist's "separate society" rationale was and is factually and legally unsupportable. Moreover, it has caused harm to the constitutional balance of civilian-military relations under the Constitution and, as will be discussed later in Part III, caused significant harm to the military as well. At one time in our history, service in the armed forces of the federal government might have been considered a peculiar, almost monastic profession, with its members living "according to their own customs in near-isolation from the civilian world."[256] However, the days of a geographically distant, frontier military, one without a presence or relevance in the lives of civilian citizens, are almost a century in the past. It was dishonest for Rehnquist to suggest that courts should rely on a perspective of military life that is not only obsolete, but has been obsolete for generations. As Joseph Bishop noted in 1961, thirteen years before *Parker v. Levy*, "if there ever was a time when the Army could rationally be described as a 'separate community' with a separate system of government, that time is long past."[257]

Congress would not have enacted the UCMJ in 1950 if not for the near-universal military service of eligible male citizens during World War II.[258] The shared

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precedent in support of his "separate society" rationale as "random quotes from Supreme Court cases." Edward F. Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539, 570 (1974).

256. Duke & Vogel, *supra* note 37, at 458.

> At the outbreak of the Civil War the Army only had a strength of some 16,000, and these were scattered all over the country and had the primary task of guarding lines of travel against the Indians. Throughout the period from the close of the Civil War to the Spanish American War, the Army was employed chiefly as a constabulary and a police force.

Id. at 458 n.128; *see also* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 226-29 (1957) (describing the isolation of the military from civilian society in the late 1800s).

257. Bishop, *Collateral Review*, *supra* note 15, at 70; *see also* Karst, *supra* note 14, at 569-72 (criticizing the "separate society" rationale as unsupported in fact); Zillman & Imwinkelried, *supra* note 238, at 400 ("Rehnquist ignored several factors highly relevant in assessing the current validity of claims that the military is a society apart.").

258. *See* Wiener, *Original Practice I*, *supra* note 36, at 11 ("At the peak of the World War II mobilization, when some 12,300,000 persons were subject to military law—almost as many

experience of millions of citizens who were then returning to civilian life served to identify the weaknesses of military justice and motivate Congress to modernize—or "civilianize"[259]—those practices. The citizen-soldier underpinning to the substantial post-World War II reforms of military law should not have been a surprise to any Justice, having been noted in a number of earlier cases.[260] It made no sense for Rehnquist to characterize military service as something so bizarre and so unknowable as to be beyond the understanding of civilian citizens. Yet this is the fundamental assumption relied upon in *Parker v. Levy*.[261]

Rehnquist's majority opinion misstated both law and fact in an apparent effort to disable the Court from questioning military judgment in any context. Before *Parker v. Levy*, the relevant "separateness" between military and civilian concerns was grounded in constitutional text. It contemplated nothing more than distinctive internal rules for military discipline that would be administered without the supervision of

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as the entire population of the country in 1830—the armed forces handled one third of all criminal cases tried in the nation.") (footnotes omitted).

259. Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970). Joseph Bishop had an irreverent and perceptive view on the inevitable cycles of war and concern for military justice. He wrote, "After every war there are loud and sometimes justified squawks about the unnecessary roughness of martial courts and cops, followed by a tremendous pother in Congress, followed by a grand general renovation of the Articles of War [now the UCMJ], followed by profound public apathy until the next emergency." Bishop, *Collateral Review*, *supra* note 15, at 57-58.

Bishop could afford to be irreverent because universal selective service eligibility in effect at the time ensured that the cycle of periodic concern for civilian-military relations would continue. In the era of an all-volunteer military, one characterized by the Court as a separate society, we risk a profound public apathy that is also permanent. Notably, Bishop still concluded that the best guarantee of fairness in military justice "is the existence of some degree of power, altogether outside the statutory system of military justice, to enforce such fairness." *Id.* at 58.

260. *See* Reid v. Covert, 354 U.S. 1, 37 (1957) ("We recognize that a number of improvements have been made in military justice . . . . In large part these ameliorations stem from the reaction of civilians, who were inducted during the two World Wars, to their experience with military justice."); *see also* Burns v. Wilson, 346 U.S. 137, 140 (1953) ("These enactments [the Uniform Code of Military Justice] were prompted by a desire to meet objections and criticisms lodged against court-martial procedures in the aftermath of World War II."). *See generally* Sherman, *supra* note 259, at 5-8, 28-29 (describing "a continuous civilianization of military justice, with particular acceleration in the post-World War II period and the present Vietnam War era") (writing in 1970).

261. Sometimes assumptions fossilize into fact given a sufficient amount of repetition. Critics of Rehnquist's "separate society" rationale have often objected to its consequences but seem to concede its fundamental validity, failing to note the judicial sleight of hand that gave the rationale life. *See, e.g.*, Chemerinsky, *supra* note 250, at 443-49 (summarizing modern instances of the Supreme Court's deference to the exercise of military discretion); David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 341-45 (1994) (conceding the principle of judicial deference to military judgment but arguing for certain limitations); Levin, *supra* note 14, at 1057 (conceding that "separate society" rationale "seems to be on target about something which, however unpleasant, has long been recognized to be correct").

Article III courts. After *Parker v. Levy*, the relevant separateness departed from constitutional text and was grounded instead in a nonconstitutional notion of a cultural and experiential divide between military and civilian lives. None of the Court's earlier decisions defining the nature of civilian-military relations, however, support Rehnquist's assumption that jurisdictions with separate rules are by nature separate societies. In fact, one decision handed down just two months after Rehnquist's favorite son of military opinions, *Orloff v. Willoughby*, demonstrates the very opposite. *Burns v. Wilson*,[262] one of the many decisions preserving a core constitutional function related to military discipline, drew an analogy between military law and state law. Each constitutes "a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[263] State law, like military law, is considered "separate and apart" because federal courts played no role in its development and only a limited role in supervising its enforcement in state courts.[264] It never would occur to a federal court, however, to find that states therefore constitute separate societies from the federal government, requiring Article III courts to defer in all circumstances to decisions made by state governments. The argument is nonsensical; citizens do not lead "state lives" that are precisely separable from their "federal lives." Neither do servicemembers lead lives that are separable from their status as citizens of the United States, and the reforms in military law achieved post-World War II and pre-Rehnquist are a reflection of that reality.

The factual assumptions of *Parker v. Levy* are just as thin. Its judicial deference is grounded, almost proudly, in professions of ignorance.[265] In Rehnquist's view, we could not possibly understand, as judges or as civilians, "the different character of the military community and . . . the military mission."[266] We are reduced to a conclusory form of trust in the military's judgment, a trust dictated by its grave responsibility "to fight or be ready to fight wars should the occasion arise."[267] For example, Rehnquist offered the military's singular need for unquestioning obedience as a reason why civilian courts are ill-equipped to question the exercise of military discretion: "Its law is that of obedience. No question can be left open as to the right to command in the

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262. 346 U.S. 137 (1953).

263. *Id.* at 140.

264. *See id.*; *see also* Noyd v. Bond, 395 U.S. 683, 693-99 (1969) (requiring servicemember to exhaust remedies within military justice system before filing petition for habeas corpus in civilian federal court; relying on analogous principles governing challenges to jurisdiction of state courts); Gusik v. Schilder, 340 U.S. 128, 131-32 (1950) (same). *But see* Parisi v. Davidson, 405 U.S. 34, 41-45 (1972) (permitting servicemember to challenge administrative denial of conscientious objector status in civilian federal court although court-martial for subsequent failure to obey still pending; demands of comity between two judicial systems did not control because court-martial was without power to grant requested relief).

265. Federal courts have managed to incorporate the methodologies and research of various academic disciplines, such as economics, statistics, or the social sciences, without undue intellectual discomfort. There is something about academic military research, however, that causes judges to doubt their abilities to understand and instead reach for stereotypes about the military as a substitute. *See* Sherman, *supra* note 255, at 541-43 (describing the Supreme Court's reluctance to utilize hard information concerning the military, despite its availability).

266. *See Levy*, 417 U.S. at 758.

267. *Id.* at 743 (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

officer, or the duty of obedience in the soldier."[268] To ensure the point would not be overlooked, he repeated his reference to the need for unquestioning obedience twice more later in the opinion.[269] Rehnquist could not have been more wrong. His stereotypical characterization of military obedience as blind and fanatical, without rational or moral context, has not been accepted since Nuremberg.[270] Military appellate courts have held that a servicemember "is not an automaton but a 'reasoning agent' who is under a duty to exercise judgment in obeying the orders of a superior officer."[271] Even from a military perspective, therefore, the introduction of independent judgment within a military environment is not something to be feared.

The most pernicious aspect of *Parker v. Levy*, however, is its invitation to the military to consider itself a society apart from—and a society above—its lesser civilian counterpart.[272] Separatism is never neutral. It necessarily implies lesser and greater, and *Parker v. Levy* implied that the military should not be subject to civilian expectations because civilian expectations inevitably will be beneath the military's. The military, for example, has "overriding demands of discipline and duty";[273] by implication, civilian society lacks that commitment to discipline and duty.[274] The

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268. *Id.* at 744.

269. *See id.* at 751, 758; *see also id.* at 744 (citing Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827), which assumes that a "prompt and unhesitating obedience to orders is indispensable" to the military mission). According to this 1827 view of the moral responsibility of servicemembers (apparently little or none), soldiers who pause to consider the appropriateness of orders risk contributing to the victory of hostile forces. *See Martin*, 25 U.S. (12 Wheat.) at 30.

270. *See* William George Eckhardt, *Nuremberg—Fifty Years: Accountability and Responsibility*, 65 UMKC L. REV. 1 (1996) (evaluating Lieutenant William Calley's war crimes at My Lai in the context of Nuremberg principles); Sherman, *supra* note 255, at 571 ("[A]bsolute obedience, if not laid to rest by Nuremberg and military cases which have upheld a serviceman's right to question orders for clarification and to disobey them if illegal, has been rejected in contemporary military teaching.") (footnotes omitted). As early as 1851, the Supreme Court recognized that illegal military orders must be disobeyed. "[I]t can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify." Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851).

271. United States v. Kinder, 14 C.M.R. 742, 776 (A.F.B.R. 1954); *see also* United States v. Calley, 22 C.M.A. 534, 541-44 (1973) (holding that, with respect to the My Lai incident during the Vietnam War, Lieutenant Calley should have known that an order to kill civilians was illegal and that obedience to orders was no defense). Servicemembers "must learn to follow orders *yet retain sufficient autonomy to refuse illegal orders.*" JAMES H. TONER, TRUE FAITH AND ALLEGIANCE: THE BURDEN OF MILITARY ETHICS 46 (1995) (emphasis in original); *see also* MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR 230-246 (1999) (distinguishing between rules and standards in military law, and recognizing the benefit of encouraging deliberative judgment in servicemembers rather than unreflective obedience).

272. *See* Bishop, *Collateral Review*, *supra* note 15, at 71 (stating that "separate society" rationale "tends to make the armed services an enclave of the national polity whose inhabitants are of other caste than the rest").

273. *Levy*, 417 U.S. at 744 (citing Burns v. Wilson, 346 U.S. 137, 140 (1953)).

274. The concurrence in *Parker v. Levy* highlights this moral dimension of the civilian-military divide. Justice Blackmun and Chief Justice Burger, oddly enough, argued that military

military community has a "different character" than that of the civilian community,[275] and Rehnquist's opinion made clear which community had the greater character and which the lesser. Civilians may be "disrespectful and contemptuous";[276] servicemembers may not. At every turn, *Parker v. Levy* left the impression that civilian expectations—including constitutional expectations—were not pertinent to the military because they were not worthy of the military.

C. The Generation That Followed Parker v. Levy, *and the Collateral Damage Inflicted by Constitutional Separatism*

During the first two decades of Rehnquist's service on the Court, "the idea that judges have virtually nothing to say about any issue involving the military [grew] like a weed."[277] In almost any case involving a challenge to the exercise of military judgment, or to a policy justified on the basis of military necessity, the Court would offer the standard *Orloff v. Willoughby*,[278] *Gilligan v. Morgan*,[279] or *Parker v. Levy*[280] platitudes as reasons to ratify military choice. Provided the government was able to tie military judgment in any remotely articulable way to the maintenance of military

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law expects *more*—not just expects *differently*—in comparison to civilian society. The distinction is important because it permits the military to characterize disagreement with its choices on a moral basis:

> Relativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral or even illegal.

Id. at 765 (Blackmun, J., and Burger, C.J., concurring). The Justices' careless characterization of civilian legal standards as morally inferior to their military counterparts was sneering in tone. "The truth is that the moral horizons of the American people are not footloose, or limited solely by 'the civil code of Tennessee.'" *Id.* I suspect neither realized how far this moral characterization of military choice would be stretched to immunize the military from constitutional review.

275. *Id.* at 758.

276. *Id.* at 759 (quoting United States v. Priest, 21 C.M.A. 564, 570 (1972)).

277. Karst, *supra* note 14, at 564; *cf.* Sherman, *supra* note 255, at 580 (noting a trend toward greater judicial involvement in military affairs as the Vietnam War progressed, a trend that would be halted by *Parker v. Levy*).

278. 345 U.S. 83, 92 (1953) ("[T]he very essence of compulsory service is the subordination of the desires and interests of the individual to the needs of the service."); *see also id.* at 93 ("[J]udges are not given the task of running the Army.").

279. 413 U.S. 1 (1973):

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Id. at 10 (emphasis in original).

280. 417 U.S. at 743 ("[T]he military is, by necessity, a specialized society separate from civilian society."); *see also id.* at 744 ("[M]ilitary society has been a society apart from civilian society.").

discipline or military efficiency, the Court would defer without substantive consideration of whether the circumstances fit within the constitutional core of military discretion. In decision after decision, the Court insisted that it was uniquely incompetent to evaluate the constitutionality of decisions made by or on behalf of the military.[281] In decision after decision, the Court reminded us that the military was a community separate and apart from the community of civilian citizens it served;[282] its higher sense of discipline, duty, and selflessness displaced the constitutional values that would otherwise control.[283] To question that judicial balance in favor of military judgment was at best uninformed, at worst unpatriotic, and therefore deference to that judgment was the only appropriate course.[284] It is, after all, "the primary business of armies and navies to fight or be ready to fight wars,"[285] and the gravity of that ultimate responsibility forgives a host of constitutional slights.

In several cases following *Parker v. Levy*, the Court did properly defer to discretionary choice with respect to military affairs. In those cases, the contested issue fell squarely within the constitutional core of congressional power to make rules for the governance and regulation of the armed forces. The military exercised judgment in the interests of maintaining good order and discipline, and its judgment did not impose collateral consequences on civilians, on civilian society, or on civilian-military relations. Although the particular results in those cases were controversial, and some might argue that better military judgment would have been different military judgment, the choice was one for the military or for Congress to make. Provided the consequences of an exercise of military discretion are confined to matters of internal discipline, and absent the most egregious circumstances, civilian courts properly defer. The Court has approached, but has not yet identified, the point at which judicial deference in matters of internal military discipline is no longer appropriate.

One of the most controversial aspects of the military disciplinary system is its disinclination to engage in "discipline by lawsuit." The military takes great care to protect its command relationships, believing that inappropriate conduct is best controlled through maintenance of an effective chain of command. In the military's

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281. *See* Solorio v. United States, 483 U.S. 435, 448 (1987) (Rehnquist, C.J.); *see also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (Rehnquist, J.); Chappell v. Wallace, 462 U.S. 296, 302, 305 (1983); Rostker v. Goldberg, 453 U.S. 57, 65 (1980) (Rehnquist, J.).

282. *See* Weiss v. United States, 510 U.S. 163, 174 (1994) (Rehnquist, C.J.); *see also Goldman*, 475 U.S. at 506; *Chappell*, 462 U.S. at 301; Brown v. Glines, 444 U.S. 348, 354 (1980); Middendorf v. Henry, 425 U.S. 25, 49 (1976) (Powell & Blackmun, JJ., concurring); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

283. *See Solorio*, 483 U.S. at 440; *see also* United States v. Johnson, 481 U.S. 681, 691 (1987); *Goldman*, 475 U.S. at 507; *Chappell*, 462 U.S. at 300; *Rostker*, 453 U.S. at 66; *Glines*, 444 U.S. at 354; *Henry*, 425 U.S. 25, 38, 43 (1976) (Rehnquist, J.); *Councilman*, 420 U.S. at 757.

284. *See Weiss*, 510 U.S. at 177; *see also Solorio*, 483 U.S. at 447-48; *Goldman*, 475 U.S. at 507-08; *Chappell*, 462 U.S. at 301-02; *Rostker*, 453 U.S. at 64-65; *Glines*, 444 U.S. at 357; *Henry*, 425 U.S. at 43; *Councilman*, 420 U.S. at 758.

285. Greer v. Spock, 424 U.S. 828, 838 (1976) (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)); *see also* Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (same); *Councilman*, 420 U.S. at 757 (same); *Henry*, 425 U.S. at 46 (same); *Levy*, 417 U.S. at 743 (same).

view, resolution of grievances or disputes throughout civil lawsuits would weaken the sense of responsibility the military attempts to instill in its noncommissioned and commissioned officers at all levels of rank. Problems cannot simply be shipped out for judicial resolution; military leaders, both junior and senior, accept a professional responsibility to correct dysfunctional behavior in subordinates to a degree we do not expect of civilians in comparable supervisory positions.[286]

One of the best illustrations of that disciplinary philosophy can be found in *Chappell v. Wallace*,[287] a 1983 decision arising out of a military version of a standard employment discrimination dispute. Five enlisted men had brought suit against eight of their noncommissioned and commissioned officers, alleging that they had been assigned to less favorable duty and given poor performance evaluations on the basis of race. The Court barred their claims, holding that servicemembers could not recover damages from their superiors for violation of constitutional rights in the course of military service. The decision was grounded in a concern for the maintenance of effective superior-subordinate command relationships. It would be counterproductive to good order and discipline, for example, if subordinates could evade the normal military chain of command and frustrate discretionary decisions and orders by seeking civilian judicial relief.[288] The Court concluded that it should not "tamper with the established relationship between enlisted military personnel and their superior officers" because that relationship was "at the heart of the necessarily unique structure of the Military Establishment."[289]

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286. *See* Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 FLA. L. REV. 461, 469 (1996) ("At each level, from the most junior 21-year-old sergeant to the most senior general, soldiers are responsible for holding their subordinates' feet to the fire until something is done correctly. If it's not done correctly, the military will find someone else who can get it done correctly.") (explaining why the military's response to sexual harassment issues has been ineffective).

287. 462 U.S. 296 (distinguishing *Bivens* action against federal officials for violation of an individual's constitutional rights under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); analogizing instead to limitations on servicemember suits established in *Feres v. United States*, 340 U.S. 135 (1950)).

288. *See id.* at 304. Furthermore, Congress has provided servicemembers with alternative administrative remedies for redress of grievances. *See id.* at 302-03. *But see* Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335, 356-58 (1999) (arguing that those administrative remedies are ineffective in cases of sexual harassment). Professor Spak and Mr. Tomes are both retired officers in the Army's Judge Advocate General Corps. *Id.* at 355 nn.1-2.

289. *Chappell*, 462 U.S. at 300. The need for the capitalization of "Military Establishment" is left unexplained. Perhaps it is intended to emphasize just how inappropriate it would be for the Court to engage in review of military judgment, conjuring a picture of the military as the Great Unknowable, Unquestionable Thing.

The Court similarly overreaches when it justifies its deference on the basis of an exaggerated statement of a servicemember's duty of obedience. It asserts, incorrectly, that "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Id.* Military ethics require the opposite; a servicemember has an obligation to disobey an illegal order, which would seem to contemplate at least brief reflection on the situation, if not occasional debate. *See* United States v. Kinder, 14 C.M.R. 742, 776 (A.F.B.R. 1954) (stating that servicemembers must exercise judgment in obeying the orders of

Some students of the military justice system criticize these limitations on a servicemember's access to legal redress in civilian courts. This criticism has become particularly acute in the case of sexual harassment. Some have argued that sexual harassment should not be addressed solely through the internal disciplinary structure of the military justice system, and that female servicemembers should be permitted to bring civilian Title VII[290] claims as well.[291] Some, including Justice Scalia, argue that *Feres v. United States*,[292] which bars servicemember claims under the Federal Tort Claims Act for injuries incident to military service, should be overruled.[293] On the issue of whether civilian remedies ought to be available to servicemembers for intramilitary harms, these differences in judgment raise fair questions but still fall within a constitutionally protected zone of discretion for the military or for Congress to exercise. The results in these "internal military discipline" cases, in and of themselves, do not raise significant concerns for civilian-military relations under the Constitution. Concerns do arise, however, when the Court uses language that is far broader than necessary to resolve the controversy at hand and disregards constitutional limitations on the scope of its deference to the military.

Two of Rehnquist's post-*Parker v. Levy* opinions raise this concern. In *Middendorf v. Henry*,[294] the Court upheld the military's choice to deny court-appointed counsel to defendants tried by summary court-martial, on the basis that the proceeding was not a "criminal prosecution" for purposes of the Sixth Amendment.[295] The Court's decision was, in practical terms, relatively insignificant. The summary court-martial, a nonadversarial proceeding, is the least formal form of court-martial the military can employ. The punishment it can impose is limited to a "teaching" level of punishment, the clear intent being that the defendant be returned to duty as soon as possible.[296] One could reasonably argue that denial of appointed counsel was a bad idea or a good idea,[297] but in the end it was a disciplinary idea, and the military is entitled to a certain

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superiors).

290. 42 U.S.C. § 2000e-2(a) (1994).

291. *See* Yxta Maya Murray, *Sexual Harassment in the Military*, 3 S. CAL. REV. L. & WOMEN'S STUD. 279, 298-301 (1994); *see also* Spak & Tomes, *supra* note 288, at 355-69. In response to the contention that the introduction of civilian lawsuits into a military environment would negatively affect good order and discipline, Spak and Tomes answer that the effect could not possibly be more detrimental to discipline than the military's handling of the Tailhook incident or the McKinney court-martial. Spak & Tomes, *supra* note 288, at 365.

292. 340 U.S. 135 (1950).

293. *See* United States v. Johnson, 481 U.S. 681, 692-703 (1987) (Scalia, Brennan, Marshall, and Stevens, JJ., dissenting); *see also id.* at 700-01 & n.* (citing numerous sources critical of the *Feres* doctrine).

294. 425 U.S. 25 (1976) (Rehnquist, J.).

295. *Id.* at 34-38, 48.

296. The most significant punishment that a summary court-martial can impose is confinement at hard labor for a period not exceeding one month, and then only if the defendant's rank is within the four lowest enlisted pay grades. *See id.* at 33 & n.11.

297. The level of punishment authorized by means of summary court-martial is very similar to that authorized by the military's nonjudicial, administrative form of military discipline, the "Article 15." No right of counsel attaches in an Article 15 proceeding. *See supra* note 44. Interestingly, the military's increased utilization of Article 15 proceedings has reduced the incidence of summary courts-martial correspondingly. *See Henry*, 425 U.S. at 64 (Marshall &

discretion in choosing how best to maintain military discipline. The more significant effect of Rehnquist's opinion was to reinforce the impression that the military is "above" the need for such technicalities, not just that a military context can create different requirements for disciplinary procedure.[298] The military community was "tightly regimented"; the civilian community was "diverse."[299] Military personnel are subject to "overriding demands of discipline and duty"; civilian citizens are not.[300]

The principle of deference to military judgment in matters related to internal discipline reached its logical conclusion in *Solorio v. United States*.[301] Rehnquist's majority opinion in *Solorio* finally overruled *O'Callahan v. Parker*,[302] the Vietnam-era decision that had once marked the high point for judicial review of military judgment. *O'Callahan v. Parker* had restricted the jurisdiction of courts-martial to "service-connected" offenses, those having some articulated relationship to military discipline.[303] In *Solorio*, Rehnquist substituted a standard that instead focused on the status of the accused, holding that any offense committed by an individual having the status of an active-duty servicemember was subject to prosecution by court-martial.[304] The nature of the offense and its specific connection, if any, to the maintenance of good order and discipline were no longer pertinent jurisdictional concerns.[305] As in *Middendorf v. Henry*, reasonable military judgment could disagree as to whether military discipline is enhanced by an expansive view of court-martial jurisdiction over servicemember offenses.[306] Provided the expansive view stops short of collateral

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Brennan, JJ., dissenting). Of course, that leaves the question of why the military needs the summary court-martial. If it is important to the military to impose the stigma of a criminal conviction, in addition to the "teaching moment" provided by minor forms of discipline, then perhaps the military should proceed by more formal and adversarial means. *See* Eugene R. Fidell, *The Summary Court-Martial: A Proposal*, 8 HARV. J. ON LEGIS. 571 (1971).

298. The dissent read Rehnquist's majority opinion as "a grant of almost total deference to any Act of Congress dealing with the military." *See Henry*, 425 U.S. at 69 (Marshall & Brennan, JJ., dissenting).

299. *Id.* at 38.

300. *Id.* at 43 (quoting Burns v. Wilson, 346 U.S. 137 (1953)).

301. 483 U.S. 435 (1987).

302. 395 U.S. 258 (1969).

303. *Id.* at 272-73; *see supra* Part I.E.

304. *See Solorio*, 483 U.S. at 450-51.

305. *Solorio*, like *O'Callahan*, was a prosecution involving sexual misconduct. *Id.* at 436-37. The *Solorio* offense arguably had a greater service connection than the sexual assault of a civilian in *O'Callahan* because the *Solorio* victim was the minor daughter of a fellow servicemember. *Id.* at 437. Rather than finding the offense "service-connected" under the *O'Callahan* standard, however, *Solorio* rejected the standard entirely and substituted a status-based approach.

306. The dissenting Justices in *Solorio* raised the persuasive point that a status-based standard would permit court-martial for offenses that most would agree are beyond the business of the military, such as tax fraud. *Id.* at 467 (Marshall & Brennan, JJ., dissenting). The dissenters argued that, under the Fifth Amendment's exception for "cases arising in the land or naval forces," offenses committed by servicemembers do not "arise" in military service unless they have some connection to military service. *See id.* at 453-62; *see also* Duke & Vogel, *supra* note 37, at 457 (arguing that cases do not "arise" in the land or naval forces unless they are service-connected). *But see* Nelson & Westbrook, *supra* note 15, at 27-29

consequences for civilians, civilian society, or civilian-military relations, however, the judgment should be made by the military or by Congress.

Where the boundaries of the constitutional core of military discretion lie is unclear. Would it interfere with the maintenance of internal military discipline to permit suit by a military veteran who was secretly administered doses of LSD as part of an undisclosed Army experiment? In *United States v. Stanley*,[307] the Court held that it *would* interfere and should therefore be barred under *Feres v. United States*,[308] even though this experiment took place outside the petitioner's chain of military command and had no relation whatsoever to his military duties.[309] In the Court's view, any judicial inquiry into whether military discipline was implicated would inevitably interfere with military discipline, and so the boundaries of the constitutional grant of power to govern and regulate the armed forces could not even be tested.[310] For Justice O'Connor, who had joined Rehnquist in overruling *O'Callahan v. Parker*, this result was beyond the pale. Although she agreed in principle that courts should normally defer to military judgment with respect to internal discipline, *Stanley* was not a case about military discipline. She concluded that "conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."[311] For O'Connor, there were limits to the constitutional core of military activity that would be immune from judicial review. She believed that conduct that would violate the standards of the Nuremberg military tribunals could not possibly be insulated from liability under any disciplinary

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(criticizing the service-connection test of *O'Callahan* for its complexity and lack of predictability).

Some students of military justice argue that even the *O'Callahan v. Parker* standard of service-connection is too broad. Michael Spak and Jonathan Tomes have argued that courts-martial should be abolished, except for offenses committed overseas or in time of war. *See* Spak & Tomes, *supra* note 40, at 534-41. Military offenses, such as absence without leave, disrespect to an officer, or disobedience of orders, can be resolved through administrative forms of discipline or by discharge from the military. *Id.* Nonmilitary offenses should be prosecuted in civilian courts with all the attendant constitutional protections. *Id.*

307. 483 U.S. 669 (1987) (Scalia, J.).

308. 340 U.S. 135 (1950).

309. *Stanley*, 483 U.S. at 682-84.

310. *See id.* at 682-83. Scalia apparently adopted the "number of constitutional clauses" test for measuring the scope of Congress's authority to manage the military, but he fails to explain the origins of this test. Under the "number of constitutional clauses" test, the fact that the drafters of the Constitution chose to spread out the various military powers across several clauses within Article I, Section 8, rather than consolidate them in a single clause, counsels greater judicial deference to legislative choice than would otherwise be warranted. Scalia wrote: "What is distinctive here is the specificity of that technically superfluous grant of power, and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches." *Id.* at 682.

311. *Id.* at 709 (O'Connor, J., concurring in part and dissenting in part); *see also id.* at 686 (Brennan & Marshall, JJ., dissenting) (characterizing the Court's decision as "abdication" to military authority in violation of the Constitution). "But in reality, the Court disregards the commands of our Constitution, and bows instead to the purported requirements of a different master, *military discipline* . . . ." *Id.* (emphasis in original).

justification.[312]

How should we identify constitutional abuses against civilian-military relations? Fundamentally, all such abuses share a single feature. In each instance, they cross a line that limits the collateral consequences of military judgment. Whenever military judgment imposes consequences on civilian society, or alters the nature of the relationship between the military and civilian society, then judicial deference is inappropriate. The pre-Rehnquist understanding of constitutional civilian-military relations, which extended back before the Civil War, consistently recognized a narrow and defined core of military discretion to be exercised under the Article I military powers. Military choice within its proper sphere was protected; military choice exceeding its proper sphere was subject to judicial review. Post-Rehnquist, there have been two particular circumstances, the second more pernicious than the first, in which judicial deference to the military has been applied in ways abusive of civilian-military relations under the Constitution. First, courts should not defer to military judgment when its effect is to isolate the military from civilian society or to protect the military from disagreement. Second, and much more significant, courts should not defer when military judgment is employed to establish caste among members of civilian society.

1. Rehnquist's Isolationism

Free speech issues involving the military have undergone a complete factual reversal over the last generation. It used to be that the military shielded its people from controversial information out of fear that they would agree with it. For example, in the Vietnam-era *Greer v. Spock*,[313] the military rejected the request of a presidential candidate—one who opposed the war—to speak to servicemembers at Fort Dix during the 1972 campaign.[314] Today, the military is more likely to shield its people from controversial information out of fear that they will *disagree* with it. It assumes that servicemembers will be most comfortable and most amenable to good order and discipline if they are protected from information with which they disagree. The military's policy of "Don't Ask, Don't Tell" is the perfect paradigm of the modern context for military speech. Provided military personnel do not have to talk about, or hear about, the reality that gay citizens serve in the military, they are then

312. *See id.* at 709-10 (O'Connor, J., concurring in part and dissenting in part).

313. 424 U.S. 828 (1976). The opinion notes that Fort Dix policy banned all "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" on an equal basis, regardless of viewpoint. *Id.* at 831. The Court, however, ignored the obvious. Speech at Fort Dix would not constitute a "demonstration" or "picketing" if it *agreed* with military or administration policy. Similarly, speech would be "political" only if it challenged the status quo. Professors Zillman and Imwinkelried raised this point when they argued that the military's speech-restricting policies would have to be far broader if their purpose was to maintain political neutrality. For example, incumbent politicians routinely raise issues of military policy when speaking to servicemembers during visits to military installations. They do so, however, as representatives of a congressional committee or, in the case of the President, as Commander-in-Chief, and not as the partisan politicians targeted by military regulation. "The equality the *Spock* majority proposes is illusory and is weighted heavily in favor of incumbents." Zillman & Imwinkelried, *supra* note 10, at 803.

314. *Spock*, 424 U.S. at 831-33.

theoretically[315] able to maintain the "high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[316]

Rehnquist's characterization of the military as a society apart from civilian society has served to isolate its personnel and weaken the institution. In combination with the end of compulsory military service a generation ago, Rehnquist's mission to insulate the military from civilian influence has left us with a military that is now more *apart from* the people than *of* the people. *Brown v. Glines*,[317] a Vietnam-era case that upheld restrictions on servicemembers' speech, serves to illustrate the transformation, if in an unusual way. *Brown v. Glines* was a significant decision in that it continued the steady erosion of constitutional civilian-military relations during the Rehnquist era, but the subject of the speech that prompted the controversy was somewhat less than central to military or foreign policy. *Brown v. Glines* was about *haircuts*. Captain Albert Glines had prepared a petition addressed to the Secretary of Defense, asking his assistance in "changing the grooming standards of the United States Air Force."[318] The petitioner believed that haircut regulations "caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy."[319] Upon discovery of the petition, which Glines had circulated without the required command approval on a single occasion during a flight stopover in Guam, the Air Force removed Glines from Air Force Reserve flying duty and assigned him to inactive status.[320] The Court made short work of Glines' challenge to his termination, offering all the usual platitudes of deference to military choice.[321]

Interestingly, the haircut fracas presented in *Brown v. Glines* may be more valuable than its First Amendment discussion in illustrating the way in which the Rehnquist era has altered civilian-military relations. Odd as it may seem in the context of a present-day military in which males with shaved-to-the-scalp haircuts are the norm, a generation ago young military men sported haircuts that were closer to a conservative business style. Men often devoted an inordinate amount of effort to the evasion of haircut regulations so they would look more like civilians.[322] These men were not just

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315. In practice, it is impossible for gay servicemembers to maintain the level of secrecy concerning their private lives that "Don't Ask, Don't Tell" requires. The policy requires much more than a commitment not to tell. It requires gay servicemembers to maintain secrecy, avoid discovery, and lie as necessary. *See* Diane H. Mazur, *Word Games, War Games*, 98 MICH. L. REV. 1590, 1602 (2000) [hereinafter Mazur, *Word Games*]; Diane H. Mazur, *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 679, 690-94 (2000) [hereinafter Mazur, *Sex and Lies*]. *See generally* Tobias B. Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997).

316. 10 U.S.C. § 654(a)(14) (2000) (codifying "Don't Ask, Don't Tell" policy) (quoting one of the fifteen statutory reasons why gay citizens should not serve in the military).

317. 444 U.S. 348 (1980).

318. *Id.* at 351 n.3.

319. *Id.*

320. *Id.* at 351.

321. *See id.* at 354 (noting again that the military was a "society separate from civilian society" and that military service required "a respect for duty and a discipline without counterpart in civilian life").

322. See Zillman & Imwinkelried, *supra* note 238, at 422-27, for a discussion of the Vietnam-era litigation concerning hair regulations in the armed services. I have seen male

disaffected victims of the draft, because even the most hardcore of young military men had haircuts that would not have appeared strange in a professional civilian setting.[323] It was important to servicemembers not to be so obviously different from their civilian peers, and it remained important long after opposition to the Vietnam War might have provided some justification for concealing a military identity. Today, in contrast, military haircuts are often designed to separate a servicemember from civilian society, to define a servicemember as different and apart. Extremely shaved styles that would be considered inappropriate for a civilian professional are chosen for just that reason—they identify a servicemember as *not* civilian.[324]

Brown v. Glines solidified an understanding that it was appropriate, even necessary, to protect a "separate" military and its servicemembers from dissent. It is admittedly difficult in some circumstances to draw a line between eliminating dissent and preventing insubordination, but the Court has never considered it necessary to try. If the military is willing to state, for example, that exposure to particular information poses "a clear danger to military loyalty, discipline, or morale,"[325] the Court will defer to that judgment without consideration of the greater danger that its deference will further isolate the military from the civilian society it protects.[326] The primary intent seems to be to protect military personnel from information and not merely to preserve the responsiveness of command, because the Court equates cases involving speech by servicemembers with cases involving speech by civilians.[327] The military should have

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servicemembers comb their hair straight up from the ears and lacquer it in position with hair gel in an attempt to comply with a regulation that required hair to be off the ears. I have seen male servicemembers structure an entire day at work in a way that would not require them to come indoors and remove their hats, which would reveal an excess of hair.

323. Haircuts are difficult to describe without a picture. The recent controversy concerning former Senator Bob Kerrey's service in Vietnam prompted news organizations to publish pictures of Kerrey and other members of his Navy SEAL (Sea-Air-Land) special operations unit, and the pictures provide good illustrations of typical military haircuts of the time. *See* Gregory L. Vistica, *What Happened in Thanh Phong*, N.Y. TIMES, Apr. 29, 2001, (Magazine), at 50, 51-53, 55 (featuring pictures of Kerrey and his Navy colleagues taken during the Vietnam War).

324. The Ninth Circuit Court of Appeals expressed a degree of disgust with the behavior of Captain Glines, although it found the Air Force's restrictions on petitions to be unconstitutional prior restraints. In describing Glines's motivation for the petition, it sarcastically noted that "Air Force standards describing maximum hair length offended him." *See* Glines v. Wade, 586 F.2d 675, 677 (9th Cir. 1978), *rev'd*, Brown v. Glines, 444 U.S. at 348. The Ninth Circuit also criticized Glines for shaving his head in protest. *See id.* Ironically, twenty years later, Glines' act of protest would have produced a perfectly normal military haircut.

325. *See Glines*, 444 U.S. at 355.

326. *See id.* at 368 (Brennan, J., dissenting) ("All that the Court offers to palliate these fatal constitutional infirmities is a series of platitudes about the special nature and overwhelming importance of military necessity."). Brennan observed, correctly, that "the concept of military necessity is seductively broad, and has a dangerous plasticity." *Id.* at 369.

327. In upholding a restriction on servicemember speech in *Brown v. Glines*, the Court relied primarily on *Greer v. Spock*, 424 U.S. 828 (1976), which upheld a restriction on civilian speech in areas of a military post open to the public. *See Glines*, 444 U.S. at 353-58. During the Rehnquist era, the Court has progressively backed away from its decision in *Flower v. United States*, 407 U.S. 197 (1972), the only instance in which it overruled military choice with

a greater interest in controlling the speech of its own people because that speech potentially could drift across a line into insubordination, interference with mission effectiveness, or loss of public trust in the military's ability to operate in a politically neutral manner.[328] There is no reason, however, that the military's interest in controlling what its people hear should be the same.

Isolationism carries a greater threat to the military and to our constitutional sense of civilian-military relations than the risks imposed by exchange of views and information across the civilian-military divide. Isolationism decays the military from within. Donald Zillman has argued that "the attitude toward free speech in the military can influence the type of military personnel serving the nation."[329] The most dangerous military, in fact, "may be the one with the 'isolated-garrison' mentality."[330] Rehnquist has relentlessly fostered the isolated-garrison mentality, encouraging servicemembers to see themselves as separate from civilian society and encouraging civilian society to view the military in the same divorced fashion. The Court's analysis of First Amendment issues in a military context has dovetailed perfectly with its endorsement of constitutional separatism between civilian and military matters, granting generous deference to the military to control the flow of information to servicemembers, and even the flow of information between servicemembers. This is the very circumstance in which courts should not simply defer to military judgment. When speech restrictions have the effect of isolating the military from civilian society, thereby impairing the traditional constitutional balance of civilian-military relations, courts should hold those restrictions to the same standards that would apply in any non-military governmental context.

On one occasion, earlier in Rehnquist's tenure, the Court revealed a glimpse of understanding concerning the importance of a shared military-civilian ethic. Although the moment may now have passed, given the sharp constitutional turn of the last generation, the moment remains instructive. The decision involved an attempt by editors of a law review to obtain information from the military for purposes of a study

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respect to civilian speech in public areas of military installations. *See* United States v. Albertini, 472 U.S. 675 (1985) (upholding the military's decision to bar civilian protest against nuclear weapons policy during a base "Open House" event; distinguishing *Flower* and following *Greer v. Spock*); *see also Spock*, 424 U.S. at 834-38.

328. For example, the UCMJ prohibits commissioned officers from using "contemptuous words against the President." 10 U.S.C. § 888 (2000). *See generally* John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968). In 1993, during the summer of congressional hearings concerning military service by gay citizens, Air Force Major General [two star] Harold N. Campbell made public reference to the Commander-in-Chief as "skirt-chasing," "draft dodging," and "dope smoking." General Campbell was reprimanded, fined, and forced to retire. *See* Michael R. Gordon, *General Ousted for Derisive Remarks About President*, N.Y. TIMES, June 19, 1993, at A9.

329. Zillman, *supra* note 246, at 433.

330. *Id.* at 444; *see also* Glines, 444 U.S. at 371 (Brennan, J., dissenting) ("The forced absence of peaceful expression only creates the illusion of good order; underlying dissension remains to flow into the more dangerous channels of incitement and disobedience. In that sense, military efficiency is only disserved when First Amendment rights are devalued."); Dienes, *supra* note 14, at 818 (arguing that restrictions on speech can foster "resentment and alienation" within the military).

of military ethics. In *Department of the Air Force v. Rose*,[331] Michael Rose, a New York University Law Review editor who was also a graduate of the Air Force Academy and an Air Force officer, sought access under the Freedom of Information Act[332] to summaries of honor code hearings—with personal references redacted—conducted at the Air Force Academy. The Air Force had refused Rose's request, arguing that the summaries were exempt from disclosure as matters relating to internal personnel rules and practices.

In an opinion crafted by Justice Brennan, however, the majority correctly viewed the controversy as something far more significant than just a bureaucratic personnel policy. Although *Parker v. Levy*[333] had been decided two years earlier, leaving the majority to scramble over a barricade of judicial deference,[334] *Rose* seemed to impose a responsibility on the military that matched the special constitutional immunity *Parker v. Levy* had awarded to exercises of military judgment. While the Court grounded its opinion in statutory interpretation rather than in constitutional obligation, the Court also recognized that questions of concern to the military cannot be resolved without attention to the nature of civilian-military relations under the Constitution. Information concerning honor code practices should have been disclosed, in the Court's view, because the military's "essential integrity [was] critical to the military's relationship with its civilian direction."[335] The distinctiveness of the military's system of discipline gave it a public relevance that could not be outweighed by the military's factually weak claims of inconvenience or invasion of privacy.[336] The Court concluded that "[t]he implication for the general public of the Academy's administration of discipline is obvious, particularly so in light of the unique role of the military."[337]

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331. 425 U.S. 352 (1976).

332. 5 U.S.C. § 552 (1994).

333. 417 U.S. 733 (1974).

334. *See Rose*, 425 U.S. at 367 (stating that the military "constitutes a specialized community governed by a separate discipline"). The *Rose* court quoted *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), in its original language instead of the Rehnquist-adjusted format in *Parker v. Levy*, 417 U.S. at 744, which was used to recast the military as a "society apart" instead of a community with a separate system of discipline.

335. *Rose*, 425 U.S. at 368.

336. *See id.* at 389-90 (Rehnquist, J., dissenting) (arguing that redaction was impractical and that, without redaction, release of the records would constitute an unwarranted invasion of personal privacy). Interestingly, Chief Justice Burger's dissent relied to a greater degree on notions of military immunity than did Rehnquist's dissent. Burger found the law review's request for information "highly unusual" and the Air Force Academy's honor system "unique." *Id.* at 382 (Burger, C.J., dissenting). He cited *Parker v. Levy* and *Orloff v. Willoughby* for illustrations of the great shame that "allegations of dishonor among commissioned officers" carry throughout military and civilian society, and he feared that the same stigma would be visited upon those individuals involved in honor-code proceedings even after redaction of identifying information. *Id.* at 383-84. Furthermore, Burger saw no real need for the information, characterizing the law review's request as nothing more than "willingness to subject an individual citizen to the risk of possible severe damage to his reputation simply to permit law students to invade individual privacy to prepare a law journal article." *Id.* at 384.

337. *Id.* at 367.

2. Military Judgment and the Establishment of Caste

This Article began with the narrow constitutional core of civilian-military relations, and traced the lines carefully drawn by the Court to distinguish matters of internal military governance and regulation from those military judgments of greater constitutional significance. Rehnquist blurred those historical lines and created a new jurisprudence of civilian-military relations under the Constitution in which military judgment could have far greater influence within civilian society. His principle of constitutional separatism with respect to the military was in some ways paradoxical. He characterized the military as a society apart from civilian society, yet that separateness seemed to operate in only one direction. Rehnquist's constitutional separatism demanded a healthy judicial deference to military judgment, but it failed to restrict the collateral consequences that military judgment might impose on civilian citizens, or on the relationship between military and civilian society. The Court reinforced this separatist perspective in two ways. It gave the military greater discretion to insulate its personnel from "nonconforming" civilian information by restricting civilian speech on public areas of military property. Less directly, the Court reinforced its separatist perspective by encouraging the military to view itself not only as separate, but as *above*, civilian society. The Court worked to instill a belief that evolving constitutional expectations were somehow beneath the military, and that the military's own ethical sense of character and discipline was a more effective measure in evaluating military judgment.

Rehnquist's transformation of civilian-military relations had its most significant impact in two Supreme Court decisions of the 1980s. *Rostker v. Goldberg*[338] and *Goldman v. Weinberger*[339] illustrated the reach of the Court's progressively expanding principle of judicial deference to military judgment. Deference to the military had been recast as a moral principle, not as an understanding grounded in constitutional structure and text. Historical wariness of the potential collateral consequences of military judgment had been forgotten as precedent and was re-written to accommodate the cultural crisis of the Vietnam War era. Under the Rehnquist view of civilian-military relations, however, the Court was prepared to take another step. In *Rostker v. Goldberg* and *Goldman v. Weinberger*, the Court would do more than just conveniently disregard the collateral consequences that military judgment imposed on civilian society. The Court would establish a principle of deference to military judgment that operated even if claims of military necessity were employed *for the purpose of* imposing collateral consequences on civilians and influencing social policy within civilian society.[340] These two decisions were the two most consequential decisions concerning constitutional control of the military of the twentieth century, and Rehnquist authored both.

Rostker v. Goldberg is the better known of the two cases. *Rostker* involved an equal protection challenge to Congress's decision to register men, but not women, for a military draft.[341] The case, however, offered little in elaboration of the Court's

338. 453 U.S. 57 (1981).
339. 475 U.S. 503 (1986).
340. *Goldman*, 475 U.S. at 506-10; *see also Rostker*, 453 U.S. at 64-83.
341. *See Rostker*, 453 U.S. at 59-63.

developing principles of equal protection on the basis of sex, because its military context completely overshadowed its constitutional context. It should be noted at the outset that *Rostker* raised an issue without historical parallel before the Court: whether citizens who *wanted* to serve in the military (or in this case, register for potential service) could be rejected nonetheless. The Court's draft-related controversies before *Rostker* had always involved citizens seeking to evade compulsory military service, or seeking to evade the consequences of evading military service.[342] As discussed in Part I.D, the Court has generally resolved draft issues without needing to resort to any particular deference to military judgment. The Constitution granted power to Congress to raise armies by either volunteer or compulsory means, and that conclusion alone was sometimes sufficient to resolve the matter.[343] If the petitioner raised claims requiring heightened judicial scrutiny, such as claims grounded in religious freedom, the Court analyzed them in accordance with prevailing nonmilitary precedent.[344] With the exception of *Rostker*, interestingly, even the Rehnquist-era Court resolved draft issues without relying on special deference to the military.[345] Issues related to drafting civilians would, by definition, have little connection to the core Article I function of internal military governance and regulation.

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342. The Court never had the opportunity to uphold or overturn military policies requiring racial segregation. The armed services were desegregated by the executive order of President Truman in 1948. *See* Karst, *supra* note 14, at 520; *see also* F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of American Armed Forces*, 8 WM. & MARY BILL RTS. J. 273, 291 (2000). In *United States ex rel. Lynn v. Downer*, 140 F.2d 397 (2d Cir. 1944), the only case contesting the military's policies of segregation, the petitioner objected to racially separate draft "calls," or "requisitions calling for a specified number of whites and a specified number of Negroes for induction during a given month and based on relative racial proportions of the men registered with a local board and subject to call for induction." *Lynn*, 140 F.2d at 400. The segregated draft calls were upheld under the "separate but equal" authority of *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Lynn*, 140 F.2d at 401.

343. *See* Arver v. United States, 245 U.S. 366, 389-90 (1918) (upholding the constitutionality of compulsory military service against claims that the draft violated religious freedoms and constituted involuntary servitude prohibited by the Thirteenth Amendment).

344. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 450-52 (1971). *Gillette* upheld the constitutionality of draft laws that denied conscientious-objector status to draftees opposing only a particular war but not all wars; the distinction was neutral with respect to religious affiliation or belief. *Id.*

345. *See* Wayte v. United States, 470 U.S. 598, 608 (1985) (upholding "passive enforcement" policy with respect to evasion of draft registration, under which only those nonregistrants who announced their intent not to register to the government, or who were reported by others, would be investigated and prosecuted; selective prosecution claims should be judged "according to ordinary equal protection standards"); *see also* Pers. Adm'r v. Feeney, 442 U.S. 256 (1979) (holding that military veteran's preference in civil service employment did not violate equal protection despite disparate impact on women; preference was gender-neutral and not enacted for the purpose of discriminating against women); Johnson v. Robison, 415 U.S. 361 (1974) (rejecting equal protection and free exercise challenges to draft law that awarded greater educational benefits to veterans of military service than those who performed alternative civilian service as conscientious objectors; classification was rational and advanced the secular purpose of assisting readjustment from military life).

Rostker would change the equation entirely. Because the claim arose in a military context, the Court assumed from the outset that standard constitutional principles would not apply. Writing for the majority, Rehnquist constructed a principle of judicial deference to matters of military concern that was novel even in comparison to his deferential language in *Parker v. Levy* seven years earlier.[346] In *Parker v. Levy*, deference was at least grounded in the Court's traditional understanding of the constitutional latitude given to the military to exercise discretion within a narrow range of internal military activity.[347] Rehnquist stated this long-standing principle in terms that were more general than warranted (and misrepresented precedent in order to do so), but his *Parker v. Levy* opinion still preserved a small connection between deference and the specific nature of the military function to which it applied. In *Rostker*, however, the historical link to the core constitutional function of internal military discipline disappeared. Deference was required, in Rehnquist's view, simply because the Constitution had expressly granted powers to Congress with respect to the armed forces. He noted that "Congress explicitly relied upon its constitutional powers under Art. I, § 8, cls. 12-14," which "'commit[] exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for Government and regulation of the land and naval forces.'"[348] It is curious, however, that Rehnquist would propose special deference when Congress acts "under an explicit constitutional grant of authority,"[349] because Congress always acts under an explicit constitutional grant of authority.[350]

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346. Rehnquist still did, of course, mention all the reliable standards in exhorting deference to exercises of military discretion. *See Rostker*, 453 U.S. at 65-66 (citing Parker v. Levy, 417 U.S. 733 (1974); *see also* Gilligan v. Morgan, 413 U.S. 1 (1973); Orloff v. Willoughby, 345 U.S. 83 (1953)). The district court had drawn the reasonable distinction between *Rostker* and the Kent State decision of *Gilligan v. Morgan*, 413 U.S. 1 (1973), noting that broad questions of policy in the draft registration system did not implicate day-to-day supervision of military operations or discipline. *See Rostker*, 453 U.S. at 68-69.

347. *See Levy*, 417 U.S. at 746-49.

348. *Rostker*, 453 U.S. at 65 (quoting in part S. REP. NO. 96-826, at 160 (1980), reprinted in 1980 U.S.C.C.A.N. 2612, 2650).

349. *Id.* at 70.

350. *See* U.S. CONST. art. I. If Rehnquist's principle of judicial deference is correct, then the Court should defer on a consistent basis to all exercises of congressional power under Article I, Section 8, including the exercise of congressional power to regulate commerce among the several states. *See* U.S. CONST. art. I, § 8, cl. 3. *But see* United States v. Morrison, 529 U.S. 598 (2000) (Rehnquist, C.J.) (second-guessing congressional findings with respect to commerce-clause-based legislation); United States v. Lopez, 514 U.S. 549 (1995) (Rehnquist, C.J.) (same).

The only apparent consistency seems to be that Rehnquist defines Article I powers, and any principle of judicial deference to those powers, as necessary to uphold claims of military necessity. In *Solorio v. United States*, 483 U.S. 435 (1987), another Rehnquist majority opinion, Rehnquist argued that all Article I, Section 8 powers should be read consistently with one another. Of course, in *Solorio* the question was whether the grant of power under the military clauses was as comprehensive as the grant of power under other Section 8 clauses, not whether the Court's obligation of deference under the various clauses should be the same:

> The constitutional grant of power to Congress to regulate the Armed Forces, Art. I, § 8, cl. 14, appears in the same section as do the provisions granting

In choosing to relieve women from the responsibility of draft registration, Congress exercised its constitutional powers to raise and govern the armed forces *for the purpose of* maintaining traditional gender relationships within civilian society. Congress was not subtle in its intent, arguing that registration of women for military service was inappropriate because it upset our traditional understanding about the role of women in civilian society. Rehnquist deferred to that congressional purpose,[351] although prevailing equal protection principles would have required the Court to reject, not defer to, legislative justifications based on "'archaic and overbroad' generalizations"[352] and "misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"[353]

> Congress authority, *inter alia*, to regulate commerce among the several States, to coin money, and to declare war. On its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section.

Id. at 441; *see also* Korematsu v. United States, 323 U.S. 214, 224-25 (1944) (Frankfurter, J., concurring) (arguing that the constitutional military power used to intern citizens of Japanese ancestry should be construed as broadly as, for example, the constitutional power to regulate commerce). Similarly, there is no indication in the text or structure of the Constitution that judicial deference to congressional action in military matters should be any different in scope than judicial deference to congressional action in other contexts.

351. *Rostker*, 453 U.S. at 83.

352. Craig v. Boren, 429 U.S. 190, 198 (1976) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

353. *Id.* at 199 (quoting Stanton v. Stanton, 421 U.S. 7, 15 (1975)). Distinctions on the basis of sex are subject to heightened scrutiny under the Equal Protection Clause. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. As a matter of law, legal distinctions grounded in stereotypical generalizations about the behavior or character of men and women cannot be "substantially related" to achievement of an important governmental objective. *Id.* at 198-99. As a matter of law, "administrative ease or convenience" cannot constitute an important governmental objective. *Id.* at 198. It should go without saying—but, unfortunately, it does not—that the *maintenance or endorsement* of stereotypical generalizations about the sexes cannot itself serve as an important governmental objective.

Two earlier equal protection decisions concerned distinctions on the basis on sex in a military context. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), the Court upheld a naval promotion system in which female officers were given more time to advance in rank before involuntary separation under an "up or out" promotion system. The Court concluded that women were not "similarly situated" in relation to men for purposes of equal protection analysis, and therefore they could be treated differently than men. In 1975, women were barred from sea duty and less likely to receive favorable "ticket-punching" duty assignments helpful for promotion, and so the Navy attempted to level the playing field by extending the maximum time in grade for women. *Id.* at 508. *Schlesinger v. Ballard* echoes *Rostker* in that, in both cases, one legal facial classification on the basis of sex—exclusion from combat or combat-related duty—was used as the justification for imposing another. Apparently, as long as the classification being challenged is one step removed from an underlying classification that *is* based on "archaic and overbroad generalizations" about women, the former is still constitutionally valid. *See generally* Diane H. Mazur, *Re-Making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even if Gay Men Are Not?*, 58 OHIO ST. L.J. 953, 963-67 (1997) (analyzing in more detail the Supreme Court's jurisprudence related to

Because the context was military and not civilian, however, constitutional expectation would be turned on its head. It was permissible, in Rehnquist's view, to exclude women from military obligation on the basis of sex because "'[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our [civilian] people.'"[354] Although military officials believed that registration of women would promote military effectiveness, it was permissible to overrule military judgment based on "the current [civilian] thinking as to the place of women in the Armed Services."[355] Rather than require the government to demonstrate a specific military need to *exclude* women from registration, it was permissible to reverse the usual standard of constitutional review and ask instead whether there was a military necessity to *include* them.[356]

Congress's purpose should never have been worthy of judicial deference under a traditional understanding of constitutional civilian-military relations, because its effect was not confined to the maintenance of good order and discipline within the armed forces. Congress intended, in fact, that the sex-based registration policy would have its primary effect within civilian society, not within the military. It concluded that

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military women).

In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court invalidated a sex-based policy that may have been found unconstitutional even under rational basis review. *Frontiero*, 411 U.S. at 691. Sharron Frontiero, an Air Force lieutenant, challenged a Department of Defense policy under which all married, male servicemembers received extra housing and medical benefits on behalf of their spouses, but married, female servicemembers received those benefits only if they could demonstrate that their husbands were financially dependent on their military salaries. *Id.* at 680-81. Frontiero's husband received federal financial aid for college, and so he was not technically dependent on his wife for his living expenses. *Id.* at 680 n.4. Therefore, Frontiero did not qualify for the same salary paid to married men of equal rank. *Id.* at 679-81. (The military apparently made no effort to discover how many military wives received college financial aid or other government benefit that might render them "non-dependent.") The government argued that the distinction served a purpose of administrative convenience in identifying spouses who were financially dependent. *Id.* at 683, 688. Because most wives in our society were financially dependent on their husbands, it was more efficient to assume that male servicemembers would meet the test, but require female servicemembers to prove spousal dependency. *Id.* at 688-89. Even if one assumes that these benefits were intended as compensation for a spouse's financial dependence—there was no evidence offered on that point—the government's position was irrational. ("Because most civilian wives do not work and are therefore financially dependent, let us apply that assumption to a situation in which the wife is a salaried professional.") Not surprisingly, Rehnquist was the only Justice to dissent in *Frontiero v. Richardson*. *Id.* at 691 (Rehnquist, J., dissenting). I would suggest that actual dependency was never the justification for additional compensation when the recipients were always men; it was a standard expectation for married personnel regardless of their personal financial circumstances. The policy became one of "dependency" only when women arrived on the scene.

354. *See* Rostker v. Goldberg, 453 U.S. 57, 77 (1981) (quoting S. REP. NO. 96-826, at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647).

355. *Id.* at 71.

356. *Id.* at 80 (quoting then-Senator Sam Nunn as stating "there was no military necessity cited by any witnesses for the registration of females"). Rehnquist obscured the issue of an appropriate standard of review by declining to state one. *Id.* at 69-70 (making a mocking reference to the phrase "levels of scrutiny").

women should be exempt from the draft because it conflicted with the role that civilian society wished them to play, and in *Rostker v. Goldberg*, Rehnquist allowed Congress to employ its constitutional military powers to enforce that unconstitutional purpose.[357] Deference to military-based judgment rises to the level of constitutional violation when employed as a diversionary tactic to evade constitutional limitation. The practice is most pernicious, however, when employed to establish or preserve assumptions of caste among citizens within civilian society. It allows women to be identified by law as different and lesser citizens, provided Congress justifies traditional gender roles in terms of military necessity.[358] Equal protection under the Constitution can mean something different and lesser for women, provided Congress justifies that deprivation in terms of military necessity. This is the legacy of *Rostker v. Goldberg*, the decision that legitimized use of military judgment as a judicially nonreviewable and nonconstitutional means of affecting social policy within civilian society.

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357. Rehnquist assumes, for reasons that are unclear, that the majoritarian oversight of Congress will be sufficiently protective of individual civil liberties in a military context, therefore obviating the need for judicial review. In *Weiss v. United States*, 510 U.S. 163, 176 (1994), Rehnquist wrote for the majority: "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss*, 510 U.S. at 176; *see also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 43 (1955) (Reed, Burton & Minton, JJ., dissenting) ("If trial of discharged servicemen by courts-martial . . . seems harsh or hurtful to liberty, the door of Congress remains open for amelioration."). Rehnquist's assumption is particularly unwarranted, and dangerous, in an era in which congressional military powers have been used *for the purpose of* evading constitutional limitation.

Rehnquist also assumes, for reasons that are equally unclear, that it is permissible for Congress to legislate on the basis of stereotypical gender assumptions provided Congress does so deliberately, and not negligently or accidentally. In justifying the sex-based distinction in *Rostker v. Goldberg*, Rehnquist attempted to distinguish precedent that condemned discrimination against males as an "'accidental byproduct of a traditional way of thinking about females'" and equally repugnant under the Equal Protection Clause. *Rostker*, 453 U.S. at 74 (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring in judgment)). Rather than focusing on the substantively important aspect of the statement—that legal distinctions grounded in stereotype are impermissible—Rehnquist seized on the word "accidental" and asserted that deliberate reliance on stereotypical assumptions was constitutional. *Id.* He reviewed the congressional record, which indicated a deliberate intent to use the constitutional military power to perpetuate a traditional understanding of gender roles in society, and then proudly announced that this deliberateness transformed the unconstitutional into the constitutional. *Id.* "The foregoing clearly establishes that the decision to exempt women from registration was not the 'accidental byproduct of a traditional way of thinking about females.'" *Id.* (quoting *Califano*, 430 U.S. at 223 (Stevens, J., concurring in judgment)).

358. By excluding women from the draft, Congress "categorically excludes women from a fundamental civic obligation." *Rostker*, 453 U.S. at 86 (Marshall & Brennan, JJ., dissenting); *see also* Linda K. Kerber, *"A Constitutional Right to be Treated Like . . . Ladies": Women, Civic Obligation and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95 (providing historical background to the *Rostker* controversy and analyzing the case in context of women's citizenship); Mazur, *supra* note 222 (arguing for greater feminist support of military service by women).

Rostker v. Goldberg was not the first time the Court would brand citizens as different and lesser under the guise of military necessity, but it was the first time the Court would do so and not have the decision termed a disaster.[359] In *Korematsu v. United States*,[360] the Court validated the World War II internment of United States citizens of Japanese ancestry on the basis of military judgment that persons of their race posed a threat to the war effort.[361] *Korematsu* was an outlier not only in a moral context, but also in terms of the Court's understanding of civilian-military relations under the Constitution. The internment policy did not relate to internal governance and discipline of the armed forces in any way; its consequences were brought to bear on civilians exclusively. Under prevailing principles defining the scope of deference to military judgment, the internment policy clearly would not qualify as an exercise of military discretion protected from substantive judicial review. Following the end of the war, the Court returned to the same narrow understanding of the constitutionally protected core of military activity it had observed before *Korematsu*. It scrutinized military or congressional decisions made under a banner of military necessity whenever they exceeded the scope of the military's disciplinary sphere or imposed consequences on civilians or on civilian society.

Policies such as those at issue in *Rostker* and *Korematsu* cross the line because they operate primarily *to exclude persons* rather than to regulate conduct, although at some level the policies might be justified tangentially in concerns for discipline. Under the "Don't Ask, Don't Tell" policy, for example, the military argues that if gay citizens are not excluded from military service, good order and discipline will suffer.[362] The military also contends that if it does not exclude women from certain military duties, such as submarine duty, good order and discipline will be affected.[363] In both instances, concern for discipline is the red herring. Discipline only suffers, if it does at all, as a result of the resentment expressed by those denied the opportunity to exclude persons as they wish. As a matter of law, the military should not be permitted to justify the exclusion or restriction of persons *identified as a group* on the basis of military discipline.[364] Disciplinary concerns are inherently individual, and they always

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359. Rostow, *supra* note 117.

360. 323 U.S. 214 (1944).

361. The Court's deference was complete and without question. "There was no testimony or other evidence in the record as to the facts which governed the judgment of the military in entering the orders in question. They were not required to support the action they had taken by producing evidence as to the need for it." Rostow, *supra* note 117, at 507; *see also* Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding curfew restrictions imposed against persons of Japanese ancestry on the basis of assertions of military necessity).

362. "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15) (2000) (codifying "Don't Ask, Don't Tell" policy).

363. *See, e.g.*, Steven Lee Myers, *New Debate on Submarine Duty for Women*, N.Y. TIMES, Nov. 15, 1999, at A1 (noting the Navy's objection that "putting women side by side with men in the extraordinarily tight confines of a submarine would disrupt the crew and compromise its war-fighting ability").

364. Justice Murphy, dissenting in *Korematsu v. United States*, observed that deference to military judgment is least warranted when based on assumptions about groups. 323 U.S. at

have been, throughout the Court's pre-Rehnquist history of civilian-military relations.

Goldman v. Weinberger[365] was the second Rehnquist-authored decision to use military judgment as a means of identifying persons as less than worthy to represent the nation as members of the armed forces. In this instance, caste was imposed on the basis of religion rather than on the basis of sex, and the opinion demonstrates how easily an intent to exclude persons can be obscured by justifications grounded in military discipline. Air Force Captain S. Simcha Goldman was a military clinical psychologist and an Orthodox Jew.[366] He had customarily worn a yarmulke while in uniform, which was visible while he was working indoors at the base health clinic but hidden by his military service cap when outdoors.[367] Following Goldman's testimony as a defense witness at a court-martial, however, and prompted by the prosecutor's complaint concerning his yarmulke, Goldman was ordered to stop wearing it while in uniform.[368] Air Force regulations on personal appearance and the wearing of uniforms generally prohibit the use of "headgear" indoors.[369] Goldman objected to the restriction, and in response his commander imposed an administrative form of punishment called a letter of reprimand, threatened him with court-martial, and withdrew a previous recommendation to extend his stay of active service.[370]

Rehnquist, not surprisingly, constructed an opinion that upheld military judgment against Goldman's claim that the military had infringed upon his right to freely exercise his religion.[371] Rehnquist incorporated all the same repetitive references about separate societies, discipline and duty, the military's moral values, and the incompetence of courts, all of which compelled judicial deference to military judgment.[372] As in *Rostker*, Rehnquist also made the curious argument that judicial

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239-40 (Murphy, J., dissenting). A judgment does not become a military judgment just because it is made by the military:

> A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially this is so when every charge relative to race, religion, culture, geographic location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

Id. at 239-40 (Murphy, J., dissenting). Murphy's comments would have been just as applicable in response to the "Don't Ask, Don't Tell" ban on military service by gay citizens. The policy was never based on "strictly military considerations"; it was motivated instead by "misinformation, half-truths and insinuations" about gay citizens as a group. *See id.* at 239. Likewise, in *Rostker v. Goldberg*, the military's stated need for female inductees was subordinated to congressional generalizations about appropriate gender roles for women as a group. 453 U.S. 57 (1981); *see also* Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175, 205-07 (1945) (noting that no military information or expertise was at issue in *Korematsu*).

365. 475 U.S. 503 (1986).

366. For the facts underlying Captain Goldman's challenge, see *Goldman*, 475 U.S. at 504-05.

367. *Id.* at 505.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* at 506-10.

372. *Id.* at 507-508 (citing the standard generalities from Chappell v. Wallace, 462 U.S. 296

deference is required whenever Congress acts pursuant to a power specifically enumerated in Article I.[373] The most disturbing aspect of *Goldman v. Weinberger*, however, was not the specific decision to prohibit Goldman from wearing a yarmulke. The proper constitutional balance between the military's interest in preserving uniformity and limiting expressions of individuality, on the one hand, and a servicemember's interest in following the dictates of religious belief, on the other, presented a difficult factual question. Justice Stevens raised a fair point in concurrence when he questioned whether a case-by-case evaluation of the obtrusiveness of various religious accoutrements might interfere more with religious exercise than the military's bright-line rule against the wearing of any visible religious symbol.[374]

Rehnquist, however, saw the question in very simple terms, and his opinion was dismissive of those who would question military judgment for any reason.[375] The military wanted to enforce a headgear policy in a manner that would result in the exclusion of Orthodox Jews (and probably others of various non-Christian faiths) from military service.[376] In justification of that policy, the military was willing to assert that uniformity of appearance was essential to the maintenance of military discipline.[377] For Rehnquist, that was the end of the story. Judicial deference to military judgment required the Court to accept the government's stated interest at face value and accord it priority over competing constitutional concerns, although standard First Amendment analysis would require otherwise.[378] The Court would not ask the military to explain why some forms of uniformity were apparently more important than others. It would not ask the military to explain the factual unsoundness or convenient inconsistency of its contentions.[379] It was enough that the military's actions were taken in the name of

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(1983); *see also* Rostker v. Goldberg, 453 U.S. 57 (1981); Brown v. Glines, 444 U.S. 348 (1980); Greer v. Spock, 424 U.S. 828 (1976); Schlesinger v. Councilman, 420 U.S. 738 (1975); Parker v. Levy, 417 U.S. 733 (1974); Orloff v. Willoughby, 345 U.S. 83 (1953)).

373. *Id.* at 508 (justifying judicial deference on the basis that "the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy").

374. *Id.* at 510 (Stevens, White & Powell, JJ., concurring) (favoring an objective "visibility" standard and suggesting that under a more subjective, multifactored standard, senior military officials might find religiously motivated turbans or dreadlocks more obtrusive than yarmulkes).

375. *Id.* at 507-10.

376. *See id.* at 505.

377. *Id.* at 508.

378. Under *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), the government is required to specify an important state interest that justifies the burden imposed on religious exercise.

379. The military's concern for uniformity of appearance is undermined by a degree of inconsistency and disingenuousness. The majority opinion noted in passing that the Air Force regulation governing the wearing of uniforms was 190 pages long. *See Goldman*, 475 U.S. at 508. Rehnquist seemed to rely on its length as evidence of a very specific uniformity, but its length was dictated much more by the liberal array of uniforms approved for use by Air Force personnel. For a sampling of the variety of uniforms worn just by members of the Air Force, see the current version of the regulation, which illustrates service dress (with coat and tie), jacket-less office attire (with either short or long sleeves), mess dress, semiformal dress, battle dress, hospital white, and food service styles of uniforms, with maternity options for all of the

military discipline or military effectiveness, and by virtue of that assumption alone and not the reality of military necessity, Goldman could be effectively excluded from military service. "The Court and the military services have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country."[380] As a final insult, Rehnquist's language would stigmatize Goldman, by virtue of his nonmajority religious beliefs, as selfish and as lacking commitment to a higher duty. Rehnquist reminded us all that "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'"[381]

Not until *Goldman v. Weinberger* did several members of the Court fully understand the enormity of the transformation in civilian-military relations that Rehnquist had achieved. The same Rehnquist who had derided varying levels of judicial scrutiny in equal protection cases[382] had constructed yet another: the "sub-

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above. *See* Dress and Personal Appearance of Air Force Personnel, Air Force Instruction 36-2903 (June 8, 1998), *available at* http://afpubs.hq.af.mil/afpubs.stm.

If Captain Goldman had served in the Army, the military's interest in uniformity would have declined further. The Army has a reputation for its many permutations of uniform styles and combinations, along with an incredible array of individual badges, insignia, and other accoutrements to wear on the uniform. *See* Wear and Appearance of Army Uniforms and Insignia, Army Regulation 670-1 (Sept. 1, 1992), *available at* http://www.usapa.army.mil/gils/. The Army's beret controversy of 2000 provides a recent illustration of the supposed "uniformity" of Army uniforms. The Army proposed that most of its personnel wear black berets rather than green headgear such as the traditional wheel-shaped service cap or the flat, foldable garrison or "flight" cap (at least when they were not wearing an organizational baseball cap, a Battle Dress Uniform ("BDU") cap, a Desert BDU hat, or a cold-weather cap, some of the other Army headgear options). *See, e.g.*, *Army Rangers Gather to Fight Beret Order*, N.Y. TIMES, Mar. 10, 2001, at A10. The only problem was that Army Rangers had traditionally worn black berets, and they were offended that the run-of-the-mill, non-combat, and sometimes female members of the Army would wear the same color. *Id.* The solution was to continue with the black beret transformation, but allow the Rangers to wear tan berets instead. *Id.* Special Forces personnel would continue to wear green berets, and Airborne personnel would continue to wear maroon berets. *See id.* Given the Army's difficulty in managing the variety of berets authorized for its personnel, Goldman's yarmulke seems unproblematic in comparison.

Furthermore, Rehnquist is disingenuous when he suggests the military requires uniformity in attire to "encourage[] the subordination of personal preferences and identities in favor of the overall group mission." *Goldman*, 475 U.S. at 508. Rehnquist wrote: "Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank." *Id.* It would have been more accurate to state that the military encourages the right kind of "outward individual distinctions." As observed by the dissenters, servicemembers can wear rings or other jewelry that associate the wearer with a religious denomination or ethnic organization. *Id.* at 518 (Brennan & Marshall, JJ., dissenting). The dissenters also could have added that the military encourages servicemembers to wear "outward individual distinctions" in the form of ribbons, badges, and other insignia that represent individual accomplishment and serve to distinguish one servicemember from another, particularly with respect to combat service.

380. *Goldman*, 475 U.S. at 524 (Brennan & Marshall, JJ., dissenting).

381. *Id.* at 507 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

382. *See supra* note 345.

rational" basis level of review applied to challenges against military judgment.[383] As Justices Brennan and Marshall observed, if "the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be."[384] Deference to military judgment had grown so extreme as to "defy common sense."[385] Justice Blackmun noted that the Air Force had failed to articulate even a "minimally credible explanation" for its decision; in his view, judgments that were not reasoned judgments were unworthy of respect or deference.[386] Finally, Rehnquist had taken his principle of unquestioning deference to the military too far even for Justice O'Connor, foreshadowing her dissent to Rehnquist's opinion in *United States v. Stanley*[387] one year later. O'Connor saw no reason not to evaluate military judgment under the same constitutional standards applicable to every other government actor.[388] She believed that judicial review as applied in a civilian context was "sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending."[389] In *Goldman v. Weinberger*, however, she concluded that the military had not even reached the level of *plausibility* in asserting that Goldman's religious practice was a threat to good order and discipline.[390]

Neither *Rostker v. Goldberg* nor *Goldman v. Weinberger* were about military discipline. They were about military resistance—resistance to constitutional development, resistance to constitutional civilian-military relations, and resistance to cultural change. In his recent book on civil liberties in wartime, Rehnquist wrote that the military is "not entrusted with the protection of anyone's civil liberties."[391] His statement was made for the purpose of softening the sheer wrongness of *Korematsu v. United States*, but it could have been offered to temper Rehnquist's own efforts in *Parker v. Levy*, *Rostker v. Goldberg*, *Goldman v. Weinberger*, and *Solorio v. United States* as well.[392] It serves to illustrate just how little Rehnquist understands about the military and about civilian-military relations, because every member of the armed forces, whether enlisted or commissioned, takes the following oath of office: "I (full name) do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; [and] that I will bear true faith and allegiance to the same . . . ."[393]

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383. *See Goldman*, 475 U.S. at 515 (Brennan & Marshall, JJ., dissenting).

384. *Id.*

385. *See id.* at 516.

386. *Id.* at 526, 527 (Blackmun, J., dissenting).

387. 483 U.S. 669 (1987); *see also supra* notes 306-11 and accompanying text.

388. *Stanley*, 483 U.S. at 709 (O'Connor, J., dissenting).

389. *Goldman*, 475 U.S. at 530-31 (O'Connor & Marshall, JJ., dissenting).

390. *Id.* at 532.

391. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 204 (1998).

392. *See* Alfred C. Yen, *Introduction: Praising With Faint Damnation—The Troubling Rehabilitation of* Korematsu, 40 B.C. L. REV. 1, 3 (1998) (criticizing the "detached indifference" of Rehnquist's commentary on *Korematsu*).

393. TONER, *supra* note 271, at vii.

III. MILITARY RESISTANCE AND THE CONSTITUTION

The most comprehensive treatment of judicial deference to the military in the context of constitutional civilian-military relations was written by James Hirschhorn eighteen years ago.[394] His analysis was evenhanded in its attempt to balance a concern for military culture and efficiency with attention to individual constitutional rights, although his predisposition was fundamentally promilitary.[395] Hirschhorn recognized that the congressional military powers under the Constitution are, and should be, limited in scope.[396] Actions taken in the exercise of military discretion would exceed constitutional bounds—and would be subject to judicial review—if in practice they operated to impose collateral consequences on civilians or civilian society:

> If benefits and burdens in the armed forces are allocated through an unconstitutional flaw in the civilian society, the resulting decision lacks both the institutional and technical credibility it would otherwise have. Moreover, to the extent that the government's powers over the armed forces are used to control the civilian political process, they destroy the existence of the free public consent, which is the foundation of political judgment. In each of these situations the courts should exercise their heightened standard of review to confine the broad authority of the political branches to the relation between the serviceman and the demands of the organization upon him.[397]

At the same time Hirschhorn identified the potential for misuse of congressional power to govern and regulate the military, however, he also believed that Congress could police itself effectively without the need for judicial review.[398] He assumed there was something inherently self-regulating about congressional power to govern the military, although congressional powers in general typically receive no similar dispensation:

> Both the structure of Congress and its actual performance . . . demonstrate that it can effectively mediate between military claims for subordination and the principles of individual autonomy that are current in civilian society. As the representative branch of the government, Congress presumably is competent to balance the cost and benefit of conflicting policies according to the number of represented persons who desire diverse goals and the intensity of their conflicting desires.[399]

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394. Hirschhorn, *supra* note 14.

395. The observation is not intended as criticism, as I consider this Article fundamentally promilitary as well. We may differ, however, in our conclusions whether Rehnquist's development of a "separate society" rationale in support of blanket judicial deference to congressional judgment has benefited or weakened the military.

396. Hirschhorn, *supra* note 14, at 248-49.

397. *Id.*

398. *Id.* at 244-45 (citing examples of when Congress amended or abolished military practices considered to be morally suspect, harmful, or ineffective, such as flogging).

399. *Id.* at 244; *see also id.* at 212-13 (relying on Congress's "representative character" to ensure consent of the citizenry to congressional military judgment). Contrary to common

The reference in this passage to the "actual performance" of Congress suggests how sensitive the principle of judicial deference can be to time and place. In 1984, it was still possible, for example, to minimize any concern that Congress would abuse its power to define the parameters of military service for the purpose of perpetuating traditional notions of gender.[400] The United States had just emerged from a decade in which Congress responded to litigation that challenged the military's restrictions on the assignment of women by broadening opportunities for women, not by seeking judicial deference to those limitations.[401] Times change, however, and a doctrine of judicial deference to military judgment requires a justification more substantive than just a general approval of the way military judgment happens to be exercised at the time.

Seeds of the Rehnquist transformation already in progress could be found in Hirschhorn's discussion of military discipline in terms of moral superiority. There may be no more accurate indicator, in fact, of a constitutional line about to be crossed than open reliance on a moral justification for its crossing. Hirschhorn wrote that

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assumption, the Court has not treated controversies involving war and foreign affairs as nonjusticiable political questions. *See* Michael R. Belknap, *Constitutional Law as Creative Problem Solving: Could the Warren Court Have Ended the Vietnam War?*, 36 CAL. W. L. REV. 99, 111-16 (1999) (contending that the Court's involvement could have expedited resolution of the Vietnam War).

400. *See* Hirschhorn, *supra* note 14, at 245, 251 (noting development of congressional interest in expanding opportunities for military women).

401. *See* Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1974) (dismissing motion for summary judgment and allowing challenge to the male-only admissions policies of the federal military academies to proceed); *see also* Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978) (finding the Navy's blanket restriction against sea-going service by women to be unconstitutional). Congress allowed women to attend the federal military academies beginning with the entering class of 1976. *See* Department of Defense Appropriation Act of 1976, Pub. L. No. 94-106, § 803(a), 89 Stat. 531, 537 (1975). Congress eased restrictions on sea duty for women in 1978, allowing them to serve on "hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions." Department of Defense Appropriation Act of 1979, Pub. L. No. 95-485, § 808, 92 Stat. 1611, 1623 (1978) (statutory restrictions on sea duty for women repealed entirely in 1993). In 1980, Congress also abolished the sex-based officer promotion system upheld as a matter of judicial deference in *Schlesinger v. Ballard*, 419 U.S. 498 (1975). *See* Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980) (codified in scattered sections of 10 U.S.C.).

Owens v. Brown provides a good illustration of how constitutional claims in a military context would be analyzed absent Rehnquist's influence. The trial court properly recognized that a facial challenge to an across-the-board sex-based exclusion was distinguishable from the claim in *Gilligan v. Morgan*, 413 U.S. 1 (1973), which sought continuing judicial surveillance of military weaponry and training. *See Owens*, 455 F. Supp. at 302. The trial court also recognized that a purpose to perpetuate traditional gender roles was insufficient, as a matter of law, to justify the Navy's sex-based restriction on sea service. *Id.* In referring to the legislative history of the restriction, the district court observed that "the sense of the discussion is that section 6015's bar against assigning females to shipboard duty was premised on the notion that duty at sea is part of an essentially masculine tradition." *Id.* at 306. I have little doubt that the decision in *Owens v. Brown* would have been reversed, and the sex-based restriction upheld, had it reached the Supreme Court.

"[t]he moral assumptions that underlie military discipline are opposed completely to those which are embodied in the Bill of Rights,"[402] with the implication that the principles embodied in the Bill of Rights are somehow lacking in moral character. In the context of the military, it is extremely difficult to dislodge the assumption that the military holds some kind of morality-based exception to constitutional principle. Even Hirschhorn, who clearly understood the constitutional limits of the military powers, rationalized the exclusion of women from the draft in *Rostker v. Goldberg* by stating that America was just not ready to rethink the public role of women to that extent—and that this "moral" calculation was one for Congress to make.[403] The idea that the participation of women in one of the fundamental activities of citizenship—military service—is nothing more than a moral question subject to majority choice is the single most pernicious consequence of Rehnquist's recasting of civilian-military relations under the Constitution.

A. Formalism as an Escape From Responsibility

Goldman v. Weinberger has been criticized as representing the Court's conceptualistic, categorical, and formalistic approach to the assessment of government interest in "special exception" contexts such as the military.[404] Claims of military necessity are treated as though they raise uniformly indispensable concerns and are entitled to uniformly unquestioning deference. There is no lesser and greater as far as claims of military necessity are concerned; anything that *could* affect the military *does* affect the military, and anything that does affect the military affects it with equal gravity, automatically presenting an unacceptable risk of loss of life or detriment to national security. Peacetime is equated with wartime, service within the United States is equated with service in foreign territory, and the headgear worn by military clinical psychologists is equated with the exigency of ground combat. There is no "gray area" subject to judgment; there is not even black and white, which would suggest that claims of military necessity could be sorted into those with merit and those without, or those that are rational and those that are not. Every assertion of military necessity is of one color, without gradation and of equal weight.

The contemporary military suffers from an acute fear of exercising judgment, which tends to operate in tandem with an acute fear of accepting responsibility.[405] This

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402. Hirschhorn, *supra* note 14, at 239.

403. In Hirschhorn's view, women will be permitted to accept increasing military responsibility only at a pace the majority finds appropriate for their sex:

> Congress's refusal to apply draft registration to women . . . reflects in part that a substantial and vocal segment of the population apparently believed that gender roles had not changed quite that much. Therefore, it considered that any military gain from registration would be offset by the legal and political resistance anticipated from these people.

Id. at 245.

404. *See* Dienes, *supra* note 14, at 785; *see also id.* at 798-99 (noting that in a military environment, the usual First Amendment protections "give way to assertions of nonjusticiability, diminished standards of judicial review and deference to abstract administrative judgments of necessity, efficiency, and appropriateness of means").

405. I have written elsewhere of the endemic fear of responsible judgment with respect to

observation refers to military judgment in more than just the Rehnquist sense of military judgment, which would mean only that the military had manifested its belief in the truth of a particular assertion. It refers instead to military judgment in the now-obsolete sense of a true judgment that requires thoughtful and deliberate balance of competing factual and legal considerations. By eliminating the prospect of substantive judicial review, Rehnquist has effectively eliminated the need for any branch of government to engage in responsible constitutional judgment in any matter related to military affairs. Rehnquist simultaneously has insulated 1) the military, 2) Congress (when acting on the military's behalf), and 3) the Court itself from their conventional constitutional responsibility to explain, defend, and justify exercises of judgment.[406] This transformation in civilian-military relations has contributed to the evolution of a contemporary military and a contemporary Congress that irresponsibly substitute conclusory moral judgment for nuanced rational judgment in evaluating constitutional

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the control of both consensual sexual behavior and sexual misconduct within the military. The military not only actively avoids its own responsibility, but also fails to expect responsible behavior on the part of either male or female personnel. *See generally* Diane H. Mazur, *Women, Responsibility, and the Military*, 74 NOTRE DAME L. REV. 1 (1998). *See also* Mazur, *supra* note 148, at 673. This author challenged the military to "overcome its fear of individualized judgment" as exhibited in the Lt. Kelly Flinn adultery prosecution:

> Having failed to explain its actions in [Flinn's] case, the military found itself without a plausible point of comparison for evaluating comparable offenses, leading to a painful post-Flinn period in which it lurched from one high-profile adultery allegation to the next, unable to draw reasoned distinctions. Simplistic notions of "accountability" and "zero-tolerance" took the place of traditional military judgment in a failed effort to satisfy civilian concerns. Until the military overcomes its reluctance to explain its actions, however, its judgment will continue to be questioned.

Id.

406. In the words of Eugene Rostow, the principle of judicial deference to military judgment "treat[s] the decisions of military officials, unlike those of other government officers, as almost immune from ordinary rules of public responsibility." Rostow, *supra* note 117, at 531. "It is essential to every democratic value in society that official action taken in the name of the war power be held to standards of responsibility under such circumstances." *Id.* at 515.

Professor Rostow wrote these words, of course, in response to the lessons learned in deferring to military judgment in the World War II Japanese internment cases. Congress, the military, or the courts might defend contemporary judicial deference on the basis that it never could be applied to immunize constitutional violations of equal protection on the basis of race, but only "lesser" violations. The distinction is unpersuasive. First, Rehnquist's language of deference to military judgment is certainly broad enough to accommodate classification on the basis of race; it is so devoid of anything other than sheer platitude that it could accommodate constitutional violation of any variety. Second, it is simply too easy to assume that the constitutional transformation achieved by Rehnquist could not have been employed to reestablish or perpetuate racial caste because, by the 1970s, facial classifications on the basis of race were beyond political viability as well as constitutional viability. *Cf.* Bishop, *Collateral Review*, *supra* note 15, at 65 (considering, in 1961, whether judicial deference to the internal operation of the military's court-martial system would permit systematic exclusion of black servicemembers from court-martial panels; concluding that Congress could not include in the Uniform Code of Military Justice "a provision plainly inconsistent with the Bill of Rights as interpreted by the Supreme Court").

issues involving military service.

The difference reveals itself in scholarly treatments of civilian-military relations before and after the Rehnquist era. After Rehnquist joined the Court—specifically, after Rehnquist's 1974 opinion in *Parker v. Levy*—constitutional issues involving the military would never again be discussed in isolation from cultural change and moral qualification. After Rehnquist, the principle of judicial deference to claims of military necessity would be employed routinely as a means of registering moral judgment on issues of social controversy and social conservatism within *civilian* society. Rather than standing on its own as a constitutional issue historically defined by constitutional text and intent, the principle of judicial deference in a military context would be reconstructed as a cultural mandate in opposition to evolving constitutional expectation in the areas of equal protection, free exercise, and free speech.

It is almost startling to read analyses of constitutional rights in a military context written before judicial deference became a cultural crusade. The preeminent legal analysis of constitutional rights in a military context published before the Rehnquist era was written by Chief Justice Earl Warren in 1962.[407] Its most distinctive feature, read in modern hindsight, is that it contained not a single word of a moralistic tone. It measured the jurisdictional reach of the constitutional military powers in traditional terms of internal governance and discipline and not in subjective judgments of the military's moral superiority. It was sensitive to factual and historical context[408] and nearly clairvoyant in anticipation of the direction in which Rehnquist would take the principle of constitutional control of the military. Warren specifically cautioned against allowing the military to develop as a separate society, although that notion had not yet entered the Court's jurisprudence of civilian-military relations. "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of civilian courts almost inevitably is drawn into question."[409] Ironically, Warren anticipated that civilian courts would soon take a greater role, not a lesser one, in adjudicating constitutional claims in a military context. When he spoke of judicial encroachment in matters subject to military discretion, he was referring to the near-sacrosanct core of internal military discipline, not the bloated form of immunity that later would be assigned to all military-related judgments during the Rehnquist era. Warren foresaw, inaccurately as it turned out, that the sheer size and intrusiveness of the military institution with respect to civilians and civilian society would warrant a drawback in judicial deference even in matters of internal governance and discipline.[410]

Rehnquist's blanket principle of judicial deference to the military provided an opportunity to act without the restraints of rational explanation or constitutional limitation, and both Congress and the military that it governs are very well aware of the latitude the Court has awarded. Congress, in particular, realizes it has been given

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407. *See* Warren, *supra* note 15.

408. *See id.* at 193 (distinguishing between wartime and peacetime militaries in assessing the need for judicial deference). "There has been time for the Government to be put to the proof with respect to its claim of necessity; there has been time for reflection; there has been time for the Government to adjust to any adverse [judicial] decision." *Id.*

409. *Id.* at 188.

410. *See id.* at 187-88.

the ability to govern the military in a manner that facilitates the shaping of civilian social policy along traditional moral lines, and it acts with that goal in mind with little attempt at concealment or misdirection.[411] In 1993, for example, Congress enacted into law previous Department of Defense policy that excluded gay citizens from military service. In codifying the end product of the "Don't Ask, Don't Tell" debate, Congress included within the statute a legislative "finding" that it held sole constitutional discretion to decide whether gay citizens could enter into or continue military service:

> Section 8 of article I of the Constitution of the United States commits exclusively to Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces. Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.[412]

As brazen as such legislative "findings" may be, they are certainly accurate. Many have analyzed the constitutional irrationalities of "Don't Ask, Don't Tell,"[413] but under the Rehnquist reconstruction of the relationship between civilian courts and the military, irrationality is constitutionally sufficient. The most significant factor preventing reform of "Don't Ask, Don't Tell" is the existence of this unlimited judicial deference to military preference.[414] The influence of any contention on the merits of the question pales in comparison.

Although "Don't Ask, Don't Tell" is a product of judicial deference to the military's preferred social order, it is not the most significant consequence of Rehnquist's judicial response to the Vietnam War. The constitutional standard of equal protection that would apply to the military's exclusion of gay citizens absent special deference may not be a heightened standard and, in any event, the standard is

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411. Ellen Oberwetter noted two instances during the 1980 congressional debate concerning registration of women for the draft in which congressmen reminded each other—on the record—that they had the latitude to do whatever they wished because the Court could not second-guess them, even for reasons grounded in the Constitution. *See* Oberwetter, *supra* note 14, at 203 n.163. Senator John Warner quoted from a letter written by Robert Bork, then a professor at Yale Law School, which advised that Congress was free to exclude women because "no court could challenge its decision." *See id.* (citing 126 CONG. REC. 13,881 (1980)); *see also Registration of Women: Hearings on H.R. 6569 Before the Military Personnel Subcomm. of the Comm. on Armed Servs.*, 96th Cong. 25 (1980) ("They [the Justices of the Supreme Court] feel we can classify according to any of these things if it is for the common defense of this country.").

412. 10 U.S.C. § 654(a)(1), (3) (1994).

413. *See supra* note 16.

414. Every U.S. Court of Appeals decision upholding the constitutionality of "Don't Ask, Don't Tell" has relied heavily on an assumed obligation of judicial deference to the military's proffered justifications. *See, e.g.*, Able v. United States, 155 F.3d 628, 632-34 (2d Cir. 1998); Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1133 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 925-27 (4th Cir. 1996) (en banc); Steffan v. Perry, 41 F.3d 677, 685-86 (D.C. Cir. 1994) (en banc).

still unclear.[415] The most clearly identifiable and clearly pernicious consequence of Rehnquist's elevation of the military's constitutional and moral standing has been its effect on the status of women as citizens of the United States. In that context, judicial deference to the military represents the only available majoritarian means of resisting constitutional precedent concerning equal protection on the basis of sex.

B. Submarines and the Perpetuation of Caste

Facial classifications on the basis of sex, now almost extinct in civilian law, are still a routine matter within the military. Military duty positions are defined in terms of the sex of the individual who can be assigned to them, with the majority open to either men or women and the remainder open only to men.[416] Congress periodically has meted out additional duty assignments to women as it deems appropriate, with appropriateness measured by consistency with traditional notions of sexual role and sexual morality as much by the interests of military efficiency. It is quite simple to blur the two concerns if necessary to achieve a particular result. For example, if allowing women to depart from traditional gender restrictions could make male servicemembers (or their wives) uncomfortable or resistant, then Congress can translate that uncomfortableness or resistance, real or imagined, into a disruption of military efficiency.

One of the best illustrations of the way in which Congress employs its military powers to perpetuate traditional notions of sexual morality and of gender stereotype can be found in its passion for preventing Navy women from serving on submarines. The Defense Advisory Committee on Women in the Services ("DACOWITS"),[417] a civilian advisory board to the Secretary of Defense, recently recommended that the Navy revise its current policy of categorically excluding women from submarines, regardless of job description.[418] With the single exception of submarines, women are eligible to serve on all Navy ships.[419] More specifically, DACOWITS recommended

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415. In invalidating a Colorado constitutional amendment that would have prohibited state government from providing legal protection to gay citizens, Justice Kennedy wrote that the Constitution "neither knows nor tolerates classes among citizens." Romer v. Evans, 517 U.S. 620, 623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Colorado failed to demonstrate that the amendment was even rationally related to any legitimate state purpose. *See id.* at 632. *Romer v. Evans*, however, did not directly overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), which found that the criminalization of same-sex intimate conduct was constitutionally rational under rational basis review. 478 U.S. at 196.

416. *See* MARGARET C. HARRELL & LAURA L. MILLER, NATI'L DEF. RESEARCH INST., NEW OPPORTUNITIES FOR MILITARY WOMEN: EFFECTS UPON READINESS, COHESION, AND MORALE 12 tbl.2.1 (1997) (stating that 62% of Marine Corps positions are open to women, 67.2% of Army positions are open to women, 91.2% of Navy positions are open to women, and essentially all (99.4%) Air Force positions are open to women).

417. *See generally* DACOWITS, http://www.dtic.mil/dacowits/ (last modified May 8, 2001) (providing background information on DACOWITS and its function).

418. DACOWITS, HISTORY OF RECOMMENDATIONS FALL CONFERENCE 2000, *at* http://www.dtic.mil/dacowits/ (last modified June 11, 2001).

419. U.S. NAVY, WOMEN IN THE NAVY—ACTIVE DUTY [INCLUDING TARS] ASSIGNMENTS AS OF 11 JANUARY 2002, at

that initial assignments of women begin with female officers on larger Trident ballistic missile submarines.[420] The integration of officers would be much less difficult logistically because of the more private berthing arrangements given to officers in general. Additionally, DACOWITS recommended that the Navy make design modifications to smaller attack submarines now under construction to accommodate mixed-sex crews in the future.[421] Any future retrofitting would be much more expensive, and DACOWITS believed it was unlikely that the Navy would continue to exclude women for the 40-year life of these new submarines.[422]

Assignment of women to submarines is a controversial issue within the Navy, but there have been small indications of movement in that direction. In the summer of 2000, female future officers in the Reserve Officer Training Corps ("ROTC") received short training assignments aboard submarines.[423] Also, two summers ago, then-Secretary of the Navy Richard Danzig, broached the subject of integrating the submarine service—de jure segregated by sex and de facto segregated by race—in a much-publicized speech to the submarine community. Speaking in reference to those who serve aboard submarines, Danzig said, "The most Narcissus-like thing about creating something in your own image, about being in love with your own image, is the continued and continuous existence of this segment of the Navy as a white male preserve."[424] The day the Navy would open the last closed door to its female personnel seemed to be approaching. Submarine service required higher intellectual and psychological standards for its personnel, and the Navy would continue to have difficulty filling duty assignments unless those slots were opened to the fourteen percent of Navy personnel who were women.[425]

Congress, however, was determined not to allow women aboard submarines, even if the Navy were to conclude that integration would benefit military efficiency. It enacted a statute that prohibited the Navy from exercising its discretion to assign women to submarines unless Congress first had the opportunity to bar them by law:

> No change in the Department of the Navy policy limiting service on submarines to males . . . may take effect until (1) the Secretary of Defense submits to Congress written notice of the proposed change; and 2) a period of 30 days of continuous session of Congress (excluding any day on which either House of Congress is not in session) expires following the date on which notice is received.[426]

The same restrictions would apply to any expenditure of funds by the Navy for the

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http://www.chinfo.navy.mil/navpalib/people/women/winfact1.html (last visited May 13, 2002).

420. *See* DACOWITS, HISTORY OF RECOMMENDATIONS FALL CONFERENCE 2000, *at* http://www.dtic.mil/dacowits/ (last modified June 11, 2001).

421. *See id.*

422. DACOWITS, FALL CONFERENCE 2000 ISSUE BOOK, http://www.dtic.mil/dacowits/ (last modified May 14, 2001).

423. *See* Rowan Scarborough, *Panel Asks Navy to Put Female Officers in Subs; Military Memo Says Move 'Very Costly'*, WASH. TIMES, May 4, 2000, at A1.

424. Myers, supra note 363, at A1.

425. *See id.*

426. 10 U.S.C. § 6035(a) (1994).

purpose of reconfiguring any existing submarine or designing any new submarine to accommodate the service of women.[427]

The magic of the Rehnquist principle of judicial deference to the military, in Congress's view, is that facial classifications on the basis of sex can be justified by any reason or by no reason. They can be justified openly on the basis of congressional desire to preserve stereotypical gender roles or to enforce traditional notions of sexual morality for women. One can mine potential congressional justifications simply by reading the *Washington Times*, a major Washington, D.C. newspaper known for its advocacy of a military that is socially conservative, morality driven, and limited in its roles for women.[428] Unlike other nonmilitary contexts for equal protection litigation, it makes no difference that the military interests proffered to justify the exclusion of women may be without factual basis or irrelevant, arising from sources that are uninformed, biased, or lacking in credibility. If the military is willing to assert a belief in its truth, any assertion is sufficient to uphold a particular military judgment under Rehnquist's principle of deference, regardless of its degree of reliance on traditional gender stereotypes. In order to justify the exclusion of Navy women from submarines, therefore, Congress could potentially proffer any of the following government interests: 1) women require separate, private berthing and bathrooms, which would be prohibitively expensive to provide and would displace operational equipment; 2) women would become pregnant and require airlift to shore, and their fetuses might be harmed by a submarine's toxic gases; 3) submarines are too confined for women, who need fresh air, sunshine, and views; 4) it is inappropriate for men and women to share berthing or bathrooms in rotating shifts; 5) the presence of women will create sexual tension and jealousy among the crew and degrade unit cohesion; 6) submarine service is too psychologically stressful for women; 7) the wives of male submariners would object; and 8) any decision to utilize women would only be made "as a final sop" to "radical feminist supporters."[429]

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427. *Id.* § 6035(b). More recently, twenty-seven members of the House Armed Services Committee sent a letter to the Secretary of Defense expressing their concern that the Army was considering an expansion of assignments available to women. Rowan Scarborough, *Panel Queries Army's Plans for Women; Fears Change in Combat Rules*, WASH. TIMES, July 5, 2001, at A1."The congressmen's suspicions were heightened when the Army submitted documents to DACOWITS this spring that a review of regulations concerning female soldiers is currently being staffed." *Id.*

428. *See* Krista E. Wiegand & David L. Paletz, *The Elite Media and the Military-Civilian Culture Gap*, 27 ARMED FORCES & SOC'Y 183, 192-93 (2001) (describing the *Washington Times*, which bills itself as "America's Newspaper," as disproportionately devoted to issues of sex and scandal, but determined to preserve an atmosphere of social conservatism within the military). "[The *Washington Times*'s] general view was that military values are vital and should be preserved. The military culture is rightly conservative, observing high standards, morals, and values; any further trend to make the military more like civilian culture would be detrimental to the institution's very existence." *Id.* at 193.

429. These justifications were taken from Elaine Donnelly, *Stealth Attack on Silent Service*, WASH. TIMES, June 8, 2000, at A18; Myers, *supra* note 363; Rowan Scarborough, *Panel Eyes Notification on Integration of Subs; Opponents Fear Administrative Decree*, WASH. TIMES, May 11, 2000, at A4 [hereinafter Scarborough, *Panel Eyes*]; Rowan Scarborough, *Lawmaker Moves to Bar Women from Subs; Wants Congress to Decide Matter*, WASH. TIMES, May 5, 2000, at A1 [hereinafter Scarborough, *Lawmaker Moves*]; Scarborough, *supra* note 423. The

Each of the foregoing "justifications" for excluding women from submarines in fact has been offered by congressmen, by military officials, or by those advocating greater restrictions on military service by women. Not one of them is related to the merits of performance of military duty;[430] all of them are related in some way to traditional expectations of sexual morality for women or to "archaic and overbroad generalizations"[431] concerning the capabilities of women. Under Rehnquist's transformation of constitutional control of the military, however, they are sufficient to justify facial classifications on the basis of sex. The fact that these assertions may be "absurd or unsupported"[432] or completely implausible[433] has been rendered irrelevant to the question of equal protection under law. It is impossible to define any limit to the judicial deference given to a congressional belief that facial sex classifications are necessary for military effectiveness. The line clearly extends beyond absurdity: two summers ago Army special forces personnel argued that women should not be permitted to serve as combat medics because, among other reasons, their duties would require them to see men naked.[434]

Rehnquist, and the Justices who have joined him,[435] have never considered the damage they inflict upon women as a class by allowing our constitutional past to be

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statement at the end of the paragraph, made by Rep. Roscoe Bartlett of Maryland, was prompted by the fear that the Clinton administration might permit the Navy to assign women to submarine duty while Congress was out of session. *See* Scarborough, *Lawmaker Moves*, *supra*.

430. *See* J. Michael Brower, *The Enemy [Below] . . . the Brass Above*, PROCEEDINGS, June 2000, at 33, 33 (explaining the irrationality of excluding women from submarine duty, with particular reference to justifications based on physical modesty and sexual morality). "Privacy issues are managed by discipline rather than by reconstructing submarine space; men and women make do with the available room." *Id. Proceedings* is a publication of the United States Naval Institute.

431. *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

432. *See* Goldman v. Weinberger, 475 U.S. 503, 515 (1986) (Brennan & Marshall, JJ., dissenting) (criticizing Rehnquist's unquestioning deference to the military's refusal to consider Goldman's request to wear a yarmulke).

433. *See id.* at 532 (O'Connor & Marshall, dissenting) (also criticizing Rehnquist's unquestioning deference).

434. *See* Rowan Scarborough, *Women Proposed for Green Berets; Army Doctor Suggests Training Them as Combat Medics*, WASH. TIMES, June 6, 2000, at A1. *But cf.* United States v. Virginia, 518 U.S. 515, 544 (1996) (noting that, more than a century ago, medicine was viewed as an inappropriate field for women). One might also assume that ninety-three years after *Muller v. Oregon*, 208 U.S. 412 (1908), which upheld limitations on the working hours of women on the basis of the infamous "Brandeis brief," employers would no longer attempt to justify their exclusion of women by arguing that the work was too stressful for them to withstand. In the context of the military, however, one would be wrong.

435. Justice Stevens, surprisingly, has not only voted to uphold an expansive view of deference to the military on two occasions, *see* Chappell v. Wallace, 462 U.S. 296 (1983), and Rostker v. Goldberg, 453 U.S. 57 (1981), but has also dissented on two occasions, *see* United States v. Stanley, 483 U.S. 669 (1987) *and* Brown v. Glines, 444 U.S. 348 (1980). Justice Scalia authored *Stanley* and joined Rehnquist in *Solorio v. United States*, 483 U.S. 435 (1987). Justice O'Connor voted to uphold deference in *Solorio* and *Chappell v. Wallace*, but dissented in *Stanley* and *Goldman v. Weinberger*, 475 U.S. 503 (1986). The remaining Justices have not yet had an opportunity to rule on Rehnquist's principle of judicial deference to the military.

resurrected in a military context. Rehnquist's crippling form of judicial deference to the military permits Congress to perpetuate notions of gender caste in ways that are otherwise considered untouchable. For example, the lack of separate, private berthing and bathroom arrangements in military facilities is assumed to constitute a sufficient justification for the exclusion of women.[436] The assumption, however, is grounded in nothing more than traditional expectations of what is "appropriate" behavior for women or an "appropriate" level of mixing between the sexes. It has no necessary relation to a purpose of military effectiveness, and the military's desire to perpetuate a traditional sense of physical modesty and sexual interaction cannot substitute as an important, or even legitimate, government purpose sufficient to justify the exclusion of women.[437] The military can, of course, enforce *standards of discipline* related to physical modesty and sexual interaction, applicable to both men and women, but it cannot draw facial classifications on the basis of sex that are grounded in generalizations about how men and women do, or should, behave.

The judicial latitude that Congress and the military now have to govern on the basis of classifications that would otherwise violate the Equal Protection Clause also expresses itself in ways that are less direct. Military culture has become more polarized in its conception of gender over the last generation, a trend that is counterintuitive in a military that has generally expanded the opportunities available to women during that time. Ostentatious masculinity and ostentatious femininity are not inherent components of military culture, but instead have developed in parallel fashion to Rehnquist's separation of the military from constitutional restraint. That the two trends would operate in tandem should not be surprising; a military—and a Congress—permitted to ignore constitutional expectation with respect to the equal protection of women will naturally develop a more polarized assumption of gender roles.

Two examples of the less-direct ways in which Rehnquist's influence has found

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436. Judge Richard Posner has stated that he "would be very surprised to learn that any Justice of the Supreme Court believes that the maintenance of sex-segregated public restrooms violates the Constitution." Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 15 (1998). He made that statement in the context of arguing that, contrary to the Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996), the Constitution did not require the admission of women to the Virginia Military Institute ("VMI"). Posner insisted that he was "not arguing that because single-sex restrooms are lawful, VMI should be entitled to exclude women." *Id.* at 15 n.39. However, there seems to be no reason to mention the presumed constitutionality of single-sex restrooms, other than its presumed significance to the exclusion of women.

It has been noted that sex-segregated restrooms are distinguishable from race-segregated restrooms, in that the former are not stigmatizing to women. *See, e.g.*, Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351-52 (1987). What this observation neglects to recognize is that sex-segregated restrooms can be stigmatizing to women if the absence of a separate restroom can be used to justify the exclusion of women from a particular activity.

437. *But see* Dothard v. Rawlinson, 433 U.S. 321, 325 n.6 (1977) (upholding, in Title VII action, exclusion of women from prison guard duties; noting that guards were required to patrol men's dormitories, restrooms, and showers on a regular basis). "The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.* at 336.

expression in gendered aspects of military culture involve haircuts and uniforms. As discussed earlier in this Article, styles of military haircuts for men have evolved as a means of expressing "separateness" from civilian society.[438] A generation ago, most military men would have cut their hair in a way that minimized any distinction from civilian peers. Today, the typical male servicemember shaves or "buzzes" his head in an extreme style that, if not perceived immediately as military, could be mistaken only for a haircut sported by some of the most culturally extreme members of civilian society. That transformation has had consequences for women as well. During the period the Virginia Military Institute ("VMI")[439] prepared for the admission of women, the nature of cadet haircuts was one of the most sensitive issues to resolve.[440] The concern was that women might never fully assimilate with their male classmates because of VMI's reluctance to require women to shave their heads in the male default style. What most people neglected to grasp, however, was that the issue arose only as a result of a gendered evolution over the last twenty-five years in what it meant to have "military hair"; it had nothing to do with the VMI's historical tradition.[441] When both military men and military women wore their hair in a more androgynous style, the difference in their appearance was fairly small. Today, the cultural expectation is that military women will wear their hair long but "put up" while on duty,[442] a style that

438. *See supra* note 323 and accompanying text.

439. VMI is a civilian university that engages in an adversative or "military" style of education, but it is not part of the military. *See generally* Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189 (1996). The VMI controversy did, however, raise the same squeamishness about the idea of women in military service that affects cases concerning the military itself. Interestingly, in arguing against the admission of women to VMI, Richard Posner noted the Rehnquist principle of judicial deference to the military. Posner contended that "if the national government decided to reduce the percentage of women in the armed forces, it is unthinkable that the Court would stand in its way." Posner, *supra* note 436, at 16. Posner believed that if VMI had been a component of the armed forces, rather than just a "military-style" civilian university, the Court never would have rejected its petition to remain all-male. *See id.* at 16-17. There are two ways to examine this distinction. I would suggest instead that the only reason *United States v. Virginia* raised such vehement protest from Justice Scalia was because the case pushed all the emotional buttons related to military service by women. *See* 518 U.S. at 566 (Scalia, J., dissenting). Otherwise; it would have been a relatively uncontroversial case concerning single-sex higher education. *See generally* Mazur, *supra* note 222 at 78-79 (contending that *United States v. Virginia* is fundamentally a case about military service, not single-sex education).

440. *See* LAURA FAIRCHILD BRODIE, BREAKING OUT: VMI AND THE COMING OF WOMEN 126-32 (2000).

441. *See id.* at 128-29 (noting that shaved heads for new VMI cadets had first appeared in the 1980s). Some administrators noted that "if the men's hair was longer, male and female rats [new cadets] might be able to wear similar styles." *Id.* at 129. The final resolution was for women to receive "buzz cuts" that were closer to the contemporary shaved style than to the pre-1980s men's cuts. *See id.* at 220-23 (including photographs).

442. Compare the more androgynous 1970s hairstyles of a group of female naval aviators with the "glamour shot" of the 1990s female naval aviator with long flowing hair pictured in JEAN ZIMMERMAN, TAILSPIN: WOMEN AT WAR IN THE WAKE OF TAILHOOK (1995) (fourth and eighth pages of photographs bound between pages 208 and 209); *see also* CAROL BARKALOW & ANDREA RAAB, IN THE MEN'S HOUSE: AN INSIDE ACCOUNT OF LIFE IN THE ARMY BY ONE OF

during the Vietnam generation would have been considered oddly formal. These changes in the outward appearance of servicemembers might seem superficial and insignificant, but they are not. What is critically important about this otherwise frivolous discourse is the reality that polarization in haircuts between men and women can be used as a way of enforcing "difference" and as a way of perpetuating the assumption that women cannot fit the standard template of a servicemember.

Uniforms have become more ostentatiously masculine or "combat-identified" as well. A generation ago, for example, Air Force personnel who performed field duties, such as aircraft maintenance, wore simple, green utility uniforms called fatigues. Today, however, dignified fatigues have been replaced by a camouflage-printed "Battle Dress Uniform" designed to look more like the uniforms worn by personnel in the Army and the Marine Corps.[443] The only possible reason for substituting a new utility uniform would be its "combat-identified" flair, because there would be little need for camouflaged stealth on a gray concrete flightline.[444] Evolution in military uniforms, however, just like evolution in military hairstyles, can be a symptom of a larger trend. In an effort to accentuate the "difference" from civilian society that the Court has endorsed, we see stereotypical attempts to make the military seem more "military." In an effort to accentuate the "difference" between male and female servicemembers that the Court has endorsed, we see an evolution in cultural style that polarizes the gendered appearance of servicemembers. Those same gendered differences are then employed to justify why the presence of women is so destabilizing to the status quo, although the status quo itself is an artificial construction.

It is anything but a coincidence that the same twenty-five-year era following the end of the Vietnam War has brought about a new constitutional principle of all-encompassing deference to military judgment, an increase in the distance between military and civilian society, a deterioration of equal protection in a military context, and a polarization of gendered roles in military personnel. These trends did not occur in isolation from one another. Rehnquist's "sub-rational basis"[445] standard of review with respect to matters of military concern has permitted Congress to use its constitutional military powers for purposes that are not legitimate government purposes.[446] They have been applied to preserve the traditional place of women in

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WEST POINT'S FIRST FEMALE GRADUATES (1990) (second page of photographs bound between pages 126 and 127) (picturing the much longer styles of men's hair and the much shorter styles of women's hair prevalent in the "plebe" or freshman class at the United States Military Academy at West Point in 1976).

443. *See* Dress and Personal Appearance of Air Force Personnel, Air Force Instruction 36-2903 (June 8, 1998), *available at* http://afpubs.hq.af.mil/afpubs.stm.

444. Furthermore, the endless pockets provided by a Battle Dress Uniform just tempt flightline personnel to carry things in their pockets that can fall and be ingested in aircraft engines. For that matter, long hair that can never be protected completely by headgear can be a potential liability around aircraft and aircraft-maintenance machinery as well.

445. *See* Goldman v. Weinberger, 475 U.S. 503, 515 (Brennan & Marshall, JJ., dissenting).

446. *Cf.* Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that Colorado's imposition of a "broad and undifferentiated disability on a single named group" is not a legitimate government purpose). Congress's latitude to use its constitutional military powers for the purpose of perpetuating traditional notions of gender might also be viewed as a similarly broad and undifferentiated disability on women.

society, to characterize women primarily in terms of their sexuality, and to establish a fundamentalist, morality-driven understanding of the limits of constitutional protection.[447] Judicial deference to military policymaking has shielded Congress from even an expectation of rationality, and its performance has degenerated to meet that expectation.[448]

CONCLUSION: CONGRESSIONAL CONTROL IN AN ERA OF A POLITICALLY PARTISAN MILITARY

A growing body of political science research indicates that the military has become less politically representative of civilian society and more politically partisan over the last twenty-five years. Popularly referred to as the "civil-military gap," this developing divide between civilian society and the military has become one of the primary topics of research within the academic study of military affairs.[449] Its core findings reveal a strong ideological and partisan drift among military officers in favor of the Republican Party, a change far greater in degree than any parallel trend of increasing social conservatism within civilian society.[450] The civil-military gap may be a counterintuitive development from the perspective of nonveteran civilians; most may

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447. For additional examples, see 10 U.S.C. § 1093 (1994) (prohibiting the use of Department of Defense funds or medical facilities to perform abortions, including abortions for servicewomen); Military Honor and Decency Act, 10 U.S.C. § 2489(a) (1994) (prohibiting the sale of sexually explicit materials in military exchanges).

448. The most intellectually embarrassing law review article ever published might be a short piece written by former Senator Sam Nunn of Georgia for the purpose of justifying "Don't Ask, Don't Tell" (interestingly, without ever mentioning "Don't Ask, Don't Tell"). *See* Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557 (1994). The article illustrates the sheer smugness of a Congress that realizes it can act without limitation under its constitutional military powers. "The principles of judicial deference developed by the Supreme Court recognize the fact that over the years Congress has acted responsibly in addressing the constitutional rights of military personnel." *Id.* at 566.

449. The journal of the Inter-University Seminar on Armed Forces and Society, *Armed Forces and Society*, published a recent symposium issue containing several research studies investigating the civil-military gap. *See* Symposium, *Media and Education in the U.S. Civil-Military Gap*, 27 ARMED FORCES AND SOC'Y 177 (2001). The research studies in this issue were just a sampling of those sponsored by the Triangle Institute for Security Studies ("TISS"), an interdisciplinary research consortium of Duke University, the University of North Carolina, and North Carolina State University and the primary source of research on civil-military gap issues. *See also* SOLDIERS AND CIVILIANS (Peter D. Feaver & Richard H. Kohn eds., 2001) (compiling additional civil-military gap research); Symposium, *Media and Education in the U.S. Civil-Military Gap*, 27 ARMED FORCES AND SOC'Y 375-462 (1998); http://www.poli.duke.edu/civmil/index.html (containing general information on TISS).

450. *See* Ole R. Holsti, *A Widening Gap Between the U.S. Military and Civilian Society?: Some Evidence, 1976-1996*, INT'L SECURITY, Winter 1998/99, at 5; *see also* Mazur, *Word Games*, *supra* note 315, at 1609 (discussing Holsti research in the context of "Don't Ask, Don't Tell"); Mazur, *supra* note 222, at 67-69 (discussing Holsti research in the context of a feminist obligation for military service); Adam Clymer, *Sharp Divergence Found in Views of Military and Civilians*, N.Y. TIMES, Sept. 9, 1999, at A20; Thomas E. Ricks, *Military Is Becoming More Conservative, Study Says*, WALL ST. J., Nov. 11, 1997, at A20.

assume that the modern military has always been consistently more conservative than the civilian society it protects. The end of the draft-era military a generation ago, however, has contributed to fundamental change in the composition of our military forces. The all-volunteer, self-selected military has become increasingly less representative in a political sense since the Vietnam War ended, and the trend is even more significant when one considers that the last generation has seen a tremendous increase in the number of military women at higher ranks. Over the last thirty years, we have lost the draft-era officers and enlisted men that made the military a force of the people rather than a force apart from the people, and we have gained a Justice of the Supreme Court determined to magnify that cultural division.

The cultural and political division revealed in the civil-military gap research inescapably relates to Rehnquist's principle of judicial deference to military judgment. In one sense, they are causally related. Rehnquist's introduction of the factually unsupported rationale of the military as a "separate society" exacerbated the disadvantages of a transition from a draft to a volunteer military. It encouraged the military to identify its "difference" in terms of resistance to constitutional expectation, which predictably led to self-selection of those who would join the military for similar constitutionally resistant reasons.[451] Paradoxically, Rehnquist was determined to eliminate the only factual predicate that could make judicial deference to the military minimally rational. The wisdom of judicial deference, if it exists at all, depends critically on the "militia ideal" of universal service by citizen-soldiers.[452] When members of civilian society feel they have a personal stake in the exercise of military discretion, judicial review of military policy becomes somewhat less necessary. Majoritarian control does not even *begin* to make sense unless participatory, "republican" forms of protection against military overreaching are also available. Majoritarian control of military decisions that impose collateral consequences on

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451. Military separatism can also impose disadvantages in the opposite direction. A generalized respect for, but lack of familiarity with, the military institution can tempt civilians to seek military solutions to difficult civilian problems, which can lead to a creeping societal militarism. *See* Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the Military*, 29 WAKE FOREST L. REV. 341, 386-90 (1994). "As the military's responsibilities become increasingly open-ended, the potential exists for the military to assume it has the right, and even the *obligation*, to intervene in a wide range of activities when it perceives it can advance a broadly defined notion of the national interest." *Id.* at 389 (emphasis in original).

452. Kirstin Dodge described the exchange of experience between military and civilian concerns that the model of the citizen-soldier provides and, conversely, that the model of a separate society inevitably prevents:

> Citizen-soldiers who come together temporarily to train or fight in the nation's defense circulate in and out of the military, bringing their opinions from civilian life to their military service. Their military experience likewise shapes their contributions to debates about military needs, treatment of servicemembers, and the like. Everyone sees herself as potentially in need of protection by the military, as potentially called upon to guard the country, and as potentially subject to military regulation.

Dodge, *supra* note 14, at 28; *see also* GARY HART, THE MINUTEMAN: RESTORING AN ARMY OF THE PEOPLE (1998) (recommending a return to universal military service in the National Guard or Reserve).

civilians or civilian society makes no sense whatsoever if, as is the case in Rehnquist's world, the military is disconnected by command of the Supreme Court from the society it is sworn to serve.

Rehnquist's reliance on the asserted moral superiority of military values in comparison to civilian constitutional values has also contributed to a rising contempt for civilian society within the military. As one retired Gulf War admiral stated, "More and more, enlisted as well as officers are beginning to feel that they are special, better than the society they serve. This is not healthy in an armed forces serving democracy."[453] That contempt expresses itself in terms of morality and social conservatism and, most alarmingly, in terms of political partisanship. A military that once prided itself on an ethic of political neutrality has drifted toward open and active identification with one political party, but seemingly for a very narrow purpose—the maintenance of cultural separateness and cultural resistance. To the military, the civil-military gap can only be a positive development, because it is consistent with a military purpose not just to defend civilian society, but to define it.[454]

This Article began with a discussion of *Greer v. Spock*,[455] and it will end with one as well. The opinion rested fundamentally on the assumption of a politically neutral military. There was a level of comfort in restricting the political involvement of servicemembers only because the constitutional need for servicemembers to remain politically neutral was of greater importance. The result was "consistent with the American constitutional tradition of a politically neutral military under civilian control."[456] Over the last generation, however, Rehnquist has turned this principle on its head. In *Greer v. Spock*, First Amendment values were displaced narrowly in the service of a greater constitutional good—civilian control of the military—that could be achieved only through maintenance of political neutrality. Today, in contrast, the Court's identification of the military as pointedly *not neutral*, but as separate, morally superior, and politically partisan, is offered as a reason why the military should not be subject to constitutional limitation at all. Judicial deference to the military can never be constitutionally effective when the military is politically partisan, or when the military is used for politically partisan purposes. Rehnquist's transformation of our constitutional understanding of civilian-military relations has achieved, with uncanny precision, the worst possible combination of constitutional anomalies. He has encouraged the military to see itself as politically partisan, enabled Congress to use the military for politically partisan purposes, and then awarded an all-encompassing judicial deference that insulates both from serious review. This is how, thirty years later, Rehnquist finally won the Vietnam War.

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453. RICKS, *supra* note 222, at 276. Thomas Ricks, now a reporter on military issues with the *Washington Post*, has investigated and written extensively on the nonacademic side of civil-military gap issues. *See, e.g.*, *id.* at 274-97; Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at 66. Ricks has also written a fascinating fictional account of the danger that the contemporary civil-military gap could pose for national security. *See* THOMAS E. RICKS, A SOLDIER'S DUTY (2001).

454. *See* RICKS, *supra* note 222, at 286 (noting the concerns of Richard Kohn, *see supra* notes 59, 448, one of the top scholars of civilian-military relations).

455. 424 U.S. 828 (1976).

456. *Id.* at 839.