Comments

CONSTITUTIONAL LAW

GOLDMAN V. WEINBERGER: CIRCUMSCRIBING THE FIRST AMENDMENT RIGHTS OF MILITARY PERSONNEL

In *Goldman v. Weinberger*,[1] the United States Supreme Court reaffirmed its longstanding position on judicial deference to military decisionmaking. The Court held that military regulations preventing an Air Force captain, who was also an Orthodox Jew and an ordained rabbi, from wearing his yarmulke[2] did not violate the free exercise clause of the first amendment.[3] The *Goldman* Court concluded that the first amendment does not require the Air Force to accommodate religious practices that detract from the uniformity of standard dress regulations.[4]

The *Goldman* decision was the latest in a long line of Supreme Court cases giving virtually unlimited deference to military decisionmaking where the constitutional rights of service people conflict with claimed military necessity.[5] Although *Goldman* follows the general theme of these cases, the five-four split[6] by the Court indicates significant dissatisfaction with the traditional stance.[7]

This Comment will describe the judicial tradition of deferring to the military when it denies certain first amendment rights because of alleged military necessity. It will attempt to derive a workable standard of review for military decisionmaking affecting constitutional rights, a standard suggested by the three dissenting opinions in *Goldman*. Finally, it will explore the impact of *Goldman* and the possibility for change in this area in light of the membership of the current Supreme Court.

---

1. 106 S. Ct. 1310 (1986).

2. The yarmulke is the small skull cap worn by Orthodox Jewish men. To Orthodox Jews, the yarmulke is a symbol of respect for God, and it is worn both indoors and outdoors as a symbol of respect for God's omnipresence. *See id.* at 1322 (Blackmun, J., dissenting).

3. *Goldman*, 106 S. Ct. at 1314.

4. *Id.*

5. *See, e.g.*, Burns v. Wilson, 346 U.S. 137 (1952), discussed at note 46 and accompanying text; Orloff v. Willoughby, 345 U.S. 83 (1953), discussed at text accompanying notes 21-26; Greer v. Spock, 424 U.S. 828 (1976), discussed at note 40 and accompanying text; Brown v. Glines, 444 U.S. 348 (1980), discussed at notes 31-40 and accompanying text.

6. *Goldman*, 106 S. Ct. at 1310.

7. *Id.* at 1314-26.

THE FACTS AND PROCEDURAL HISTORY OF GOLDMAN

S. Simcha Goldman is an Orthodox Jew and an ordained rabbi. In 1973, he entered the Armed Forces Health Professions Scholarship Program on inactive reserve status in the Air Force. Under this program he studied clinical psychology. After receiving his Ph.D., Goldman began active duty in the U.S. Air Force at March Air Force Base in California. Until 1981, Goldman wore his yarmulke on the base as part of his religious observance. In April of that year, the hospital commander received a formal complaint about Goldman's yarmulke. As a result, the Commander ordered Goldman not to violate Air Force Regulation (A.F.R.) 35-10 which provides that headgear may not be worn indoors except by on-duty armed security police. Goldman brought suit in federal court to prevent the Air Force from restricting the wearing of his yarmulke.

The District Court for the District of Columbia permanently enjoined the Air Force from enforcing A.F.R. 35-10 against Goldman.[8] The Court of Appeals for the District of Columbia reversed the District Court ruling that the Air Force's interest in maintaining discipline justified rigorous enforcement of the dress code.[9] The United States Supreme Court affirmed the Court of Appeals' decision.[10] The Court cited overriding military interests in affirming the decision.[11] The Court held that the military's interests in maintaining certain levels of order, discipline and obedience may, to a degree, override the constitutional rights of its members.[12]

In arguing his claim that the enforcement of A.F.R. 35-10 impermissively infringed on his right to free exercise of religion, Goldman urged the Court to use a more rigorous standard than mere deference to military judgment.[13] The Court, however, chose to reiterate the traditional stance on issues where the Constitution and military interests clash.[14] Thus, the Court applied the traditional standard of deference to military judgment in evaluating Goldman's claim.[15]

BACKGROUND: DEFERENCE TO MILITARY DECISIONMAKING

The judiciary's rather passive acceptance of constitutional violations

8. *Id.* at 1311.
9. *Id.*
10. *Id.*
11. *Id.* at 1311-12. The Court reasoned, "the First Amendment does not require the military to accommodate such [religious] practices in the face of its view that they would detract from the uniformity sought by the dress regulations." *Id.* at 1314.
12. *Id.* at 1313.
13. *Id.* at 1312.
14. *Id.* at 1312-13.
15. *Id.* at 1313. It has been argued, most notably by Justice O'Connor in her dissent in *Goldman*, that this standard is really no standard at all. *Id.* at 1324 (O'Connor, J., dissenting). She suggests a two-prong test based on Sherbert v. Verner, 374 U.S. 398 (1963), Wisconsin v. Yoder, 406 U.S. 205 (1972), and Thomas v. Review Board, 450 U.S. 707 (1981): "First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake. . . . Second, the government must show that granting the requested exemption will do substantial harm to that interest. . . ." *Id.* at 1325 (O'Connor, J., dissenting). *See also infra* text accompanying notes 61-70.

suffered by servicemen is well-documented in the case law of this century.[16] Although the Supreme Court has consistently prohibited judicial interference with military decisionmaking affecting all constitutional rights,[17] the

16. United States v. Keating, 121 F. Supp. 477 (N.D. Ill. 1949), offers an excellent compendium of some of the more significant deprivations that have been sanctioned, or at least tolerated, by the court. The dispute in *Keating* centered on whether an individual's discharge from the Navy was valid. An invalid discharge would have left Keating vulnerable to a court-martial. In a habeas corpus petition, Keating claimed he was honorably discharged from the Navy. The Navy contended that Keating had reenlisted, and that consequently the discharge was nullified. *Id.* at 477. During this period of confusion, the petitioner committed several violations of Navy regulations, punishable by court-martial if the offender was a member of the Navy. *Id.* In deciding this issue, the District Court of Illinois recognized that if Keating had, in fact, received a valid discharge, he was afforded numerous constitutional rights to which he was not entitled while still a member of the Navy. *Id.* at 478. As a member of the armed forces, an individual is governed by military law, in this case naval law. *Id.* As such, he can be denied freedom of speech and assembly, protection from unreasonable searches and seizures, due process and a trial by jury. *Id.* To summarize, the soldier, sailor, flyer or marine can be deprived of his first, fourth, fifth, sixth and fourteenth amendment rights with little or no interference by civilian courts. *Id.*

Illustrative of this point is Middendorf v. Henry, 425 U.S. 25 (1976), in which the plaintiffs, various enlisted members of the Marine Corps, were denied representation by counsel at a summary court-martial. The plaintiffs claimed that the military had overstepped its authority in not appointing them counsel, and that as a result their sixth amendment rights had been violated. *Id.* at 28-30. The Supreme Court dismissed this argument by simply holding that a summary court-martial is not a criminal prosecution within the meaning of the sixth amendment and, as such, there is no constitutional right to counsel in that proceeding. *Id.* at 42. The Court considered, among other things, that the court-martial takes place in the unique arena of the military, as opposed to in civilian society. *Id.*

See also Daigle v. Warner, 490 F.2d 358 (9th Cir. 1974), to which the Supreme Court cited approvingly in *Middendorf.* In *Daigle,* the Ninth Circuit decided that the fifth amendment guarantee of due process did not obligate the military to provide counsel for every case in which a defendant is imprisoned. *Daigle,* 490 F.2d at 360. The court reasoned that the standard for due process laid out in Gagnon v. Scarpelli, 411 U.S. 778 (1973), should be relaxed in the military context due to the "exigencies of military discipline and the need for flexibility." *Daigle,* 490 F.2d at 365. The court's opinion also explained that

> *Gagnon* is a case dealing with right to counsel at a parole or probation revocation hearing which the court found analogous to the situation in *Daigle.* The Supreme Court held in *Gagnon* that a parolee or probationer has a presumptive right to counsel at a proceeding in which after being informed of his right to counsel . . . he makes such a request based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to present.

Daigle, 490 F.2d at 365, citing *Gagnon,* 411 U.S. at 790.

The court concluded that even where this modified standard is met, exigencies arising in the course of military operations may modify it even further. Where it is not reasonable to obtain qualified counsel, the court-martial may proceed if the rights of the defendant "will not be unduly prejudiced." *Daigle,* 490 F.2d at 365. The court offered no test for determining "undue prejudice."

The mitigated standard is a two-faceted test in which the plaintiff must meet one of the conditions in order for the request for counsel to be granted. The defendant must make a request founded "on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary to adequately present the defense of mitigating circumstances." *Id.*

17. Chief Justice Earl Warren, speaking of the need to protect the constitutional rights of members of the armed forces said, "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. REV. 181, 188 (1962). In the same article, Warren acknowledged the inherent conflict between military necessity in the name of national defense and attempts to safeguard personal freedoms from encroachment by excessive government authority. He believed that the military *has had to* make a "most extraordinary showing" of necessity before implementing procedures that substantially violate the Bill of Rights in those situations where the Supreme Court has deferred to its

major holdings in this area have focused on first amendment issues.[18]

The first amendment to the United States Constitution prohibits the federal government from restricting the right of free exercise of religion.[19] The Supreme Court has significantly foreclosed any governmental intrusion on this right,[20] unless the state can show a compelling interest that overrides the values protected by the free exercise clause. In the absence of such an interest the government may not compel conduct that interferes with an individual's right to practice his religious beliefs.[21]

In *Orloff v. Willoughby*,[22] the Supreme Court clearly expressed the idea that the military has a special right to control the actions of its members.[23] The Court stated that the military was a specialized community that may be governed by a different set of rules than civilians.[24] The *Orloff* Court ruled that the military, as a unique entity, is not subject to the same judicial criteria as civilian society.[25] It is therefore necessary that the judiciary scrupulously avoid intervening in legitimate military matters, just as the armed forces should be scrupulous not to interfere with judicial matters.[26] The Court concluded that only if this principle is upheld is it possible for the military to perform its intended functions.

Two decades after the *Orloff* decision, the Court reiterated the *Orloff* rule in *Parker v. Levy*.[27] In *Parker*, the Supreme Court held that the necessity for maintaining obedience and discipline is fundamental to the functioning of the armed forces.[28] Army regulations restricting free speech, the *Parker* Court asserted, are not facially invalid for constraining first amendment rights.[29] Consequently, actions that would normally be held unconstitutional, such as inhibiting free speech, are permissible in a military context.[30]

In 1980, the Supreme Court further elaborated this point when it de-

---

judgment. *Id.* at 197. It is arguable, however, that this belief, if not flatly erroneous, was at least misguided since no Supreme Court cases support this position.

18. *See infra* notes 20, 21, 27 and 40.

19. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of a religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

20. Sherbert v. Verner, 374 U.S. 398 (1963). "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such." *Id.* at 402 (emphasis in original).

21. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Religious beliefs are to be distinguished from mere "personal" or "philosophical" beliefs in that the former merit a much higher degree of first amendment protection. *Id.* at 215-16. *See also* Thomas v. Review Board, 450 U.S. 707, 714 (1981). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

22. 345 U.S. 83 (1953).

23. *Id.* at 94.

24. *Id.*

25. *Id.*

26. *Id.* at 94.

27. 417 U.S. 733 (1974). *Parker* concerned an army doctor who received a court-martial for several violations of the Uniform Code of Military Justice after publicly advising blacks not to go to Viet Nam. *Id.*

28. *Id.* at 744.

29. *Id.* at 758.

30. *Id.*

cided the companion cases of *Brown v. Glines*[31] and *Navy v. Huff*.[32] In these cases the Court explained that regulations protecting substantial governmental interests unrelated to suppression of free expression are not void for restricting constitutionally protected rights.[33]

Brown and *Huff* arose from situations in the Air Force and Marine Corps, respectively. Both branches of the service have regulations requiring members to obtain approval from base commanders before circulating petitions on or around the base.[34] In each case, the plaintiff claimed that the regulations were facially invalid due to overbreadth; specifically, that the regulations unreasonably restricted the first amendment right to free speech.[35] Both Courts held that the regulations in question protected the interest in maintaining respect for duty and discipline vital to military effectiveness.[36] Since the interest in maintaining respect for duty and discipline does not stem from a desire by the government to suppress free expression, the Courts held that the regulations were not facially invalid.[37] Moreover, they were found not to restrict free speech any more than was reasonably necessary to protect such overriding interests.[38]

In both cases, the plaintiffs also claimed that the regulations were in violation of 10 U.S.C. section 1034, which prohibits the armed forces from preventing servicemen from communicating with members of Congress.[39] The *Huff* Court explained that such statutes must be liberally construed to avoid limiting a base commander's authority any more than the legislative purpose requires.[40] The Supreme Court gave an additional reason for upholding the tradition of deference to military judgment in *Chappell v. Wallace*,[41] a case frequently relied upon in *Goldman*.[42] In *Chappell*, a unanimous Court cited the intent of the Framers as a basis for its refusal to intrude upon intramilitary affairs.[43] The *Chappell* Court held that enlisted

31. 444 U.S. 348 (1980).
32. 444 U.S. 453 (1980).
33. *Brown*, 444 U.S. at 354.
34. *Id.* at 349-50; *Huff*, 444 U.S. at 455.
35. *Brown*, 444 U.S. at 351-53; *Huff*, 444 U.S. at 455-56.
36. *Brown*, 444 U.S. at 354; *Huff*, 444 U.S. at 458.
37. *Brown*, 444 U.S. at 355; *Huff*, 444 U.S. at 458.
38. *Brown*, 444 U.S. at 355; *Huff*, 444 U.S. at 458.
39. The defendants in *Brown* and *Huff* intended to send the completed petitions to various members of Congress. *Brown*, 444 U.S. at 351; *Huff*, 444 U.S. at 458. 10 U.S.C. § 1034 (1956) provides, "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication in question is unlawful or violates a requirement necessary to the security of the U.S."
40. Navy v. Huff, 444 U.S. at 458. The interest in maintaining military effectiveness is so strong that the Court has upheld the enforcement of this same type of regulation against civilians. In Greer v. Spock, 424 U.S. 828 (1976), civilians who wished to distribute political literature on a military base challenged an Army regulation prohibiting such activity without the approval of the base commander. In upholding the validity of the regulation, the Court adjudged that there was no constitutional proscription disabling a military commander from neutralizing a situation he perceived as dangerous "to the loyalty, discipline, or morale" of the troops under his command. *Id.* at 840. Obviously, courts view the military as an entity so distinct from civilian society that the constitutional protections supposedly guaranteed to citizens can be stripped away if citizens venture into this unique territory.
41. 462 U.S. 296 (1983).
42. *See Goldman*, 106 S. Ct. at 1313.
43. *Chappell*, 462 U.S. at 300-01.

armed forces personnel cannot maintain suits to recover damages from superior officers when the enlisted men sustain alleged injuries as a result of constitutional violations in the course of military service.[44] In essence, not only were service people denied any remedies for constitutional violations, they were even foreclosed from recovering for actual injuries directly caused by those violations.[45]

The standard of review for military decisionmaking that resulted from this line of cases is clear. In order for the military to circumvent the rights and freedoms granted by the first amendment, all that is required is an assertion of "military necessity." No link between the restricted right and the claimed military need is necessary. The branch of service need not show how the right in question threatens any aspect of military order.

When evaluating judicial deference to the military, courts should note that such deference is not based merely on the military's need to preserve order. The Supreme Court has repeatedly acknowledged that the Framers of the Constitution expressly entrusted to Congress the task of striking a balance between, on the one hand, certain overriding demands of military discipline and, on the other, the rights and duties of persons in the armed forces.[46]

ANALYSIS: FINDING A STANDARD OF REVIEW FOR MILITARY DECISIONMAKING

Exemptions From Military Regulations

Frequently, the serviceman who feels he is justified in deliberately disobeying an order has a moral, religious or philosophical ground for his actions.[47] Such was the case in *Goldman*. Goldman wore his yarmulke out of a deeply ingrained religious belief.[48] For him, religious belief took precedence over Air Force regulations. As a result, he faced the dilemma of choosing between military orders and his conscience. Generally, military commanders have the discretion to permit visible religious headgear and other items in restricted areas on the base.[49] In the past, the Army has

44. *Id.* "[C]enturies of experience" have resulted in a "hierarchical structure of discipline and obedience" established to elicit the proper responses from soldiers should they ever be called upon to perform their ultimate duty in the field of combat. *Id.* at 300. The Court concluded that civilian courts should rarely entertain suits in which there is an intramilitary relationship at issue. *Id.* In anticipating this problem, the Framers explicitly granted Congress, not the judiciary, the plenary authority to control the functions and mechanisms of the military. *Id.* at 301. Congress has the plenary power to control the "rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." *Id.* *See generally* Rotsker v. Goldberg, 453 U.S. 57, 70 (1981).

45. In other words, if a serviceman suffers a constitutional injury that results in actual, recoverable damages, he cannot recover those damages.

46. Burns v. Wilson, 346 U.S. 137, 140 (1952). In Burns v. Wilson, the Court likened military law to state law in that it exists apart from that which governs the federal system. *Id.* at 140. The Court claimed to have played no role in the development of military jurisprudence, and to have exerted no supervisory powers over the courts that enforce it. *Id.* Thus, the Supreme Court concluded that civil courts are not the forum in which to determine to what extent the rights of servicemen must be conditioned not to compete with fundamental military interests. *Id.*

47. Foreman, *Religion, Conscience and Military Discipline*, 52 MIL. L. REV. 77, 81 (1971).

48. *Goldman*, 106 S. Ct. at 1314-15, n.1.

49. *Id.* at 1314.

granted such a specific policy exception to members of the Sikh religion by allowing them to wear a beard and turban.[50]

While exemptions from military regulations have been granted on occasion,[51] the Air Force decided against making an exception in Goldman's case. In its rationale, the Air Force relied on reasons pertaining to the interest in maintaining order, discipline and obedience.[52] Although the military has traditionally been given great deference in its decisionmaking, there are court cases that have dealt with the review of military decisionmaking. In *Bitterman v. Secretary of Defense*,[53] the District Court of the District of Columbia provided some tangible, practical reasons for enforcing A.F.R. 35-10.[54] The *Bitterman* court went as far as to articulate a standard of review for military regulations.[55] To withstand judicial review, the court stated, a regulation must protect a governmental interest substantial enough to overshadow first amendment rights, and regulate only the type and amount of conduct reasonably necessary to protect that interest.[56] The court distinguished between a religious *preference* and a religious *requirement*, noting that preferences are more easily circumscribed than requirements.[57]

Although the *Goldman* Court faced essentially the same issues as those in *Bitterman*, it failed to address them. Captain Goldman was not granted an exemption to A.F.R. 35-10, nor was he ever given any legitimate reason why his request was denied. In fact, the *Goldman* Court did not even acknowledge *Bitterman* in its opinion. It made numerous references to judicial discretion and military necessity, but developed no specific criteria with which to measure them.[58] The Court simply endorsed A.F.R. 35-10 by approving the way it evenhandedly governs the military's perceived need for

---

50. Foreman, *supra* note 47, at 95-96.

> No other religious group has been given special treatment. . . . In granting the exception, the Army authorities noted that cutting of the hair is absolutely forbidden to a Sikh, whereas in other religions the wearing of the beard was not mandatory, but merely commemorative. Furthermore, the exception . . . applies only to Sikhs who are inducted; those who enlist are expected to shave off the beard and dress like their military contemporaries.

Id.

51. *Id.*

52. *Goldman*, 106 S. Ct. at 1313. The Air Force ruled:

> [T]he traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions. . . . The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

Id.

53. 553 F. Supp. 719 (D.C. Dist. Col. 1982). The facts of *Bitterman* are essentially the same as those in *Goldman*.

54. These include testimony by a general that tended to show a direct correlation between performance of military duties and adherence to the dress requirement and a concern that the Air Force would be flooded with an unmanageable amount of requests for exemptions by members of other religious groups. *Bitterman*, 553 F. Supp. 719, 721-22 (D.C. Dist. Col. 1982).

55. *Id.* at 723-24. This standard is "to be tempered by the substantial deference to be accorded military judgments." *Id.* at 724.

56. *Id.* at 723-24.

57. *Id.* at 726. The *Goldman* Court conspicuously failed to define any kind of meaningful standard for reviewing military pronouncements that affect constitutional rights.

58. *Goldman*, 106 S. Ct. at 1316 (Brennan, J., dissenting).

uniformity.[59] Yet, facts and competing interests were present which would have allowed the Court to articulate a standard of review.[60] Thus, it appears that the majority in *Goldman* was simply not prepared to delineate a procedure for the military to follow in making decisions that affect free exercise.

Standards of Review for Military Decisionmaking Explored by the Goldman Dissenters

The dissenters in *Goldman* suggested several meaningful standards of review for military decisionmaking affecting first amendment rights. Justice Brennan proposed a fairly broad standard for reviewing appearance regulations based on the Air Force's acknowledged justification for having such regulations.[61] Brennan asserted that as a minimum requirement a particular branch of the military must offer a credible explanation as to how the requested exemption interferes with a legitimate military concern.[62]

In his concurring opinion, Justice Stevens proposed a visible/not visible standard for evaluating requests for religious exceptions to the dress code.[63] The visible/not visible standard divides religions into two categories—those with visible dress and grooming requirements and those without such requirements.[64] Justice Brennan summarily rejected this test on the grounds that it favors established majority religions over distinctive minority groups.[65] Alternatively, Brennan suggested a standard in which the military is viewed as a governmental agency.[66] Under the United States Code, all

59. *Id.* at 1314. "The Air Force has drawn the line essentially between religious apparel which is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity." *Id.*

60. For example, Justice Rehnquist alludes to the need for evaluating "whether military needs justify a particular restriction on religiously motivated conduct" but concludes that civilian courts are ill-equipped to make such evaluations. *Goldman*, 106 S. Ct. at 1313. He then goes on to discuss the 190-page A.F.R. 35-10 which describes in intricate detail what Air Force personnel may and may not wear. *Id.* at 1314.

It seems that if there is a need for developing a system by which courts can evaluate military necessity in a first amendment context, it would be quite sensible to request the entity that wrote the 190-page treatise on clothing restrictions to devote a few more to the reasons underlying the restrictions.

61. The Air Force cites "functional utility, health and safety considerations and the goal of a polished, professional appearance" as the rationale behind A.F.R. 35-10. Goldman v. Weinberger, 106 S. Ct. 1310, 1319 (Brennan, J., dissenting). Brennan stated that an appropriate standard for evaluating military dress regulations is their relationship to the interests of "neatness, cleanliness, safety and military image. . . ." The lack of explanation, by both the Air Force and the majority, as to how Goldman's request for an exception to A.F.R. 35-10 could interfere with the Air Force's interests seems to be what disturbed Brennan the most. *Id.* at 1318-19.

62. *Id.* at 1317. Brennan saw the "credible explanation" test as a preferable alternative to the existing system in which the Air Force can insist upon "absolute adherence to whatever rule is established." *Id.* at 1318. *See also supra* note 54.

63. 106 S. Ct. at 1316 (Stevens, J., concurring).

64. *Id.* at 1314-16 (Stevens, J., concurring).

65. 106 S. Ct. at 1320 (Brennan, J., dissenting). Brennan argues that the first amendment prohibits a dual category analysis since under the Constitution the only permissible category is all faiths. "Burdens placed on the free exercise rights of members of one faith must be justified independently of burdens placed on the members of another religion." *Id.* Brennan implied that unless the visible/not visible standard promotes a significant military interest, it is unconstitutional. *Id.*

66. *Id.* at 1321. "Government agencies are not free to define their own interests in uniform treatment of different faiths. That function has been assigned to the First Amendment." *Id.* Justice Brennan's evaluation of the majority's opinion reveals the exasperation of the dissenting Justices

agencies are subject to judicial review for constitutional claims.[67] Taking Brennan's argument one step further suggests that the systematic review of the constitutionality of military regulations would make the armed forces answerable to legitimate claims of unreasonable first amendment violations set forth by their members. Since Brennan admits that there are legitimate interests that may inhibit free exercise, this method also considers the military's need to occasionally circumscribe the first amendment rights of servicemen due to military necessity.[68] Treating the military as an agency does not require that it be treated as a civilian agency.[69] The scope of a constitutional right need not be the same within the military as it is outside the military.[70] However, having an agency standard would require some degree of review for decisions affecting constitutional rights.

In his dissent, Justice Blackmun outlined a simple test for granting a religious exception to a military dress code. He argued that only interests of the highest order can override the free exercise clause.[71] He rejected Justice Brennan's "polished and professional" standard for the same reasons Justice Brennan rejected the visible/not visible standard. Blackmun contended that the "polished and professional" standard favors established religions over distinctive minority faiths.[72] He advocated a case-by-case analysis of religious practices to determine how difficult it would be to accommodate these practices.[73] If the military can make a meaningful showing that the cost of accommodating a particular practice is too great, the exception will not be permitted.[74] While Justice Blackmun's case-by-case methodology would be effective, it seems apparent that articulating a standard in advance would be less burdensome in terms of time and cost to both the judiciary and the military.[75]

---

with rulings such as this. *Id.* at 1318 (Brennan, J., dissenting). In his dissent he sarcastically reconstructed the majority argument:

> Non-Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slope toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies.

Id.

67. 5 U.S.C. § 706 (1982). "[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of or applicability of the terms of an agency action." *Id.*

68. "The First Amendment requires that burdens on free exercise rights be justified by independent and important interests that promote the function of the agency." Goldman v. Weinberger, 106 S. Ct. at 1321 (Brennan, J., dissenting).

69. Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 422-23 (1984).

70. *Id.*

71. *Goldman*, 106 S. Ct. at 1322 (Blackmun, J., dissenting). Blackmun relied on language in Wisconsin v. Yoder, 406 U.S. 205 (1972), which states that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

72. "[F]avoritism based on how unobtrusive a practice appears to the majority could create serious problems of equal protection and religious establishment. . . ." *Goldman*, 106 S. Ct. at 1323 (Blackmun, J., dissenting). *See supra* note 65 and accompanying text.

73. *Id.*

74. *Id.* at 1322. "Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment with respect to Captain Goldman is a reasoned one." *Id.* at 1324.

75. A case-by-case standard would not be an effective way to review military decisionmaking. Rather than delineating a uniform standard by which a military decision could be measured, courts

Finally, Justice O'Connor articulated what is arguably the most workable standard for evaluating a free exercise claim in the military context.[76] The O'Connor analysis requires the government to satisfy a two-prong test before restricting the constitutional rights of military personnel.[77] First, an extremely important military interest must be at stake.[78] Second, the government must show that the asserted interest will be significantly harmed by granting the requested exemption.[79]

Under Justice O'Connor's standard of review, the special role of the military is considered at the first level of the analysis. At this stage, the military has an opportunity to describe the type of interest at stake and to state why it is of such unusual importance that it can take precedence over constitutionally protected freedoms.[80] The second step compels the government to demonstrate that allowing the exemption will significantly jeopardize the military's interest.[81] This second requirement precludes the armed forces from circumscribing the constitutional rights of its members by a blanket assertion of military necessity.[82]

SCOPE OF GOLDMAN

In light of the historical background involving judicial review of military matters, it is not surprising that the *Goldman* Court opted not to tamper with the judgment of the Air Force to strictly enforce A.F.R. 35-10. On the contrary, it would have been far more unusual had the Court chosen to break its longstanding tradition of deference to the judgment of the military and to find in favor of Simcha Goldman.[83] However, the significance to be found in *Goldman* is that three Justices have articulated suggestions for standards of review for military pronouncements affecting constitutional rights.

Since *Goldman*, a number of circuit courts have cited the decision when discussing issues involving judicial review of military matters.[84] The circuits add little to the *Goldman* majority's technique of deferring to the professional judgment of the military.[85] While it is still relatively early to draw any long-term conclusions about the repercussions of the Supreme Court's

would be required to judge each case separately on its own facts. Instead of effectuating judicial review in this area of law, case-by-case analysis would bog down both the judiciary and the military in an endless stream of litigation. *See also supra* notes 54-57 and accompanying text.

76. 106 S. Ct. at 1324-26 (O'Connor, J., dissenting). *See also supra* note 12.

77. 106 S. Ct. at 1325 (O'Connor, J., dissenting).

78. *Id.* at 1325.

79. *Id.*

80. *Id.*

81. *Id.* at 1325-26.

82. This is the expected result since "military necessity" will no longer be a sufficient justification for overriding constitutional rights.

83. *See supra* notes 11, 16, 27-30, 40, 44, 46 and accompanying text.

84. Khalsa v. Weinberger, 787 F.2d 1288 (9th Cir. 1986); Berry v. Bean, 796 F.2d 713 (4th Cir. 1986); *see also* Citizens for John W. Moore Party v. Board of Educ. Commissioners, 794 F.2d 1254 (7th Cir. 1986).

85. In *Khalsa*, the court stated that "[t]he *Goldman* decision broadly upholds the professional judgment of the military that uniform appearance standards are necessary for a unified and disciplined military service in the defense of our country." *Khalsa*, 787 F.2d at 1290. Similarly, the court in *Berry, supra*, held that "[S]pecial considerations obtain when courts are asked to review the judgments of military authorities." *Berry*, 796 F.2d at 716.

most recent refusal to delineate a standard for reviewing military decisions affecting first amendment rights, one development is evident from the lower court decisions. Post-*Goldman* courts are becoming more thoughtful in their review of constitutional issues arising in the military context, despite their inability to deter constitutionally offensive military conduct.[86]

CONCLUSION

Some courts, while upholding the basic premise of the Supreme Court, have supported the maintenance of the constitutional rights of members of the armed forces.[87] It seems unlikely, however, that the Supreme Court's position, which has changed so little over the last century, will change dramatically in the foreseeable future.[88] With the advent of the Rehnquist Court and the addition of Justice Scalia to the bench, the membership of the Supreme Court is perhaps even more conservative now than under Chief Justice Burger.[89] Moreover, since the retirement of Justice Powell and the addition of Justice Kennedy, the Court is currently in a state of transition. If the make-up of the Court shifts toward a more liberal philosophy, deference to the military necessity standard may be challenged.[90] In the immediate future, however, it appears that the tradition of deference to military judgment in matters affecting the constitutional rights of military personnel will remain unthreatened.[91] Although some type of review of military deci-

86. The *Khalsa* court reviewed its original holding (*see* Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir. 1986)) after *Goldman* came down. In reaffirming its decision to allow the Army to refuse to process the application of a Sikh because of his religiously required appearance (long hair, beard, bracelets and turban), the *Khalsa* court noted, "the *Goldman* Court simply assumed, without discussing or deciding the issue, that the constitutional challenge to military requirements was reviewable." *Khalsa*, 787 F.2d at 1289. The court acknowledged that this reviewability was, in fact, limited. *Id.*

87. *See, e.g.*, Stolte v. Laird, 353 F. Supp. 1392 (D.C. Dist. Col. 1972):

> Military personnel retain their basic rights and freedoms as American citizens, subject only to those limitations necessary in the interests of good order and discipline, the unique components of their specialized environment. They retain their political freedoms, their right to hold their own views on all political matters. . . . While soldiers can be compelled to obey orders, they cannot be compelled to an ideological orthodoxy prescribed by their superior officers. . . .
>
> . . . .
>
> . . . .That limited standard of freedom must be vigorously guarded as a precious constitutional right.

Id. at 1402-03.

In addition, many writers have questioned the wisdom of this premise. *See, e.g.*, Warren, *supra* note 17, at 188; Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. CIN. L. REV. 223, 237 (1967); Boudin, *The Army and the First Amendment*, in CONSCIENCE AND COMMAND, JUSTICE AND DISCIPLINE IN THE MILITARY 55, 70 (J. Finn, ed., 1971).

88. *See supra* note 44. *See also In re* Grimsley, 137 U.S. 147 (1890), where the Court stated that "public policy requires that [the relationship between the officer and the soldier] should not be disturbed." *Id.* at 153.

89. *See, e.g.*, Adler, *Scalia's Court*, AMERICAN LAWYER, March 1987, at 1. Justice Scalia is described as an "ultraconservative" whose basic philosophical bearings are not likely to change. *Id.* at 20.

90. Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 24 (1980).

91. Kaczynski, *From O'Callahan to Chappell: The Burger Court and the Military*, 18 U. RICH. L. REV. 235 (1984). "Justices Brennan and Marshall have dissented in [virtually] every case in which the result favored the military." *Id.* at 292. Stevens and O'Connor have flip-flopped between the liberals and the conservatives. *Id.* That leaves the Rehnquist-Scalia-White-Kennedy group with

sions affecting constitutional rights exists, the question of whether judicial review will ever become meaningful remains unanswered.

At first glance *Goldman* seems to be a mere reaffirmation of a long line of decisions marking an established tradition. Once again, a majority of the Supreme Court declined to articulate a standard of review applicable to military decisions that restrict constitutional rights. Narrowly viewed, this decision means that the armed forces can enforce regulations that interfere with their members' ability to practice religion, and, in particular, that Orthodox Jewish airmen cannot wear their yarmulkes indoors. But despite this latest display of enduring judicial restraint, *Goldman* has a broader interpretation. Three of the four dissenting Justices took the time to write thoughtful opinions expressing their dissatisfaction with the traditional view. Although it is possible that this is not an indication that judicial deference to military decisionmaking is waning, it will give future Justices other options to consider when similar issues arise.

Felice Wechsler

an excellent chance of maintaining the status quo on this issue, especially if any of the aging liberals leave the Court and are replaced by more conservative Justices.