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The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights

James M. Hirschhorn

THE SEPARATE COMMUNITY: MILITARY UNIQUENESS AND SERVICEMEN'S CONSTITUTIONAL RIGHTS

JAMES M. HIRSCHHORN†

The Supreme Court generally judges servicemen's claims for violations of their constitutional rights under a deferential "separate community" standard of review. The Court has failed, however, to supply an entirely satisfactory rationale for the separate community doctrine. In this Article, Professor Hirschhorn considers the needs and purposes of the military in a democratic society, and develops a theory of servicemen's relationships to the military that is generally supportive of the separate community doctrine.

The Vietnam War, fought in an unprecedented legal climate, produced unprecedented legal effects on the armed forces. Most American wars had been fought against the wishes of a significant moral and political opposition,[1] and the conscript armies of the Civil War, the World Wars, and the Korean War included many unwilling soldiers. But the Vietnam War was the first in which a combination of the draft[2] and a broadly based antiwar movement brought a significant number of politically hostile individuals into the military. Other servicemen came to see their personal dissatisfaction with military life in political terms.[3] For these men and their civilian supporters, resisting military authority both obstructed the war and preserved what they considered their essential personal liberty. They shared the contemporary willingness to attack entrenched authority in the federal courts. At their disposal was a body of constitutional doctrine protecting individual rights of expression, association, and privacy that had not existed in earlier wars. By the early 1970's, military practices that had gone without effective judicial scrutiny since the founding of the Army were subject to serious constitutional challenge.[4] Since the war's end, lower federal courts have continued to rule on the constitutional

† Associate Professor of Law, Rutgers Law School. A.B. 1969, Johns Hopkins; J.D. 1974, Chicago.

1. *See infra* text accompanying notes 245-48.

2. Since enlistees chose their service and had some choice of training and assignment, it may be assumed that a substantial number of the voluntary enlistments in the armed forces were motivated primarily by a desire to avoid the consequences of the draft.

3. *See generally*, D. CORTRIGHT, SOLDIERS IN REVOLT: THE AMERICAN MILITARY TODAY (1975); W. HAUSER, AMERICA'S ARMY IN CRISIS: A STUDY IN CIVIL-MILITARY RELATIONS (1973).

4. *See, e.g.*, Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973) (court-martial jurisdiction), *rev'd*, 420 U.S. 738 (1975); Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1972) (punishment for conduct "to the prejudice of good order and discipline"), *rev'd*, 418 U.S. 676 (1974); Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970) (refusal to permit antiwar publication on base); Stolte v. Laird, 353 F. Supp. 1392 (D.D.C. 1972) (punishment for conduct "to the prejudice of good order and discipline"); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.) (transfer after antiwar political activity), *rev'd*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); Dash v. Commanding Gen., 307 F. Supp. 849 (D.S.C. 1969) (refusal to permit antiwar publication on

limits of congressional and executive power to control the political activity, sexual orientation, appearance, privacy, and professional opportunities of military personnel.[5]

These cases raise two general issues: whether military necessity justifies restrictions that would be unconstitutional in a civilian setting, and, if so, by what standards the courts should evaluate a legislative or executive decision that a particular military practice is sufficiently necessary. The opinions typically concede that some balance must be struck between established individual rights and military needs,[6] but they differ markedly on what military interests justify unusual restrictions, how clearly the government must show them to be affected, and how precisely the controls must further them.[7]

Cases raising these issues began reaching the Supreme Court in 1974. In eight decisions since then, a stable majority of the Court has accepted the proposition that the armed forces are a "separate community"[8] in which greater than usual restrictions on individual liberty are required. In practice, the Court has given considerable, though not clearly delineated, deference to decisions by Congress or the military authorities that restrict the political expression, access to political activity, and right to counsel of servicemen and that impose gender-based restrictions on military career prospects. It has justified its relatively uncritical approach only in very general terms, asserting without explanation that the function of the armed forces practically requires the Court to accept the judgment of Congress and the military authorities on the relation of the serviceman to the armed forces.[9] By 1980 the majority opinions on point repeated the standard phrases by rote.[10]

Dissenting opinions and commentators have vigorously criticized the separate community doctrine on several levels. It has been attacked as based on a

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base), *aff'd*, 429 F.2d 427 (4th Cir. 1970). *Cf.* Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970) (barring access to post for political activity).

5. *See, e.g.*, Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979) (appointment of court-martial by commanding officer); West v. Brown, 558 F.2d 757 (5th Cir. 1977) (enlistment restriction for unwed mothers); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (discharge for pregnancy); Campbell v. Beaughler, 519 F.2d 1307 (9th Cir. 1975) (hair length); Committee for G.I. Rights v. Calloway, 518 F.2d 466 (D.C. Cir. 1975) (antidrug inspections and urine tests); Hough v. Seamans, 493 F.2d 298 (4th Cir. 1974) (hair length); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980) (discharge for homosexuality); Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978) (gender restriction on sea duty).

6. *E.g.*, Crawford v. Cushman, 531 F.2d 1114, 1121 (2d Cir. 1976); Hough v. Seamans, 493 F.2d 298, 299 (4th Cir. 1974).

7. *Compare* Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979) *and* Committee for G.I. Rights v. Calloway, 518 F.2d 466 (D.C. Cir. 1975) *with* Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) *and* benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980).

8. Rostker v. Goldberg, 453 U.S. 57 (1981); Brown v. Glines, 444 U.S. 348 (1980); Middendorf v. Henry, 425 U.S. 25 (1976); Greer v. Spock, 424 U.S. 828 (1976); Schlesinger v. Councilman, 420 U.S. 738 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1974); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974); Parker v. Levy, 417 U.S. 733 (1974).

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist have been in the majority in every case. They were joined by Justice White in all except *Ballard* and *Rostker*, both of which involved gender-based discrimination; in those cases they were joined by Justice Stewart.

9. *See infra* notes 152-74 and accompanying text.

10. *See* Chappell v. Wallace, 103 S. Ct. 2364, 2365-66 (1983); Rostker v. Goldberg, 453 U.S. 57, 66 (1981); Brown v. Glines, 444 U.S. 348, 354-61 (1980).

historically obsolete model of the relation of the armed forces to society and the duties of modern military personnel.[11] A more fundamental criticism is that the majority's approach is rhetorical and superficial and does not demonstrate that the judiciary is any less competent to consider individual rights in a military context than in connection with prisons, government employment, or national security.[12] In this view, the armed forces have not been shown to be fundamentally different from other government agencies whose actions the courts review.

Generally, an individual claiming a constitutional right against the federal government asserts that the agency involved may not take the action it desires despite an executive or legislative determination that the action serves a legitimate government function. In the separate community cases, the two factions of the Court have disputed whether the peculiar function of the armed forces justifies denying protection to an individual interest that would be granted against any other government agency. Both factions of the Court have employed a balancing analysis, but neither the majority of the Court nor its critics address the basic questions of the relation between the courts and the military. While purporting to balance the needs of the armed forces against individual rights, neither faction draws on the social science literature that describes the basis for military discipline. Neither examines the distinctive nature of war as a government activity or its effect on the armed forces' relation to the Constitution. In arguing the competence of the courts to balance individual and military interests, neither faction explains how the judiciary's ability to balance between the individual and other government agencies applies to the armed forces. Finally, neither faction clearly distinguishes between judicial attitudes toward military practices based on a statute as opposed to those originated within the armed forces. The purpose of this Article is to analyze these factors.

When an individual asserts a right against a federal agency, he claims either a liberty or an entitlement with which he contends the organization has no authority to interfere. The right, and the corresponding limit on the agency's authority, may derive from a regulation, statute, or the Constitution, which is to say that the agency's authority may have been limited by its own decision, by Congress, or by principles developed judicially from a text that cannot be altered by the normal legislative process.[13] When a court holds that a practice is contrary to regulation, it requires the agency to act consistently with its previously announced intentions. When it finds a practice contrary to statute, it vindicates the authority of Congress over the agency. In both instances the court interprets and applies restrictions derived from a text created

11. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 851-57 (1976) (Brennan, J., dissenting); Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME LAW. 397, 400 (1976). *See also infra* text accompanying notes 175-87.

12. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 368-70 (1980) (Brennan, J., dissenting). *See also infra* text accompanying notes 189-93.

13. A common law right, though judicially created, can be overridden by the legislature just as can an unwanted construction of a statute.

by other bodies. If the originator of the text believes that judicial interpretation will produce undesirable results in subsequent cases, it is legally free to change the text to preclude the unwanted interpretation.[14] When a court finds that the Constitution prohibits a particular practice, neither the agency nor Congress has the power to alter the text on which the conclusion rests. The decision therefore denies the agency power to infringe on an individual interest in pursuit of its own purposes, even if authorized to do so by statute, and vests in the courts the final say on what circumstances, if any, warrant infringement of the interest.

Judicial review of servicemen's claims of constitutional rights against the armed forces therefore differs fundamentally from judicial review of claims that the military has violated its own regulations or a statute. In the latter, victory for the serviceman frustrates the organizational will in the immediate case, but leaves the organization free to achieve its purpose in the future. When Congress declines to amend a statute held to limit military authority, any resulting frustration of the armed force's desires merely reinforces the superior authority of Congress to decide military powers and duties. A decision that a practice is unconstitutional, however, prevents the armed forces from exercising a particular power over their members despite their own or Congress' conclusion that it furthers the performance of their legitimate functions.

In the separate community cases an individual, usually a member of the armed forces claiming a liberty or entitlement, is met with the government's argument that the functioning of the armed forces justifies its denial even if it would be granted against another agency or for a person not subject to military law.[15] Both factions of the Court resolve the question by balancing the benefit to the individual or his interest in autonomy against the potential frustration of military purpose that would result from granting the liberty. Once the Justices have derived the individual interest claimed from precedent involving nonmilitary agencies, a well-reasoned balancing analysis would require a judicial consideration of ends, means, and consequences.

It is impossible to decide whether a practice is useful or essential to the proper functions of the armed forces without some idea of what those functions are.[16] The typical majority opinion speaks only briefly of the primary function of the armed forces as "fighting wars," along with a secondary, negative function of remaining subordinate to civilian authority.[17] A fully developed concept of these functions would include a more or less explicit analysis of the distinctive place of war in the constitutional system and the problems caused by active or passive military insubordination to civilian authority.

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14. There may be, of course, political constraints that prevent the legislative or administrative authorities from overriding the courts.

15. *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974).

16. It is highly unlikely, for instance, that the Court would consider a restriction on expression by servicemen to be justified by the military's power to inculcate "desirable" political attitudes for their return to civilian life. *Cf.* Harmon v. Brucker, 355 U.S. 579, 580-82 (1958) (dishonorable discharge based on preinduction activities); *id.* at 585-86 (Clark, J., dissenting).

17. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 837-39 (1976).

Once equipped with a concept of effective performance in war and political subordination at home, the Court must decide whether and how far the practice in question contributes to those ends. Conversely, how well will the armed forces be able to achieve their legitimate purposes if they may not use the practice? This requires some understanding of the demands that an effective military organization must make on its members, the resistance to those demands caused by the serviceman's personality, the range of legal and psychological techniques available to overcome that resistance, and the relative efficacy of different methods as applied to individuals whose attitudes have been formed by American society. It demands, in short, some knowledge of how military organizations work.

Although there are military practices that are completely useless, or even harmful to military effectiveness,[18] it must be assumed that there will be cases in which a practice makes some contribution to the organization's proper functioning. Balancing requires the Court to decide how much decrease in military efficacy is tolerable to sustain the individual interests involved, or how much sacrifice of individual interest is acceptable to maintain the present state of efficiency. Disagreement, as in *Rostker v. Goldberg*,[19] over whether a practice is militarily "necessary" is a dispute over the required directness of the relation between the means and the end—whether the practice is "necessary" in the *McCulloch v. Maryland* sense of "useful,"[20] or in the sense of "essential" rejected in *McCulloch* but normally used when fundamental individual rights are involved.[21] Since the individual rights claimed against the armed forces are generally fundamental,[22] or, in the case of gender discrimination, semi-fundamental,[23] the Court needs a concept of what, if any, distinctive features of the military function justify acceptance of a less direct connection between means and ends than that required of a civilian agency.

Given concepts of proper military functions, military utility, and the relative importance of military utility and individual interests, a court is in a position to decide whether the practice in question is sufficiently related to military functioning that it must be accepted even though it infringes individual rights that would otherwise be protected. In reaching that decision, however, the court must consider the likelihood that it will be mistaken and the consequences of error. There are two possible sources of error; one inherent in the

18. *See infra* notes 350-64 and accompanying text.

19. 453 U.S. 57 (1981). *Compare* the majority opinion *id.* at 79-83 *with* Justice Marshall's dissent, *id.* at 102-06.

20. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-21 (1819).

21. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 407-10 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07 (1969). *See also* Greer v. Spock, 424 U.S. 828, 852-56 (Brennan, J., dissenting).

22. *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980) (speech and association); Middendorf v. Henry, 425 U.S. 25 (1976) (counsel and procedural due process); Committee for G.I. Rights v. Calloway, 518 F.2d 466 (D.C. Cir. 1975) (freedom from unreasonable search). *But cf.* Campbell v. Beaughler, 519 F.2d 1307 (9th Cir. 1975) (hair style); Hough v. Seamans, 493 F.2d 298 (4th Cir. 1974) (hair style).

23. *See Rostker,* 453 U.S. at 87-88 (Marshall, J., dissenting); Craig v. Boren, 429 U.S. 190 (1976).

adversary system and one peculiar to balancing individual interests against institutional needs. The first is the problem of party presentation: the court's sources of information are to some extent limited to that which is presented by the parties and amici curiae, and the possibility always exists that significant data will not be presented. The second is the problem of expertise. It is possible that the court will overvalue or undervalue a practice because it does not understand information about its utility. Consequently, the court may either permit an infringement of individual interests that is not in fact required to meet military needs, or it may uphold the individual interests at a cost of impaired military efficiency that it would not knowingly impose. By exercising its own judgment to balance the interests, a court necessarily concludes that the risk of error is acceptable, either because the likelihood of error is low or because the direction provided will still produce more good than harm. While the first aspect of judicial self-confidence is purely a matter of technical competence, the second derives from the relative importance the court is willing to give the individual and organizational interests.

Finally, by exercising its own judgment on behalf of the individual, the court sets aside the conclusion reached on the same problem by either the executive authorities or Congress. This decision requires not only sufficient confidence by the court that its decision will produce an acceptable balance of individual rights and organizational needs, but also the conclusion that the court is more likely to have done so than the institutions whose decision is under review.

Thus the balancing process in the separate community cases raises the following questions:

1. What are the purposes of the armed forces and the social interest in their fulfillment?
2. What is useful to the government in fulfilling these purposes?
3. What is the acceptable amount and direction of error in accomodating these purposes to individual rights?
4. Which organs of government are least likely to commit unacceptable error in making the accomodation?

The answer to the first question depends on the position of the United States in the international system and the dangers to civilian society from the creation of an armed instrument to protect that position. The second is a question of legislative fact for the historian, the social scientist, and the military theorist. The third depends on the relation between the environment in which the armed forces act and the legal system which gives rise to individual constitutional rights, and the fourth calls for an understanding of the respective decision making processes of the courts, the political branches of government, and the military authorities.

This Article resolves these questions in a way generally sympathetic to the results of the separate community cases. The analysis involves four tasks: to establish the uniqueness of war as a government activity and the consequent uniqueness of the armed forces' functions; to describe the relation of the indi-

vidual serviceman to the armed forces that arises from these functions; to articulate the basis of judicial competence to determine the constitutional limits on government action against individuals; and, finally, to examine the relative ability of the judicial, executive, and legislative branches to reconcile the ordinary constitutional rights of the individual with an acceptable level of performance by the armed forces. In doing so, this Article presupposes that a theory of servicemen's constitutional rights should satisfy two conditions. The first is that it must leave the civilian political system of the country completely free to determine when and why the United States will use or threaten to use force in international relations. The Constitution, in this view, places no substantive limits on the United States' power to make war; it merely allocates the decision between the President and Congress.[24] Any such decision made according to constitutional procedures is, as a matter of domestic law, lawful.[25] The only check on, and the ultimate source of legitimacy for, these decisions, is the responsibility of the President and the two Houses to the electorate. Within that limit, the Constitution permits the United States to act with the unfettered egotism of any national state, and the relation of the serviceman to the armed forces must reflect that freedom.

Two subordinate consequences follow. First, a satisfactory doctrine must permit continued political debate in the country at large over the desirability of beginning or continuing any use of force. Second, it must preserve the supremacy of the civilian political process over the armed forces by preventing military authorities from obstructing decisions, not yet reversed, with which they disagree. A constitutional doctrine is not acceptable if it freezes public debate in the name of national unity or if it protects the collective efforts of servicemen to impose their own view of the propriety of any war on the civilian authorities.[26]

The second condition is that the rationale for denying civilian constitutional rights to servicemen must be clearly limited to persons in the armed forces. This Article takes the position that effective performance of military functions requires the individual to be subordinated to his organization in a way that is inconsistent with ordinary civilian liberties.[27] The military relationship is clearly distinguishable from the normal relation of the citizen to the state. Nevertheless, the relation of civilians who are pervasively regulated, subject to paternalistic authority, or part of strongly goal-directed organizations—students, policemen, and government employees, for example—to their superiors superficially resembles the serviceman's relation to the armed forces. Their superiors may want to reduce them to the same level of subordination.

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24. *See infra* text accompanying notes 207-22.

25. *See infra* note 203.

26. This position is, of course, inconsistent with the assumptions underlying either a claimed constitutional right of conscientious objection or with a so-called "Nuremburg" defense based on norms of international law to which the political authorities have decided not to adhere. The first has never been recognized by the Supreme Court. *See* Gillette v. United States, 401 U.S. 437, 461-62 (1971). With respect to the second, see *infra* note 202.

27. *See infra* text accompanying notes 138-96.

Unless constitutional doctrine clearly defines and strongly emphasizes the uniqueness of the military situation, it is possible that a false analogy with the armed forces will be used to limit the rights of others against organizations that do not share these qualities.[28]

In sum, the Article proceeds from the assumption that the United States exists in an environment in which the use of force among states is limited only by each state's calculation of its own advantage. The Article therefore accepts the complete legal freedom of the elected authorities to act toward other states as this environment appears to require, using the members of the armed forces as their instruments. At the same time, it attempts to segregate the fundamentally lawless international sphere from a domestic society that places legal restraints on government authority in order to preserve the primary values of individual dignity.

I. THE SEPARATE COMMUNITY; PRECURSORS, THESIS, AND ANTITHESIS

A. Precursors

The Supreme Court had no precedent dealing with servicemen's constitutional rights on which to draw when it decided *Parker v. Levy*[29] in 1974. A number of earlier Supreme Court opinions contained general statements to the effect that the armed forces were necessarily authoritarian organizations, whose proper functioning entailed some loss of the ordinary rights of the individual, and which had wide, nonreviewable discretion to develop their internal law and procedure under the general supervision of the political branches of the government. While these earlier cases have been cited by the majority since 1974 as authority for this restrictive view of individual rights,[30] only one of the earlier cases directly addressed the substance of constitutional claims by individual servicemen.

The early decisions fall into four substantive groups. The first, typified by *U.S. ex rel. Toth v. Quarles*,[31] involves the constitutional limits on Congress' authority to subject civilians, or military personnel who commit crimes not related to the military community, to court-martial jurisdiction. In *Toth* the Court reasoned that courts-martial provided fewer procedural protections to an accused than civilian courts, that this was justified only by military necessity, and that the power to subject an accused to the inferior procedure should therefore be limited to cases directly related to military discipline. The constitutional adequacy of court-martial procedure for persons within the narrowed

28. *Compare* United States Postal Ser. v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981) *with* Greer v. Spock, 424 U.S. 828, 836-37 (1976). *See also* Zillman & Imwinkelried, *The Legacy of* Greer v. Spock*: The Public Forum Doctrine and the Principle of Military Political Neutrality*, 65 GEO. L.J. 773 (1977).

29. 417 U.S. 733 (1974).

30. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 349 (1980); Middendorf v. Henry, 425 U.S. 25, 46 (1976); Greer v. Spock, 424 U.S. 827, 937-38 (1976); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); Parker v. Levy, 417 U.S. 733, 743-45 (1974).

31. 350 U.S. 11 (1955).

jurisdiction was not at issue.[32] Similar reasoning was applied to the civilian spouses of military personnel,[33] civilian employees,[34] and the off post, off duty civilian-type crimes of servicemen within the United States.[35] While these cases narrowly restrict the personal and functional borders of the military community, they do not determine the rights of individuals within its limits.

A second group of cases involves the review of nonconstitutional errors of courts-martial. From the 1857 decision of *Dynes v. Hoover*[36] it was settled that nonconstitutional errors are reviewable in the federal civilian courts only to the extent that they affect jurisdiction over the person or offense. To the extent that review involved the construction of the military criminal statutes, the civil courts were held not competent to review the armed forces' common law interpretations based on military needs and experience.[37] Similarly, the Court conceded to the services as early as 1827 the unreviewable power to develop their own common law of procedure in cases not provided for by Congress.[38] These cases did not involve substantive or procedural constitutional rights.

A third group involved the review by habeas corpus of constitutional claims of court-martial defendants. In *Burns v. Wilson*[39] a plurality of the Court ruled that, although constitutional claims could be heard by civilian courts, they were bound by the factual findings of the military courts if based on a fair hearing of the defendant's assertions. Petitioners' claims that their confessions had been coerced were rejected, not because the fifth amendent did not apply to the military, but because the court-martial's findings of fact were that the confessions were voluntary. The decision is not inconsistent with the limited scope of review of state court fact findings in federal habeas corpus proceedings that prevailed at the time.[40]

Finally, in *Orloff v. Willoughby* Justice Jackson uttered the oft-quoted statement:

> [J]udges are not given the task of running the Army. The responsibility for setting up the channels through which such grievances can be considered and fairly settled rests with the President of the United

32. *Id.* at 14-18.

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

34. *See, e.g.*, Gresham v. Hagen, 361 U.S. 278 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

35. *See, e.g.*, Relford v. Commandant, United States Disciplinary Barracks, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969).

36. 61 U.S. (20 How.) 65 (1857).

37. *See* Swaim v. United States, 165 U.S. 553 (1897); United States v. Fletcher, 148 U.S. 84 (1893); Smith v. Whitney, 116 U.S. 167 (1886).

38. *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

39. 346 U.S. 137 (1953). Chief Justice Vinson wrote the plurality opinion, joined by three other justices. Justice Jackson concurred in the result without opinion. *Id.* at 146. Justice Minton concurred in the result on the theory that the constitutional claim could not be heard in the civilian courts. *Id.* at 146-48. Justice Frankfurter, in a separate opinion, stated that the case should be reargued. Justices Douglas and Black dissented. *Id.* at 148-55.

40. *See* Brown v. Allen, 344 U.S. 443, 458, 463-65 (1953); *id.* at 506-07 (Frankfurter, J., concurring). *See generally*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 493-98, 501-03 (1963); Note, *Federal Habeas Corpus Review of State Convictions*, 68 YALE L.J. 98 (1958).

> States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[41]

The case involved a drafted doctor, overage for the regular draft, who had been denied a commission because he claimed a constitutional privilege not to disclose whether he had belonged to any group on the Attorney General's list of subversive organizations. After holding that he had no statutory right to either a commission or a discharge, the Court concluded that the Army's determination of his rank and duties could not be judicially reviewed for abuse of discretion.[42] It rejected Orloff's first amendment argument that he could not be denied a commission in retaliation for refusing to disclose his political associations.[43] Neither the majority nor Justice Black's dissent discussed the point at length or cited any authority.

B. The Majority Position

With the exception of *Orloff*, then, the earlier decisions of the Supreme Court had asserted the essentially separate nature of the military community without having to determine the constitutional rights of individuals plainly within it. *Orloff*, although an exception, rejected a constitutional claim that probably would have failed also if raised by a civilian government employee at that date.[44] Despite the dicta the Court had uttered, there was little or no precedent in either direction for the question raised in *Parker v. Levy*[45] in 1974.

Levy, a doctor, was drafted and commissioned a captain in the Army Medical Corps in 1966. When assigned to train Special Forces medical corpsmen, he refused, saying that he considered Special Forces personnel to be "liars and thieves and killers of peasants and murderers of women and children."[46] When Levy's superior directly ordered him to train Special Forces personnel, he refused to obey the order. During this time, Levy made several statements to enlisted men to the effect that he would refuse orders to go to Vietnam, that black soldiers should disobey such orders, and that he had disobeyed orders to train Special Forces members.[47] For his statements to enlisted men, Levy was convicted by court-martial of "conduct unbecoming an officer and a gentleman" in violation of article 133 of the Uniform Code of

41. 345 U.S. 83, 93-94 (1953).

42. *Id.* at 88-90.

43. *Id.* at 89-92.

44. *See* Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950); Washington v. Clark, 84 F. Supp. 964 (D.D.C. 1949), *aff'd sub nom.* Washington v. McGrath, 182 F.2d 375 (D.C. Cir. 1950).

45. 417 U.S. 733 (1974).

46. *Id.* at 736-37.

47. *Id.* at 736-37, 738 n.5.

Military Justice (U.C.M.J.)[48] and "conduct prejudicial to good order and discipline in the Armed Forces" in violation of article 134 of the U.C.M.J.[49] The Third Circuit overturned Levy's convictions under articles 133 and 134 on the ground that the excessively vague language and overbroad sweep of the "General Articles," as they are known, violated the fifth and first amendents.[50] The Supreme Court reversed.

To uphold Levy's conviction, the court first had to determine that articles 133 and 134 were neither unconstitutionally vague nor overbroad. Once the Court decided that the General Articles were not defective in form, it then had to determine whether the substance of Levy's remarks were protected by the first amendment. The majority of the Court ruled against Levy on all three points, expressly applying different constitutional standards than it would have used to review a civilian conviction.

In the same Term as *Levy*, the Court's opinion in *Smith v. Gougen*[51] had restated the principles underlying the void for vagueness doctrine. Generally speaking, the opinion stated that an unduly vague statute denies due process of law in two ways: it leaves the individual without reasonably clear notice of the line between permitted and forbidden conduct, and it leaves the authorities with discretion to enforce it for arbitrary or invidious reasons.[52] These vices are especially harmful when the statute can be applied to expression possibly protected by the first amendment, for the unclear legal standard both deters protected expression and permits selective enforcement based on content. Therefore, the *Smith* court concluded, more precise language is required when the statute relates to expression than when it merely regulates non-expressive conduct.[53]

Justice Rehnquist, writing for the majority in *Levy*, rejected this standard. The opinion did not discuss the problem of selective enforcement and did not denounce deterrence of expression. Instead, it stated that the peculiar characteristics of military society require that its criminal law have only the degree of precision of statutes regulating civilian economic affairs, which is to say that a defendant be reasonably able to know that the conduct in question was prohibited. In light of the well understood distinctive mores of military society,

48. *Id.* at 737-38 (quoting 10 U.S.C. § 933 (1982), which provides: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.").

49. *Id.* at 137-38. 10 U.S.C. § 934 (1982), quoted therein, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces . . . of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

50. Levy v. Parker, 478 F.2d 772 (3d Cir. 1973). Levy was also convicted of refusal to obey a direct order, in violation of article 90(2) of the U.C.M.J., 10 U.S.C. § 890(2) (1976). This conviction was upheld by both the court of appeals, *Levy*, 478 F.2d at 797, and the Supreme Court, *Levy*, 417 U.S. at 761.

51. 415 U.S. 566 (1974).

52. *Id.* at 572-76, 578.

53. *Id.* at 573.

the majority opinion concluded that the General Articles provided a reasonably clear standard of conduct to an officer in Levy's position and were not unconstitutionally vague.[54]

Overbreadth, like vagueness, is a defect of statutory form. Briefly, a statute is overbroad on its face when its language prohibits both behavior that is not protected by the first amendment and behavior that is. Any individual prosecuted under an overbroad statute may invoke the doctrine as a defense, even though his behavior is not protected by the first amendment, thereby raising the rights of other, possibly hypothetical, persons, in his defense. This departure from the normal principle that a party may assert only his own constitutional rights has been justified by the value to society of free expression and the concomitant need to obtain prompt judicial review of statutes that may have successfully deterred other potential defendants from engaging in it.[55]

The majority opinion in *Levy* stated that the General Articles govern a "wide range" of activity that is clearly not protected by the first amendment and affect only a "fringe" of arguably protected expression. In the light of that disparity, the Court concluded that the distinctive nature of military society precludes the use of the overbreadth doctrine.[56] In other words, the majority did not consider free expression in the military community sufficiently important to allow a soldier prosecuted under the General Articles to raise the first amendment rights of others in his defense. Any incidental chilling effect of the General Articles on protected expression is apparently tolerable in the light of their other applications.

There remained only the question whether Levy's remarks were themselves protected by the first amendment. Without discussion, the majority opinion stated that "a commissioned officer publicly urging enlisted personnel to disobey orders which might send them into combat" is "unprotected under the most expansive notions of the First Amendment."[57] The opinion did not directly consider whether Levy's remarks created any particular degree of danger to military discipline. Instead, it cited with approval the Court of Military Appeals' doctrine that speech which would be protected in the civilian community is not protected in the military if it "*may* undermine the effectiveness of response to command."[58]

The majority opinion is based on two descriptive propositions about the

54. *Levy*, 417 U.S. at 756-57.

55. *See generally* Gooding v. Wilson, 405 U.S. 518, 521-22 (1972) (setting aside conviction under state statute prohibiting "fighting words"); Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (enjoining prosecutions under state subversive activities and communist control laws); Imwinkelried & Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 50-57 (1975).

56. *Levy*, 417 U.S. at 758-61.

57. *Id.* at 761.

58. *Id.* at 760-61 (emphasis added). *See* United States v. Priest, 21 C.M.A. 564, 570 (1971) ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command," and, consequently, is not protected.). In the civilian context, of course, Levy's statements could not be penalized unless they created danger of imminent disorder. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969); Imwinkelried & Zillman, *supra* note 55, at 78-81.

nature of the military as separate society. The first is that, as a matter of history and practice, there is a fairly clear body of social norms peculiar to the military and known to all reasonable personnel. These known principles, the majority believed, define the prohibitions of the General Articles with sufficient precision that Levy could not have reasonably doubted that his statements violated them.[59]

The second proposition is that a military organization is a hierarchy based on response to command, that the successful performance of its mission depends on effective response to command, and that this requires more pervasive regulation of the individual than is found in civilian society.[60] The individual's relation to the military organization is comprehensive since it is his "employer, landlord, provisioner, and lawgiver in one."[61] The majority noted that Congress, through the U.C.M.J. and its predecessors, has established crimes with respect to obedience and job performance that have no civilian counterpart.[62] In addition, the enforcement procedures of the U.C.M.J. include nonjudicial administrative sanctions that permit paternalistic supervision of the details of the serviceman's behavior with no parallel in civilian life.[63]

In *Levy* the Court defined the separateness of the military community in terms of cultural norms and individual subordination to institutional goals. The next Term, in *Schlesinger v. Councilman*,[64] the Court treated the armed forces' courts as separate legal entities whose relations with the federal courts were analogous, if not equivalent, to the relation between state and federal courts.

Councilman arose from a court-martial of an Army captain for selling marijuana to an enlisted man off post and off duty. Before trial, defendant moved to dismiss the charge for lack of jurisdiction because the offense was not "service connected" as required by *O'Callahan v. Parker*[65] and *Relford v. Commandant*.[66] The motion was denied by the military judge. Rather than submit to trial, defendant sued in the federal district court for an injunction against any further military proceedings. The injunction was granted on the ground that the offense was not service connected, that the court-martial therefore lacked jurisdiction, and that trial by the court-martial would inflict irreparable injury on defendant. The court of appeals affirmed,[67] but the Supreme Court reversed.[68] The majority opinion, written by Justice Powell, held that

59. *Levy*, 417 U.S. at 745-49, 757.
60. *Id.* at 743-45, 749-51.
61. *Id.* at 751.
62. *Id.* at 749-51.
63. *Id.* at 749-50. *See* U.C.M.J. art. 15, 10 U.S.C. § 815 (1982); MANUAL FOR COURTS-MARTIAL §§ 128, 129b (1969) [hereinafter cited as MCM 1969]. *See also* Note, *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481, 1481-82 (1973).
64. 420 U.S. 738 (1975).
65. 395 U.S. 258, 272-73 (1969).
66. 401 U.S. 355, 369 (1971).
67. Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973).
68. *Councilman*, 420 U.S. at 739-40.

the district court lacked "equitable jurisdiction" to enjoin the court martial on the basis of defendant's jurisdictional defense. Because defendant could raise his jurisdictional defense in the military courts and on postconviction habeas corpus,[69] the opinion concluded, the same principles that preclude federal injunctions of state criminal prosecutions prohibited an injunction against the court martial.[70]

The Court had recently reiterated these principles in *Younger v. Harris*.[71] *Younger* had held that a federal district court lacked authority to enjoin a pending state criminal prosecution on the basis of the defendant's claim that conviction would violate his first amendment rights.[72] In the *Councilman* majority's view, this decision rested on the premise that defendant could assert his constitutional claims as part of his defense in state court, where they would receive a meaningful hearing.[73] Considerations of comity between the federal and state authorities in the federal system required the federal courts to conclusively presume, in advance of trial, that their state judicial counterparts would correctly find the facts and sympathetically and faithfully interpret and apply the Constitution. The need for "respect for coordinate judicial systems" justified the continued use of the traditional restrictions on equitable interference in criminal proceedings.[74] In addition, the opinion continued, the resources of the federal courts are more efficiently used if defendants must exhaust state remedies before raising their federal claims in federal courts. Only state courts can correct errors of state law. They also bear the primary burden of fact finding. It is alway possible that the defendant will prevail at some point in the state system, and if the federal courts ever have to decide the case at all, they will have a fully developed state court record at their disposal.[75]

Unlike the state courts, courts-martial are not agents of a separate sovereign, but creations of Congress. Nevertheless, the majority concluded, considerations of both efficiency and respect applied equally to federal court injunctions against prosecutions in courts-martial. Whether an offense is serv-

69. *Id.* at 754. If defendant did not prevail at trial, the jurisdictional issue would be reviewed by the convening authority for the court-martial, a military officer, before he approved its result. *See* 10 U.S.C. §§ 860-861 (1976); MCM 1969, *supra* note 63, at §§ 484-85. Defendant then had an appeal of right to the Army Court of Military Review and the U.S. Court of Military Appeals, both established under article I of the Constitution. The Court of Military Appeals is composed of civilian judges. 10 U.S.C. §§ 866-867 (1976). After exhausting his military appeals, defendant then could raise the jurisdictional defense in the district court by application for habeas corpus. *See, e.g., Relford*, 401 U.S. at 366; Gusik v. Schilder, 340 U.S. 128, 130-32 (1950).

70. *Councilman*, 420 U.S. at 753-61. In the majority's view, defendant's only injury was the cost of defending the court-martial proceeding and the risk that the military courts would not accept his jurisdictional defense. *Id.* at 755-56. Under traditional equity principles, these were not sufficiently irreparable injuries to justify enjoining the criminal proceeding. *See* Younger v. Harris, 401 U.S. 37, 45-47 (1971); Douglas v. City of Jeannette, 319 U.S. 157, 163-64 (1943); Beal v. Missouri Pac. R.R., 312 U.S. 45, 47-50 (1941). *See generally* Fiss, *Dombrowski*, 86 YALE L.J. 1101 (1971).

71. 401 U.S. 37 (1971).

72. *Id.* at 45-54.

73. *Councilman*, 420 U.S. at 755-56.

74. *Id.* at 756-57.

75. *See id.* at 756.

ice connected turns on the facts of the particular case and the relation of the conduct to military functions, issues on which the informed judgment of the courts-martial and specialized civilian courts of review are particularly useful to the federal courts.[76] But comity, not efficiency, is the most important consideration to the majority. The system of courts established by the Uniform Code of Military Justice is a system of separate and equal dignity. The military is, as stated in *Levy*, a "specialized society" requiring a distinctive discipline to achieve its essential purpose—victory in war.[77] The court system established under the U.C.M.J. is Congress' attempt to balance the rights of servicemen against military necessities. Congress' judgment must be respected, and it must be assumed that the U.C.M.J. system will protect servicemen's rights. Therefore, the nonintervention principles of *Younger* apply.[78] Congress' power to regulate the armed forces, in short, is presented as analogous to the rights of the states in the federal system.

The next year, in *Greer v. Spock*,[79] the Court considered whether the separate constitutional status of the military community justified the exclusion of civilian activity normally protected by the first amendment from areas of an army post otherwise open to the public. It held, reversing the Third Circuit Court of Appeals,[80] that a post commander could, on a neutral basis, prohibit

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76. *Id* at 759-60. Under Relford v. Commandant, United States Disciplinary Barracks, 401 U.S. 355, 365 (1971), a court must balance the following 12 factors in determining whether an offense is sufficiently "service connected" to give a court-martial jurisdiction:

1. The defendant's proper absence from the base;
2. Whether the crime was committed on or off base;
3. Whether the crime was committed at a place under military control;
4. Whether it was committed in the United States or abroad;
5. Whether it was committed in war or peace time;
6. Whether it was connected with the defendant's military duties;
7. Whether the victim was performing a duty related to the military;
8. Whether a civilian court is available for prosecution;
9. Whether military authority has been flouted;
10. Whether a threat to a military post is involved;
11. Whether a threat to military property is involved; and
12. Whether the crime is traditionally subject to civilian prosecution.

Relford requires the court to consider in detail the facts of the alleged crime and its effect on military discipline and efficiency. *See* United States v. Conn, 6 M.J. 351, 353 (C.M.A. 1979); United States v. Hedlund, 2 M.J. 11, 13-14 (C.M.A. 1976); United States v. Moore, 1 M.J. 448, 449-50 (C.M.A. 1976). This is especially true in cases like *Councilman* that involve the off-post use of drugs with other servicemen. *Compare* United States v. Graham, 9 M.J. 554, 558-60 (N.C.M.R. 1980) (military jurisdiction found over officer charged with smoking marijuana off-base with junior enlisted men) *and* United States v. Mackey, 7 M.J. 649, 651-53 (A.C.M.R. 1979) (military has "paramount interest" in prosecuting servicemen who used on base contacts to sell marijuana off base) *with* United States v. Saulter, 5 M.J. 281, 284 (C.M.A. 1978) (military jurisdiction not found over sergeant who sold marijuana while off base and out of uniform).

77. *Levy*, U.S. at 743.

78. *Councilman*, 420 U.S. at 757-58. The majority opinion also distinguished the case from several in which habeas corpus had been granted without exhaustion of military remedies. These cases involved civilians in peacetime, who could not be subject to military law under any circumstances. *See, e.g.*, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 284 (1960); Reid v. Covert, 354 U.S. 1, 19 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 (1955).

79. 424 U.S. 828 (1976).

80. *See* Spock v. David, 502 F.2d 953 (3d Cir. 1974) (permanent injunction); Spock v. David, 469 F.2d 1047 (3d Cir. 1972) (preliminary injunction).

all speeches by political candidates in publicly accessible areas of the base.[81] It also held that the commander could prohibit in those areas the distribution of any publication not submitted to him for review or which he determined on review to present "a clear danger to the loyalty, discipline, or morale" of troops on the base.[82]

The case arose from post regulations of Fort Dix, New Jersey, an "open post."[83] Although the commanding general permitted certain nonpolitical first amendment activities on the base, partisan political speeches were absolutely prohibited by Fort Dix Regulation 210-26.[84] Post regulation 210-27 prohibited the distribution of any publication on the base unless first approved by the post adjutant general. Permission could be withheld if the publication presented a "clear danger" to military loyalty, discipline, or morale.[85]

Four plaintiffs, minor party candidates for President and Vice-President in 1972, requested the commanding general's consent to hold a political rally on the base, subject to any reasonable restrictions on time and place. The request was denied as contrary to Fort Dix Regulation 210-26 and as inconsistent with Army regulations and the military mission of the post. The remaining plaintiffs had been excluded from the post on several occasions for distributing literature without having obtained the post commander's approval. Each was told that returning to Fort Dix could result in criminal prosecution.[86] The courts below had enjoined enforcement of the two regulations on the ground that the nonrestricted areas of the post were public forums under the Supreme Court's decision in *Flower v. United States*.[87]

Justice Stewart, for the majority in *Greer*, distinguished *Flower* as being based on the understanding that the earlier case involved "a public thoroughfare in San Antonio no different from all other public thoroughfares in that city," in which the military had abandoned not only the right to exclude civilian traffic, but also the right to exclude leafleteers.[88] Justice Stewart continued, however, that not all public property is a "public thoroughfare" for first

81. *Greer,* 424 U.S. at 834-38.

82. *Id.* at 840.

83. Though Fort Dix is within the exclusive territorial jurisdiction of the United States military, civilian vehicular and foot traffic moves freely through it on public highways and foot paths. The gates of the post are not guarded, and civilians may visit any area not marked as restricted. *Id.* at 830.

84. *Id.* at 831.

85. *Id.*

86. *Id.* at 832-33. Entering a military base with intent to violate a regulation or after having been expelled is a felony. 18 U.S.C. § 1382 (1976).

87. Spock v. David, 469 F.2d 1047, 1053 (3d Cir. 1972) (citing Flower v. United States, 407 U.S. 197 (1972)). *Flower* had reversed, without argument, a criminal conviction for distributing unauthorized leaflets on New Braunfels Avenue, Fort Sam Houston, Texas. This street, although it ran through the base, was a major traffic artery connecting parts of San Antonio. The civilian public used it in the same manner as any other downtown street. In those circumstances, stated the opinion, the Army had "abandoned" any special claim to control access to the area, and defendant, therefore, had the same first amendment right to distribute leaflets there as he would on any other "public street." *Flower*, 407 U.S. at 197-98. *See* Zillman & Imwinkelried, *supra* note 28, at 779.

88. *Greer,* 424 U.S. at 835.

amendment purposes. While the Court has historically protected political expression as an appropriate use of such areas, it has also upheld the government's right to prevent outsiders from engaging in political expression on other government property where their activities would interfere with the government's use of the property. Civilian political speech is so inconsistent with the use of a military base that, in the absence of express or implied waiver of the right, the United States may exclude it.[89]

The opinion does not discuss the inconsistency of political speech and military activity in any detail. It simply states that the military has a "special constitutional function" and that the purpose of the base is "to train soldiers, not to provide a public forum."[90] Why these purposes are necessarily irreconcilable is not explained. The majority opinion also states that regulation 210-26 has been impartially applied to exclude all political speakers from the base, which practice it considers consistent with "the American constitutional tradition of a politically neutral military establishment under civilian control."[91] Moreover, it continues, the military authorities did not waive their right to exclude political activity from the base by consenting to through traffic and nonpolitical first amendment activity.[92] Finally, the opinion states, without citing any authority, that regulation 210-27 is constitutional on its face because "nothing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of the troops under his command."[93] Since none of the leafletting plaintiffs had submitted their material for approval under the regulation, they could not complain that it was unconstitutionally applied.

The majority opinion in *Greer* is remarkable for its silence on three points raised by the dissent. Despite plaintiff's offer to submit to reasonable time and place restrictions, the majority did not find it necessary to consider the possible effects that a political rally held in any particular part of the base during nonduty hours would have on particular military functions.[94] In upholding regulation 210-27, the majority ignored the fact that a system of licensing publications based on content and enforced by administrative and criminal penalties for not submitting the material for review is the paradigm of unconstitutional prior restraint on expression.[95] Nor did the majority explain why the commander may exclude publications on grounds even more tenuous than the obsolete "clear and present danger" test.[96]

In the same Term, *Middendorf v. Henry*[97] applied the separate commu-

89. *Id.* at 836-37. *See* Adderly v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 559 (1965). *See generally* Zillman & Imwinkelried, *supra* note 28, at 775-82.

90. *Greer,* 424 U.S. at 837-38.

91. *Id.* at 838-39.

92. *Id.* at 838 n.10.

93. *Id.* at 840.

94. *Id.* at 857-62 (Brennan, J., dissenting).

95. *See id.* at 865-67 (Brennan, J., dissenting).

96. *See id.* at 863-64 (Brennan, J., dissenting).

97. 425 U.S. 25 (1976).

nity doctrine to the question whether the fifth or sixth amendments required counsel to be provided for servicemen tried at summary courts-martial. The case was a class action by enlisted Marines, seeking habeas corpus review of their individual convictions and an injunction against future imprisonment after conviction by summary court-martial without benefit of counsel.[98] In *Argersinger v. Hamlin*[99] the Court had held that the sixth amendment requires the appointment of counsel in all civilian criminal proceedings in which any sentence of imprisonment could be imposed. The plaintiffs contended that this rule applied equally to courts-martial.

Writing for the majority in *Henry*, Justice Rehnquist first stated that the Court had never resolved whether the sixth amendment's right to counsel applied to courts-martial. It would not do so in this case, he continued, because a summary court-martial was not in any event a "criminal proceeding" within the meaning of the sixth amendment. This conclusion rests on the premise that, even in the context of civilian proceedings, the Court had not applied the sixth amendment to imprisonment through probation revocation or juvenile court conviction. The summary court-martial was analogized to these civilian proceedings rather than the misdemeanor prosection of *Argersinger*.[100]

The majority opinion concedes that the critical analogy is with the juvenile court prosecution. Probation is revoked only after being imposed by conviction in a criminal proceeding that conformed to the sixth amendment, whereas juvenile proceedings, like the summary court-martial, are original determinations of guilt.[101] The opinion states that when *In re Gault*[102] required appointment of counsel in prosecutions in juvenile court, the Court "based its conclusion . . . on the Due Process Clause of the Fourteenth Amendment rather than on any determination that the hearing was a 'criminal prosecution' within the meaning of the sixth amendment."[103] Therefore, the majority opin-

98. *Id.* at 28-30. A summary court-martial consists of one officer who acts as judge, prosecutor, and defense counsel, and who examines all witnesses. It may try any offense under the U.C.M.J. but may impose sentences of no more than one month's confinement at hard labor. The defendant may cross-examine prosecution witnesses or have this done by the summary court officer, and he may call any witnesses of his own. Retained defense counsel is permitted, but in the Navy and Marine Corps, no defense counsel is appointed. *See Henry*, 425 at 31-33; *id.* at 65 n.17 (Marshall, J., dissenting); 10 U.S.C. §§ 820, 827(a) (1982); MCM 1969, *supra* note 63, at §§ 6c, 48a. A serviceman must consent to trial by summary court-martial, or he will be tried before a special court-martial, in which defense counsel is appointed. *See* 10 U.S.C § 820 (1982); MCM 1969, *supra* note 63, at § 169. A special court-martial, however, may impose substantially more severe sentences for the same offense. 10 U.S.C § 819 (1982); MCM 1969, *supra* note 63, at §§ 15b, 16b.

99. 407 U.S. 25 (1972).

100. *Henry*, 425 U.S. at 33-37. *See* Gagnon v. Scarpelli, 411 U.S. 778, 783-91; *In re* Gault, 387 U.S. 1, 34-42 (1967).

101. *Henry*, 425 U.S. at 37.

102. 387 U.S. 1 (1967).

103. *Henry*, 425 U.S. at 37. The majority's conclusion misstates the basis for the decision in *Gault*. Since *Gault* involved a state proceeding, the right to counsel must have been derived immediately from the due process clause of the fourteenth amendment. *In re* Gault, 387 U.S. 1, 41 (1967). However, the *Gault* opinion specifically states that a juvenile proceeding that can result in imprisonment for delinquency is "comparable in seriousness to a felony prosecution," and it concludes that the juvenile's need for counsel is identical to the felony defendant's need identified in Gideon v. Wainwright, 372 U.S. 335 (1963).

ion continues, not every civilian proceeding that results in a guilt-based loss of liberty is a criminal proceeding under the sixth amendment.

The opinion then states that the summary court-martial's occurrence in the military community is as significant as the special nature of juvenile proceedings in determining that it is not criminal prosection.[104] The noncriminal nature of the summary court-martial lies in three facts. First, citing *Levy*, the relationship of the serviceman to military authority is unlike the civilian's situation.[105] Second, a summary court-martial conviction of a minor offense against military discipline with no civilian counterpart, such as absence without leave, lacks the stigmatic effect of a civilian conviction, and most summary courts-martial involve such offenses.[106] Finally, a summary court-martial, unlike a criminal trial, is not an adversary proceeding, since the summary court officer is obliged to act as prosecutor, defense counsel, and fact finder.[107] The combination of these elements plus the unspecified details of the "distinctive nature of military life and discipline" satisfied the majority that the summary court-martial is not a criminal proceeding.[108]

The second part of *Henry* rejects the contention that the due process clause of the fifth amendment requires appointment of counsel in summary courts-martial either in general or in particular cases. The majority uses a conventional balancing analysis, weighing the relatively light punishment against what it considers the military interest in avoiding the delay, complexity, and expense caused by the participation of counsel. This additional time and expense is seen as a diversion of resources from the Marine Corps' main mission.[109] The opinion is significant for the way in which the military necessity is inferred. It does not consider whether nonjudicial punishment under the U.C.M.J. provides an alternative form of swift, convenient disciplinary action without the stigmatic effects of a summary court-martial,[110] and it does

104. *Henry*, 425 U.S. at 34-40.

105. *Id.* at 3 (citing *Levy*, 417 U.S. at 749).

106. *Id* at 39-40.

107. *Id.* at 40-42.

108. *Id.* at 42. This argument is defective on several points. That summary courts-martial have different procedures from criminal trials begs the question whether this is permissible. The asserted lack of stigma is a misstatement of fact. As the dissent points put, a substantial minority of summary courts-martial, including one involved in *Henry*, are for "civilian" crimes such as theft and assault. *Id.* at 58 (Marshall, J., dissenting). In addition, the armed forces do not distinguish between a summary court-martial conviction and other courts-martial in counting prior convictions for sentencing in a subsequent case for awarding punitive discharge. Id. at 58-59. See MCM 1969, *supra* note 63, at §§ 76, 88b. In this it differs from military nonjudicial punishment, which is also imposed without counsel. *Henry*, 425 U.S. at 58; MCM 1969, *supra* note 63, at § 133c. Finally, the majority is completely silent about the characteristics of "military life and discipline" which tip the balance in favor of its conclusion that no summary court-martial is a criminal proceeding.

109. *Henry*, 425 U.S. at 42-48.

110. See *id.* at 63-65. Under article 15 of the U.C.M.J., 10 U.S.C. § 815(b)(2) (1982), an enlisted serviceman's commanding officer may, in a non-adversary proceeding, punish him for violation of the U.C.M.J. with custody of 7 days or less, forfeiture of 7 days pay, reduction in rank, 14 days extra duties, 14 days restriction to limits, and/or detention of 14 days pay. If the commanding officer is a major or lieutenant commander or above, he may impose 30 days custody, forfeiture of one-half month's pay for 2 months, 45 days extra duty, and 60 days restriction. The

not discuss in detail the burdens of providing appointed counsel.[111] Instead, it states that the constitutional power of Congress over the armed forces requires the Court to give "particular deference" to the legislative balancing of individual rights and military necessity. Since Congress has twice refused to abolish the summary court-martial in its present form, only "extra-ordinarily weighty" factors, which are not present, could overcome its decision that counsel need not be provided.[112]

In its most recent decision in the area, *Brown v. Glines*,[113] the Court routinely disposed of a claim that an Air Force regulation prohibiting any person from soliciting signatures for a petition on a base and any serviceman from soliciting signatures in uniform without prior approval violates the first amendment on its face. Justice Powell, for the majority, amplified the portion of *Greer* that upheld prior restraint on distributing publications.[114] Because the unit commander is responsible for the morale, discipline, and loyalty of his unit, he has the authority to control distribution of materials that endanger them. This authority derives from the nature of military subordination and not from the special exigencies of combat or overseas service. The military has substantial discretion to make regulations that assure an "unquestioned" right to command and duty to obey. Both the prior approval regulations of *Greer* and the antipetitioning regulations in *Greer* served this purpose, and both were facially valid under the first amendment.[115] The opinion was novel in only two respects. While the Court had previously spoken of the need for "effective" response to command,[116] the use of "unquestioned" obedience was a new departure.[117] Unlike *Greer*, the opinion omitted any discussion of the mitigating effect of servicemen's access to first amendment activity in the civilian community. Otherwise, it merely summarized and restated the doctrine of the earlier cases. The same is true of the unanimous opinion in *Chappell v. Wallace*, which refused to recognize an implied constitutional cause of action for damages by servicemen against their commanding officer for intentional constitutional torts.[118]

Levy and its progeny involve the constitutional power of the military to prevent or control individual activity inconsistent with its functions and the conflicting constitutional right of the individual to be free of organizational

serviceman may refuse to accept nonjudicial punishment and elect to be tried by court-martial. 10 U.S.C. § 815(a) (1982). *See generally* MCM 1969, *supra* note 63, at §§ 128-29, 133.

111. *See Henry*, 425 U.S. at 65-67 (Marshall, J., dissenting).

112. *Id.* at 44.

113. 444 U.S. 348 (1980).

114. *Greer*, 424 U.S. 828, 832-40.

115. *Glines*, 444 U.S. at 353-58.

116. *See, e.g., Parker,* 417 U.S. at 760-61.

117. *Cf. Glines*, 444 U.S. at 357.

118. 103 S. Ct. 2364, 2365 (1983). *But cf.* Davis v. Passman, 444 U.S. 228 (1977) (private cause of action for damages under fifth amendment for intentional sexual discrimination); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (private cause of action against federal narcotics agents for intentional violation of fourth amendment guarantee against unreasonable search and seizure). The *Chappel* opinion curtly noted that the right to sue military superiors would be both harmful to discipline and inconsistent with congressional authority. *Chappel*, 103 S. Ct. at 2366.

constraints and penalties. Since 1974 the Supreme Court has also had two occasions to consider the converse problem: the constitutional right of the individual member to professional rewards and opportunities and the conflicting power of the organization to retain and promote in accord with its own concept of its needs. In *Schlesinger v. Ballard*[119] the Court rejected a contention that the Navy promotion system, which guaranteed female junior officers a longer period of service than their male couterparts, denied the male officers equal protection of the laws. The opinion expressly held that the disparate treatment was rationally related to the more restricted duties available to female officers, and it implicitly approved Congress' power to deny female officers certain duty assignments open to men.[120]

The statutes then governing promotion of male line officers in the Navy provided for a pyramidal distribution of rank in which officers competed for promotion against their contemporaries.[121] Those who were twice considered and rejected for promotion had to leave the Navy.[122] A male lieutenant twice passed over for lieutenant commander was dischared after nine to eleven years of service.[123] Female line officers were then subject to a separate statutory "up or out" promotion system identical in all respects but one:[124] a female lieutenant twice passed over for lieutenant commander had the statutory right to remain in the Navy until she had served for thirteen years.[125]

The intended effect of an "up or out" promotion system was to create promotion vacancies for the most able junior officers by removing those of

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119. 419 U.S. 498 (1975).

120. *Id.* at 508.

121. The number of positions in each officer grade is a percentage of the Navy's enlisted strength. *See* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 297 (repealed 1980); Act of Aug. 10, 1956, ch. 1041, 70A Stat. 307 (amended 1968) (repealed 1980); 10 U.S.C. § 5442 (1982).

Male line officers were placed in a "promotion zone" after being in their existing rank for a certain time, which was established by the Secretary of the Navy. *See* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 353 (amended 1967 and repealed 1980); Act of Aug. 10, 1956, ch. 1041, 70A Stat. 356 (repealed 1980). At least once a year, all officers in a promotion zone are considered by a selection board, and those chosen by merit are placed on a promotion list from which promotions are made as vacancies occur. *See* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 336 (amended 1970) (repealed 1980); Act of Aug. 10 1956, ch. 1041, 70A Stat. 347 (amended 1957, 1967) (repealed 1980); Act of Aug. 10, 1956, ch. 1041, 70A Stat. 356 (amended 1961, 1970) (repealed 1980). Because of the pyramidal distribution of rank, there are fewer places on the promotion list than there are officers in the promotion zone. *See* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 354 (amended 1961, 1967) (repealed 1980).

122. *See* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 399-405 (repealed 1980). Officers at the grade of lieutenant commander or above who were twice passed over were retired and received retirement pay for life. *Id.* at 404. Officers at the grade of lieutenant or below who were twice passed over were honorably discharged and received a lump sum payment of up to two years' salary. *Id.* at 405.

123. *See generally* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 356 (repealed 1980).

124. *See* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 327 (repealed 1980); Act of Aug. 10, 1956, ch. 1041, 70A Stat. 339 (repealed 1980); Act of Aug. 10, 1956, ch. 1041, 70A Stat. 413 (amended 1958) (repealed 1980); Act of Aug. 10, 1956, ch. 1041, 70A Stat. 414 (amended 1958) (repealed 1980); Act of Aug. 10, 1956, ch. 1041, 70A Stat. 415 (repealed 1980).

These provisions were replaced in 1980 with a gender-neutral promotion system for the entire armed forces. *See infra* note 374.

125. Act of Aug. 10, 1956, ch. 1041, 70A Stat. 415 (repealed 1980). In addition, a female lieutenant commander could serve for 20 years even if twice passed over. Act of Aug. 10, 1956, ch. 1041, 70A Stat. 414 (amended 1958) (repealed 1980).

their seniors who are not as capable as their own contemporaries. Were this not done, the upper ranks would be clogged with older officers and energetic subordinates would be encouraged to leave the Navy by the lack of hope for advancement. The system had the additional effect of encouraging vigorous performance by all officers, who knew that their retention depended on how they compared to their peers.[126] For female line officers, however, the full rigor of the system was mitigated by the statutory assurance of thirteen years service.

Lieutenant Ballard, having been twice passed over for promotion, sued to enjoin his discharge on the ground that the longer tenure of a female lieutenant in his situation denied him equal protection of the laws under the fifth amendment.[127] The district court granted the injunction,[128] relying on *Frontiero v. Richardson*.[129] The Supreme Court, in an opinion by Justice Stewart, reversed.

Frontiero had involved a statute that automatically gave a married male officer extra pay and allowances to support his wife but withheld these benefits from a female officer unless she proved that her husband actually depended on her for support.[130] The Court held that the gender-based disparate treatment denied female officers equal protection because it was established solely to achieve administrative convenience and rested on overbroad, irrational generalizations about sex roles. The decision applied the prevailing standard of equal protection formulated for gender-based discrimination in the civilian community.[131]

The majority opinion in *Ballard* used the same standard but found that the difference in promotion systems was justified by "the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service in the Navy."[132] Specifically, female officers were at that time barred by statute from serving on combat aircraft or aboard vessels other than hospital ships and transports.[133] Since the operation of warships and combat aircraft are the central functions of the Navy,[134] female officers were effectively precluded from its most desirable

126. *See Ballard*, 419 U.S. at 502-03.

127. *Id.* at 500.

128. Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973), *rev'd sub nom.* Schlesinger v. Ballard, 419 U.S. 498 (1975).

129. 411 U.S. 677 (1973).

130. *See* Act of Sept. 7, 1962, Pub. L. No. 87-649, 76 Stat. 469 (current version codified at 37 U.S.C. § 401 (1976)).

131. *Frontiero*, 411 U.S. at 690-91.

132. *Ballard*, 419 U.S. at 508.

133. *Id.* at 508; *see* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 375 (amended 1978 & 1980) (current version codified at 10 U.S.C. § 6015 (1982)).

In 1978 the United States District Court for the District of Columbia held that 10 U.S.C. § 6015 denied female Navy personnel equal protection of the laws. Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978). The statute was amended, and the current version prohibits assignment of women to vessels and aircraft engaged in combat missions and permits sea duty in vessels other than transports or hospital ships only on a temporary basis. Act of Oct. 20, 1978, Pub. L. No. 95-485, § 808, 92 Stat. 1623 (codified at 10 U.S.C. § 6015 (1982)).

134. "The Navy, within the Department of the Navy, includes, in general, naval combat and

professional positions, including the highest commands. Accordingly, the Navy needed fewer senior female line officers, and it was rational for Congress to provide female junior officers with longer tenure in recompense for their more limited prospects.[135] Congress, in the majority's view, had considered this problem and specifically foresaw that the statutory promotion system would give female officers longer tenure.[136] The rationality of Congress' decision is highlighted, in this view, by the fact that male and female officers in the technical specialist branches of the Navy, in which women's duties are not circumscribed by law, were subject to gender-neutral "up or out" statutes.[137]

Justice Stewart's opinion is remarkable chiefly for what it does not do. The separate statutory promotion and attrition systems for male and female officers do not deny equal protection, it concludes, because they produce "a flow of promotions commensurate with the Navy's current needs."[138] Those disparate needs are formed by the statutory exclusion of women from sea duty and combat aviation. It would be immaterial that the dual promotion system meets the needs of the dual career pattern unless Congress could restrict military duties by gender without denying equal protection. The majority opinion does not discuss officers' duties, however. Its final paragraph merely cites the often-quoted generalities of *U.S. ex rel. Toth v. Quarles*[139] and *Orloff v. Willoughby*[140] on combat readiness and judicial deference, proclaiming that the Court "cannot say" that Congress, exercising its "broad constitutional power" to organize the armed forces, has denied either male or female officers equal protection of the laws.[141]

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service forces and such aviation as may be organic therein. The Navy shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea . . . ." 10 U.S.C. § 5012(a) (1982).

135. *Ballard*, 419 U.S. at 508.

136. *Id.* at 508 n.12.

137. *Id.* at 509.

In 1975, officers in the Medical, Dental, Judge Advocate General's, Medical Service and Nurse Corps were appointed without regard to gender. *See* Act of Aug. 10, 1956, Pub. L. No. 84-1028, §§ 5574 (amended 1958), 5578 (amended 1958), 5579 (amended 1966), 5580 (amended 1966), 70A Stat. 1, 321-323 (repealed 1980); Act of Dec. 8, 1967, Pub. L. No. 90-179, § 5(1), 81 Stat. 547 (repealed 1980). Male and female officers in these corps competed against each other for promotion without regard to gender. Act of Aug. 10, 1956, Pub. L. No. 84-1028, § 5702, 70A Stat. 337 (amended 1957 & 1967) (repealed 1980). Commissions in the Supply, Civil Engineer and Chaplain Corps were statutorily restricted to males under the Act of Aug. 10, 1956, Pub. L. No. 84-1028, §§ 5575-5577, 70A Stat. 1, 322 (repealed 1980). Female officers in these three corps were appointed under a separate provision, *id.*, § 5590, at 327 (repealed 1980), considered for promotion under a separate provision, *id.*, § 5704, at 339 (amended 1967) (repealed 1980), and separated for nonpromotion under a different provision as well, *id.* §§ 6398 (amended 1958, 1963, 1967 & 1980), 6399 (amended 1958 & 1963) (repealed 1967), 6400 (amended 1958, 1963 & 1980), 6401 (amended 1958, 1960 & 1962), 6402 (amended 1960), at 413-415 (repealed 1980).

138. *Ballard*, 419 U.S. at 510.

139. 350 U.S. 11, 17 (1955).

140. 345 U.S. 83, 94 (1953).

141. The dissent was equally unwilling to explore this issue. Justice Brennan's opinion argues that the separate tenure provision for female line officers was not essential to military functions and, in any event, had not been intended by Congress to compensate women for inferior promotion opportunities arising from their exclusion from sea duty. *Ballard*, 419 U.S. at 511-21 (Brennan, J., dissenting). He therefore found it unnecessary to explore the constitutionality of the underlying restriction on women's opportunities, merely noting that the issue is "obviously implicated" but not considered in the majority opinion. *Id.* at 512 n.1.

Congressional power to determine military personnel needs was again upheld against a claim of gender-based discrimination in the 1980 decision of *Rostker v. Goldberg*,[142] which held that male-only draft registration did not deny equal protection of the laws to registrants. Justice Rehnquist's majority opinion follows the *Ballard* analysis, finding that male-only registration bears a rational relationship to the military need for combat troops which Congress had concluded a future draft would fill.[143] The more detailed legislative history of the statute and developments since 1975 in the law of gender-based discrimination, however, occasioned more extensive discussion of Congress' calculations by both the majority and Justice Marshall's dissent.

Section 3 of the Military Selective Service Act empowers the President to require, by proclamation, registration for the draft of "every male citizen."[144] Draft registration had ceased in 1975. When President Carter revived it by proclamation in 1980, it was necessary to obtain an appropriation to activate the selective service machinery. At the same time, the Administration sought statutory changes that would extend draft registration to women.[145]

There followed extensive congressional consideration of the problem, during which military and civilian Defense Department witnesses testified in favor of registering women. The military witnesses testified against actually drafting women, but stated that the Army could absorb 80,000 female draftees out of a hypothetical draft of 650,000.[146] The Defense Department position was that the purpose of a future draft would be to provide combat replacements or noncombat replacements who could, if necessary, be transferred to combat.[147] Women were barred by statute or regulation from combat service in the armed forces.[148]

The congressional response was to conclude that the Defense Department's anticipated purpose of a future draft could be met without drafting women, that registration was only a means to facilitate this anticipated draft, that the armed forces anticipated need for female personnel could be met by volunteers, and that there was therefore no military need to draft women.[149] Instead, the proposal to register women was inspired only by considerations of "equity."[150] The 80,000 potential female draftees were not essential, and the legal and administrative difficulty of raising and assigning them made them less useful than males.[151]

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142. 453 U.S. 57 (1981).

143. *Id.* at 72-83.

144. Selective Service Act of 1948, Pub. L. No. 80-759, § 3, 62 Stat. 604, 605 (amended 1951 & 1971) (codified as amended at 50 U.S.C. app. § 453 (Supp. V 1981).

145. *See Rostker*, 453 U.S. at 60-61. *See also* S. REP. No. 789, 96th Cong., 1st Sess. 1 (1980).

146. *Rostker*, 453 U.S. at 80-81; *id.* at 97-101 (Marshall, J., dissenting).

147. *See* S. REP. No. 826, 96th Cong., 2d Sess. 154-155, 157-158, 160 (1980).

148. *See* 10 U.S.C. §§ 6015, 8549 (1982); Army Reg. 611-201, ch. 4, at 4-1 (1976).

149. *See* S. REP. No. 826, *supra* note 147, at 157-59. The majority opinion considered this report, which was endorsed by the Conference Committee, as the "finding of the entire Congress." *Rostker*, 453 U.S. at 73-74.

150. *See* S. REP. No. 826, *supra* note 147, at 158.

151. *See* S. REP. No. 826, *supra* note 147, at 159-61. The Senate report expresses apprehension about the legality of a predominantly male draft after both genders have registered. *Id.* at

The majority deliberately muddled the standard of review of legislative judgment exercised by the Court. After denigrating the entire concept of different levels of scrutiny for different types of discrimination,[152] Justice Rehnquist disclaimed any intention to establish a special standard of review for military equal protection cases.[153] He cited, however, the separate community decisions in general[154] and *Ballard*[155] in particular as establishing the need for "healthy deference" to Congress' judgment in military affairs, particularly when Congress had fully considered the constitutional issue at hand.[156] Given that consideration in this case, he concluded, the constitutional power to raise armies requires the Court to defer to its judgment.[157]

Two new points emerge from the opinions in *Rostker*. The first is the primacy of Congress over the executive in determining military need. The second is the majority opinion's strong intimation that judicial deference to legislative and executive judgment in this area is not merely prudent but is required by the Constitution.[158] Otherwise, the opinion is merely the most recent example of the majority of the justices' willingness to take claims of military necessity at face value and the minority's corresponding skepticism.

These cases show that the separate community doctrine consists of four propositions. First, as a matter of observation and history, the armed forces are a distinct subculture in which the individual is subordinated to the organization in a manner unlike any other government activity. Second, the existence of this peculiar relationship is evidence that it rationally serves both the armed forces' internal purposes and the larger society's interests. Third, when

158-59. It also states that political hostility to drafting women could place serious strain on national morale during a crisis. *Id.* at 159.

152. *Rostker*, 453 U.S. at 69-70.

153. *Id.* at 70.

154. *Id.* at 66-67. *See* Brown v. Glines, 444 U.S. 348, 354 (1980); Middendorf v. Henry, 425 U.S. 25, 43 (1976); Greer v. Spock, 424 U.S. 828, 837-38 (1976); Parker v. Levy, 417 U.S. 733, 743 (1974). In addition, the majority opinion cites Gilligan v. Morgan, 413 U.S. 1, 10 (1973), for the proposition that the Court is not competent to exercise its own judgment on the composition and training of the armed forces. *Rostker*, 453 U.S. at 65-66.

155. *Rostker*, 453 U.S. at 65. *See Schlesinger,* 419 U.S. at 508-10.

156. *Rostker*, 453 U.S. at 66.

157. *Id.* at 71-72.

Justice Marshall's dissent explicitly embraces the test for unconstitutional gender-based discrimination established in Craig v. Boren, 429 U.S. 190, 197 (1976)—"substantial relation to an important government interest"—and contends that male-only registration does not satisfy this test. The opinion concedes that maintenance of the armed forces is an important government interest, but it concludes that the government has failed in three respects to show a "substantial relation" between it and not registering women for possible future draft. *Rostker*, 453 U.S. at 87-90 (Marshall, J., dissenting). First, Justice Marshall sees no necessary connection between registration and a combat-only draft, for Congress may decide in the future to draft for non-combat positions that women concededly can fill. *Id.* at 92-95. Second, the Army's own witness before Congress stated that even the type of draft Congress had in mind could usefully produce 80,000 women to fill noncombat positions and release men for combat. *Id.* at 95-101. Finally, there has been no showing that drafting women in these proportions would create significant administrative problems. *Id.* at 106-11. The dissent accuses Congress and the majority opinion of interpreting military necessity to mean only that it is not necessary to draft women rather than that is is necessary not to draft them. *Id.* at 103-105. This, the dissent asserts, is inconsistent with the *Craig* standard. *Id.* at 94-95, 102-06.

158. *Rostker*, 453 U.S. at 64-65, 71-72.

individual rights appear to conflict with the smooth working of the armed forces, the Court distrusts its own ability to reconcile them without harming military effectiveness. Fourth, its exceptional reluctance to intervene on behalf of judicially developed individual rights is justified because the purpose of the armed forces, "to fight wars," is fundamentally different from any other government activity.

The majority relies heavily on describing the nature of the armed forces to justify challenged military practices. The Court first used description in *Levy* to demonstrate that the General Articles of the U.C.M.J. are not unconstitutionally vague. The long history of the General Articles was taken as evidence that there is a distinctive body of military norms that a rational person in Captain Levy's place would have known he was violating.[159] But the majority also uses description to justify the substance of those distinctive norms. Thus, Captain Levy's remarks were held unprotected "under the most expansive notions of the First Amendment" because they advocated disobedience to orders.[160] The summary court-martial was held not to be a criminal proceeding in part because it is not conducted in an adversary manner.[161] The first amendment does not protect servicemen circulating petitions in part because of the traditional norm of unquestioned obedience.[162] In each instance, that military personnel do not enjoy the same rights as civilians is advanced as a reason why they should not.

Implicit in the first point is the second; these practices have not come about by chance but represent a rational response, informed by experience, to the needs of a military organization. The Navy has found providing counsel in relatively minor disciplinary matters expensive in time and manpower.[163] Permitting open political association among military personnel may lead to collective indiscipline, as may abstract advocacy of disobedience by commissioned officers.[164] Assignment of female personnel to combat duty may cause unknown difficulties.[165] Military courts, being familiar with military needs, should have the first opportunity to consider the constitutional rights of court-martial defendants.[166]

To the majority, that a military practice exists outweighs evidence that it may be unnecessary. It disregards the opinion of the Army's chief legal officer that the General Articles are unnecessary.[167] Although the Army and Air Force appoint counsel in summary courts-martial, the Navy and Marine Corps remain free not to do so.[168] The majority presumes that Congress,

159. Parker v. Levy, 417 U.S. 733, 752-57 (1974).
160. *Id.* at 761.
161. Middendorf v. Henry, 425 U.S. 25, 40-42 (1976).
162. Brown v. Glines, 444 U.S. 348, 356-58 (1981).
163. Middendorf v. Henry, 425 U.S. 25, 45-47 (1976).
164. Brown v. Glines, 444 U.S. 348, 357-58 (1981); Parker v. Levy, 417 U.S. 733, 757 (1974).
165. Rostker v. Goldberg, 453 U.S. 57, 76-78 (1981).
166. Schlesinger v. Councilman, 420 U.S. 738, 759-61 (1975).
167. *See* Parker v. Levy, 417 U.S. 733, 788-89 (1974) (Stewart, J., dissenting); Hodson, *The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1, 12 (1972).
168. *See* Middendorf v. Henry, 425 U.S. 25, 66-67 (1976) (Marshall, J., dissenting).

when it expressly permitted individual servicemen to correspond freely with members of Congress, did not intend to alter the long-standing military prohibition of collective action.[169] As the dissenting opinions of Justices Brennan and Marshall point out, the majority is unwilling to compare the existing state of affairs with alternatives closer to civilian norms.[170]

The separate community doctrine, in other words, is not so much a set of substantive rules as a standard of review. The majority of the Court disclaims the knowledge necessary to examine military restrictions on servicemen's rights with the same skepticism and attention to detail that meets other governmental claims of necessity.[171] When Congress has acted, the majority defers to its supposed special constitutional responsibility for military matters, but it is equally willing, in the absence of statute, to yield to the conclusions of the military authorities themselves that political activity must be restrained.[172] The majority does not articulate a reason for this distinctive unwillingness to question legislative and administrative judgment where individual rights are concerned. Instead, it consistently asserts, without further elaboration, that the purpose of the armed forces is to fight wars, which requires a climate of discipline and unquestioned obedience without parallel in other activities of the government.[173]

These statements are made in support of the conclusion that particular restrictions on servicemen's liberties are rationally related to the armed forces' function. They further imply, however, that the function of the armed forces is sufficiently different from all other government activity that its successful performance justifies such restrictions as are apparently required to achieve it. The majority does not, however, elaborate the distinctive characteristics of war on which it bases its conclusion. Similarly, the particular competence of Congress is merely asserted. While the opinions state that Congress has the power to declare war and regulate the internal affairs of the armed forces,[174] they do not explain why its decisions that affect servicemen's rights should be reviewed with any more deference than the excercise of any other legislative power conferred under article I, section 8 of the Constitution. Because the majority's

169. Brown v. Glines, 444 U.S. 348, 360 (1980). *See* 10 U.S.C. § 1034 (1982).

170. *Cf.* Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting) (claiming that the Court "reflexively bowed to the shibboleth of military necessity"); Middendorf v. Henry, 425 U.S. 25, 63 (1976) (Marshall, J., dissenting) (claiming that the Court approved the denial of counsel in certain circumstances without examination); Greer v. Spock, 424 U.S. 828, 856 (1976) (Brennan, J., dissenting) (claiming that the Court affirmed exclusion of all unapproved public expression from military bases without examining the necessity for such action).

171. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981) (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

172. *Compare* Rostker v. Goldberg, 453 U.S. 57 (1981) *and* Middendorf v. Henry, 425 U.S. 25 (1976) *and* Parker v. Levy, 417 U.S. 733 (1974) *with* Brown v. Glines, 444 U.S. 348 (1980) *and* Greer v. Spock, 424 U.S. 828 (1976). In *Rostker*, the majority opinion speaks of "a healthy deference to legislative *and executive* judgments." *Rostker*, 453 U.S. at 66 (emphasis added).

173. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 356-58 (1981); Middendorf v. Henry, 425 U.S. 25, 46 (1976); Greer v. Spock, 424 U.S. 828, 837-38 (1976); Parker v. Levy, 417 U.S. 733, 743-44 (1974).

174. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981); Schlesinger v. Councilman, 420 U.S. 738, 757-58 (1975); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

premises have been asserted rather than explained, the distinct, less assertive standard of review provided under the separate community doctrine has been vulnerable to criticism.

C. *Opposition to the Separate Community*

In addition to a stable majority, each of the separate community decisions shows a bloc of dissenters who would have applied civilian constitutional norms and invalidated the military practice in question.[175] Their cumulative position consists of five parts. First, the actual separateness of the traditional military community has ceased to exist. Second, the duties of most servicemen can be performed without the subordination of the traditional military community. Third, the majority has not proved that the norms of the traditional military community are necessary for the effectiveness of even combat personnel or, if so, legally justifiable. Fourth, nothing distinctive about the problem of the constitutional rights of individual servicemen places it beyond the competence of the courts. Finally, both military and civilian interests would be better served by integrating the armed forces into the civilian society.

Critics of the separate community point out that the military society of the past no longer exists. The hierarchical structure and traditional social norms of the armed forces, established during the Revolutionary War in conscious imitation of contemporary British and other European models,[176] were preserved until this century largely by the small size and peripheral position of regular Army and Navy. Except during Reconstruction,[177] the pre-Spanish-American War peacetime regular Army numbered no more than 25,000 men and 2,000 officers.[178] The Army and Navy officer corps were alienated from the larger society by their quasi-aristocratic values.[179] Most civilians rarely, if ever, had any contact with the military.[180] Except during the Civil War, military activities had only a peripheral effect on the national life. The civilian community therefore looked down on military men, both officer and enlisted, as worthless in the meaningful activities of American life.[181] The result was an isolated, homogeneous society, voluntarily entered, in which strict disci-

175. Justices Brennan and Marshall have dissented in each of the cases, except that Justice Marshall did not sit on Parker v. Levy, 417 U.S. 733 (1974), or Brown v. Glines, 444 U.S. 348 (1980). Justice White joined the dissenters in both cases involving gender discriminiation, Schlesinger v. Ballard, 419 U.S. 498 (1975), and Rostker v. Goldberg, 453 U.S. 57 (1981), but adhered to the majority in the others. Justice Stewart has been erratic, dissenting on constitutional grounds in *Levy* and in *Greer*, and adhering to the majority in *Councilman* and in *Rostker*.

176. *See* R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 33-34, 63-64 (1967). *Cf.* 4 D. FREEMAN, GEORGE WASHINGTON 149-50, 210, 406-07, 426-27 (1951); T. ROPP, WAR IN THE MODERN WORLD 73-75 (1959).

177. R. WEIGLEY, *supra* note 176, at 190, 267.

178. *See* M. CUNLIFFE, SOLDIERS AND CIVILIANS 119-20 (1968); R. WEIGLEY, *supra* note 176, at 168, 270.

179. *See* R. WEIGLEY, *supra* note 176, at 157. *See also* S. AMBROSE, UPTON AND THE ARMY 129-32, 135 (1964); J. MERRILL, WILLIAM TECUMSEH SHERMAN 117-18, 126-27, 149-50 (1971).

180. *See* M. CUNLIFFE, *supra* note 178, at 102-03, 120-21; R. WEIGLEY, *supra* note 176, at 167, 271-72.

181. *See* M. CUNLIFFE, *supra* note 178, at 101-06; R. WEIGLEY, *supra* note 176, at 271.

pline was needed to make marginal human material useful, within which customs and values were well known, and about which the larger society was indifferent if not contemptuous. The armed forces were separate in fact, and the rights of their members were of little concern to the public.[182]

Since World War II, it is argued, these conditions have ceased to exist. The armed forces number approximately two million,[183] they recruit from a broad segment of the population, and conscription is always possible. Most enlisted personnel and junior officers return to civilian life after fairly short service.[184] The cost and potential activities of the armed forces are of great public concern, and their personnel are in frequent contact with the civilian community. The modern armed forces, in brief, are not as isolated from American society as the frontier army of the 19th century or the garrison army of James Jones.[185]

Two conclusions have been drawn from these changes. Most narrowly, a "chrome plated civilian" like Captain Levy cannot be reasonably expected to know the norms that give meaning to the General Articles in the same way as can a career military man.[186] More fundamentally, the typical or common member of the armed forces is not an alien outcast but is one of us. He comes out of a civilian background, participates in civilian society when off duty, enjoys and exercises political rights, and will probably return to civil life when it is to his advantage to do so. Rather than being one of a distinct caste, he merely holds an unusual job. He has neither isolated himself nor been expelled from American society. It follows, in this view, that he enjoys the rights of any other member of society unless cause is shown to the contrary.[187]

That cause, certain critics of the separate community doctrine have argued, cannot be shown for the bulk of military jobs. The traditional norms of military discipline were developed to insure that soldiers would perform reliably in combat despite fear and danger. If they are still justifiable, it is because they are still needed to produce efficient combat personnel. The great bulk of servicemen, however, do clerical, maintenance, and service jobs that never expose them to combat conditions. The duties of a military computer programmer, truck mechanic, or cook are not intrinsically different from his or her civilian counterpart, it is argued, and the full rigors of traditional military discipline are no more needed in these jobs than they would be in a civilian corporation. If the business of the armed forces is to fight wars, it follows that

182. *See* Zillman & Imwinkelried, *supra* note 11, at 397, 409.

183. 1982 DEP'T OF DEFENSE ANN. REP. app. B, 3-4.

184. In fiscal years 1979 and 1980 the armed forces reenlisted approximately 95,000 servicemen at the end of their first enlistment. At the same time, they took in approximately 350,000 new enlistees. *See* 1982 DEPT. OF DEFENSE ANN. REP. at 270; 1981 DEP'T OF DEFENSE ANN. REP. 268. Reenlistment ratios were much lower towards the end of the Vietnam War. 1982 DEP'T OF DEFENSE ANN. REP. 268.

185. *See* Parker v. Levy, 417 U.S. 733, 781-82 (1974) (Stewart, J., dissenting); Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539, 542-43, (1974); Zillman & Imwinkelried, *supra* note 11, at 400.

186. *See* Parker v. Levy, 417 U.S. 733, 781-83 (1974) (Stewart, J., dissenting). *Accord* Avrech v. Secretary of the Navy, 477 F.2d 1237, 1242 (D.C. Cir. 1973), *rev'd*, 418 U.S. 676 (1974).

187. *See* Greer v. Spock, 424 U.S. 828, 851-52 (1976) (Brennan, J., dissenting).

only those personnel who do so should be set apart from the larger society.[188]

Whether even combat troops are outside the civilian community is a proposition that opponents of the separate community regard as not proved. It is not self-evident to the dissenting Justices that the relation of the serviceman to the armed forces is intrinsically different from an individual's relation to any other government authority. Justice Brennan, for example, cites decisions governing first amendment rights in prisons, schools, defense employment, and public debate on foreign policy[189] to demonstrate that the Court treats skeptically claims of necessity both in disciplined institutions and in the area of national defense. Beginning with the proposition that the Government must demonstrate compelling need in order to infringe fundamental individual rights, the dissents demand a detailed showing that a specific military need cannot be satisfied by a lesser restriction on individual rights than the particular practice in question imposes.[190] They contend that the majority's generalities about the armed forces neither meet this standard nor prove that a less skeptical one should be applied.[191] Absent such proof, they will regard military practices in the same light as those of any other government agency.

Proponents of this view also believe that the courts are fully competent to balance claims of military necessity against individual rights. They begin with the belief that professional military men often confuse their own comfort, convenience, and prestige with military necessity; claims of military necessity should therefore be heard with skepticism.[192] They subject such claims to detailed analysis and usually reject them. Moreover, they contend, even if the military authorities accurately perceive their own needs, they are simply not competent to balance the values embodied in individual constitutional rights against even genuine military necessity. Only the courts are experts in constitutional law, and their view of the proper constitutional balance must therefore prevail.[193]

Finally, critics urge that greater judicial imposition of civilian norms on

188. *See* Zillman & Imwinkelried, *supra* note 11, at 403-04. *Cf.* Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting).

189. Greer v. Spock, 424 U.S. 828, 852-56 (1976) (Brennan, J., dissenting). *See* Procunier v. Martinez, 416 U.S. 396 (1974) (prisons); New York Times Co. v. United States, 403 U.S. 713 (1971) (public debate on foreign policy); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (schools); United States v. Robel, 389 U.S. 258 (1967) (defense employment). *Cf.* United States v. United States Dist. Court, 407 U.S. 297 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* Brown v. Glines, 444 U.S. 348, 365 (1980) (Brennan, J., dissenting); Middendorf v. Henry, 425 U.S. 25, 57 (1976) (Marshall, J., dissenting).

190. *See* Brown v. Glines, 444 U.S. 348, 364-68 (1980) (Brennan, J., dissenting); Middendorf v. Henry, 425 U.S. 25, 63-69 (1976) (Marshall, J., dissenting); Greer v. Spock, 424 U.S. 828, 858-61 (1976) (Brennan, J., dissenting); Parker v. Levy, 417 U.S. 733, 786-89 (1974) (Stewart, J., dissenting).

191. Brown v. Glines, 444 U.S. 348, 368-69 (1980) (Brennan, J., dissenting); Greer v. Spock, 424 U.S. 828, 851-53 (1976) (Brennan, J., dissenting).

192. *See* Brown v. Glines, 444 U.S. 348, 370 (1981) (Brennan, J., dissenting). *See also* N. DIXON, ON THE PSYCHOLOGY OF MILITARY INCOMPETENCE 172, 178-79, 187-88 (1976); A. VAGTS, HISTORY OF MILITARISM 13-15 (rev. ed. 1959).

193. *See* Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting); Schlesinger v. Councilman, 420 U.S. 738, 763-65 (1975) (Brennan, J., dissenting); Zillmen & Imwinkelried, *supra* note 11, at 435-36.

the armed forces would increase military effectiveness. Justice Brennan, for instance, has contended that collective expression of grievances through petitioning, regulated as to time, place, and manner, will improve discipline and morale by revealing discontent before it can "flow into the more dangerous channels of incitement and disobedience."[194] A considerable body of nonlegal literature written in response to the defeat in Vietnam has suggested that the effectiveness of the Army will be enhanced by decreasing the political and cultural gap between the institution and its human raw material.[195] This conception has been endorsed by academic writers who believe that judicial protection of individual liberties in the military will make the rank and file less alienated, and therefore more effective soldiers.[196]

The separate community doctrine, then, has been criticized as being based on a notion of military life that is not consistent with present reality and on claims of necessity that are hardly articulated, much less demonstrated. Its critics assume, until shown otherwise, that the courts are as competent to determine the desirable balance between individual autonomy and organizational need within the armed forces as in any other situation. Some contend, moreover, that greater judicial intervention, rather than harming military effectiveness, would increase it by bringing the armed forces into harmony with the society from which their personnel are drawn.

II. WAR, THE ARMED FORCES, AND JUDICIAL ASSERTIVENESS

It is apparent that opinions of neither faction of the Court satisfy the conditions for an adequate balancing analysis of servicemen's rights and military needs. The majority does not discuss in any detail the demands imposed by war, the distinctive nature of war as a government activity, or the consequences of failure at war as opposed to failure at other activities undertaken by the political branches. Similarly, it asserts judicial incompetence and superior competence of the political branches in military affairs without attempting to distinguish decisions in this area from decisions with respect to other activities within the power of Congress. Instead, it resorts to what Justice Brennan has characterized as "a series of platitudes about the special nature and overwhelming importance of military necessity."[197] The minority, on the other hand, refuses to explore the distinctive position of the armed forces at all. Instead, it argues that they are not distinct from agencies performing other government functions until proven otherwise, and it denies without explanation

194. Brown v. Glines, 444 U.S. 348, 371 (1980) (Brennan, J. dissenting). *Accord* Sherman, *supra* note 185, at 541-42.

195. *See, e.g.*, Z. BRADFORD & F. BROWN, THE UNITED STATES ARMY IN TRANSITION (1973); W. HAUSER, *supra* note 3; S. LOORY, DEFEATED: INSIDE AMERICA'S MILITARY MACHINE (1973). *Cf.* L. RADINE, THE TAMING OF THE TROOPS: SOCIAL CONTROL IN THE UNITED STATES ARMY (1977).

196. *E.g.*, De Nike, *The New "Problem Soldier"—Dissenter in the Ranks*, 49 IND. L.J. 685, 696 (1974); Zillman & Imwinkelried, *supra* note 11, at 409-10, 414, 427, 435; Comment, *Military Discipline and Political Expression: A New Look at an Old Bugbear*, 6 HARV. C.R.-C.L. L. REV. 525, 540-43 (1971).

197. Brown v. Glines, 444 U.S. 348, 368 (1980) (Brennan, J., dissenting).

that any distinctive quantum of proof should be used. Although both factions purport to be balancing individual interest against military need, none of the opinions in the separate community cases cite any of the considerable body of historical and social science literature on effective military discipline. We are presented on the one hand with bugle blowing and on the other with ostensible skepticism that implicitly denies the distinctiveness of the military situation, neither of which appear to be informed by concrete knowledge of military life.

This portion of the Article sets out the principles, not discussed in detail by either faction of the Court, that underlie a proper concept of individual constitutional rights in the military. The first is that the Constitution permits the United States an unlimited choice of ends in war, which necessarily implies an unlimited choice of means. The second is that these ends can be effectively pursued with safety to the political institutions of the Constitution only by subordinating the personalities of members of the armed forces to the will of the political authorities. The third is that this relation differs in kind, rather than in degree, from the relation between the individual and the state on which judicial protection of fundamental personal rights is premised.

A. The Military Necessities of the Constitution

The armed forces are those organizations composed of persons subject to court-martial under the Uniform Code of Military Justice for crimes of absence, disobedience, and faulty performance of duty that have no civilian counterpart.[198] As the Supreme Court has often stated, their primary purpose is to fight wars,[199] *i.e.*, to inflict violence on persons subject to other governments in order to attain the objectives of the United States. While it is true that waging war can involve the entire population and resources of a country, blurring the distinction between the civilian and the military, the armed forces have the peculiar function of directly applying violence to other nations. They are the immediate instruments of war. It follows that a concept of their distinct position in relation to the courts must begin with an understanding of the relation of war to the Constitution.

War is, as von Clausewitz defined it, an act of violence by which one sovereign compels another to do its will.[200] To say that it is between sovereigns is to say that it is between entities that do not recognize a common superior authority and that command enough force to assert their independence effectively.[201] As a result, the belligerent states are bound by no positive law other than their own in determining the ends for which they wage war or the

198. *E.g.*, 10 U.S.C. §§ 885 (desertion), 886 (absence without leave), 889-891 (insubordination), 892 (dereliction of duty), 899 (misbehavior before the enemy), 913 (misbehavior of a sentinel), 915 (malingering) (1982). *See also* 10 U.S.C. § 802 (1982); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957) (delineating persons subject to and exempt from courts-martial).

199. *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

200. C. VON CLAUSEWITZ, ON WAR 75, 86-88 (1976).

201. *See* The Prize Cases, 67 U.S. (2 Black) 635, 667 (1863); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 307-09 (1829); Q. WRIGHT, A STUDY OF WAR 896-99 (1942).

means they will use.[202] Each sovereign is free to determine its internal law on this and any other question insofar as it can prevent, by successfully waging war, any other state from compelling a different determination.[203]

In theory, wars can be fought for the unlimited end of completely overthrowing the enemy state, using whatever resources are necessary. This has been done on occasion, but it is more usual for states to fight for more limited ends with more limited means. The objectives of war are limited by the availability of means to attain them. Two forces govern the selection of means: the state's own willingness to bear their cost, and the resistance exerted by the opponent. Only the first is within the control of the state's domestic institutions; the state must take the enemy's will and resources as it finds them. It follows that once a war has begun, an enemy with enough strength and the will to use it can force the state to choose between abandoning its self-imposed restrictions on means or abandoning the ends for which it fights.[204] As long as it desires the end, the state's choice of means is controlled by the enemy's capacity to resist.

The total resources of a state are its population and economy. The proportion of those resources available for war depends on the ability of the government to inflict hardship on its population by diverting people and goods from their ordinary occupation to war. This depends in part on administrative efficiency, but primarily on the acquiescence of the populace. The dynastic

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202. In the absence of an authoritative statement to the contrary by the political branches, the courts of the United States will apply rules of decision derived from either treaties or customary international law, including the so-called laws of war, in cases involving private rights. *See* The Paquete Habana, 175 U.S. 677, 700-14 (1900); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39-40 (1826); The Antelope, 23 U.S. (10 Wheat.) 66, 120 (1825); Brown v. United States, 12 U.S. (8 Cranch) 110, 122-23 (1814). *See also* Lauritzen v. Larsen, 345 U.S. 571, 577-78 (1953); Wilson v. McNamee, 102 U.S. 572, 574 (1881); 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 11 (1963). Once the political authorities have explicitly acted contrary to international law, as by an inconsistent statute or by denunciation of a treaty, the courts must apply the rule of decision resulting from that act even though the action may be regarded by other states as contrary to international law. *See* The Adula, 176 U.S. 361, 371 (1900); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39-40 (1826); Brown v. United States, 12 U.S. (8 Cranch) 110, 122-23 (1814). The Supreme Court stated in Young v. United States, 97 U.S. 39, 60 (1878):

> As war is necessarily a trial of strength between the belligerents, the ultimate object of each, in every movement, must be to lessen the strength of his adversary, or add to his own. As a rule, whatever is necessary to accomplish this end is lawful; and, as between the belligerents, each determines for himself what is necessary. If, in so doing, he offends against the accepted law of nations, he must answer in his political capacity to other nations for the wrong he does. If he oversteps the bounds which limit the power of belligerents in legitimate warfare, as understood by civilized nations, other nations may join his enemy, and enter the conflict against him.

In short, the President and Congress have between them the authority to determine how far the domestic law of the United States will follow international law in the conduct of war. To the extent that either customary international law or treaties, *e.g.*, U.N. CHARTER, art. 2, paras. 3-4; Treaty Providing for the Renunciation of War, July 24, 1929, 46 Stat. 2345, T.S. No. 796, prohibit the United States from waging war for certain purposes, or with certain means, the highest authorities in the political branches may act in disregard of them without restriction by the courts.

203. The United States, of course, established itself as a state through successful war. Conversely, the United States fought both the Civil War and World War II with the object of reconstructing the domestic institutions of its enemies in a way that would make them permanently incapable of waging war against it.

204. *See generally* C. VON CLAUSEWITZ, *supra* note 200, at 90-99, 585-86, 605-08.

warfare of the Eighteenth Century was limited by the inability of the *ancien regime* governments to effectively tax or conscript their politically passive populations. The mass wars since the French Revolution—the Napoleonic Wars, the American Civil War, and the two World Wars—could be fought for total victory with the full human and material resources of the societies involved because the belligerent populations willingly embraced their objects. Other things being equal, political sympathy between the government and the population increases military effectiveness.[205]

The population must bear more than material costs: the cost of war also includes military service by individuals. Service has two costs. The possibility of death or injury, though severe, is relatively remote. It does not exist in peacetime, and, even in war, the human capacity to believe that the "other guy" will be the casualty is notorious. The most immediate and galling individual cost is the loss of freedom involved in becoming and remaining a skilled soldier. The extreme case of willingness to bear this cost is perhaps ancient Sparta, where the whole political nation devoted their entire lives to military training. The extreme case to the contrary is the United States in the Jacksonian era, when the system of a universal citizen militia collapsed under general unwillingness to do one day of training each year.[206] The military capacity of a state, and thus the ends it can pursue through war, will depend in part on its political ability to impose upon a given part of its population a sufficient discipline to make them effective instruments of violence.

In a sense, the United States has the power to wage war because it is a sovereign nation, and, in another, it is a sovereign because it waged war successfully. The Framers of the Constitution never discussed whether to authorize the United States as a whole to fight wars. They knew from personal experience that it had done so since before the adoption of the Declaration of Independence, when the Continental Congress appointed Washington to command the army besieging Boston. Their efforts were concentrated instead on allocating the authority to begin, conduct, and provide for war among the states and the branches of the federal government.[207] Except for the raising and training of the militia, which is left to the states, they vested the war powers of the Constitution in either the President or Congress.[208] Between them, the political branches were given all of the explicit authority provided by the Constitution to determine ends and means in such wars as the United States would fight.[209]

The military clauses of the Constitution do not prescribe detailed rules for

205. *See* C. VON CLAUSEWITZ, *supra* note 200, at 218-20, 588-93; T. ROPP, *supra* note 176, at 40-59, 107-12, 132-33.

206. *See* M. CUNLIFFE, *supra* note 178, at 186-92, 205-12.

207. *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 318-20 (1937); THE FEDERALIST No. 41, at 269-70 (J. Madison) (J. Cooke ed. 1961). *See generally* Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 683-88 (1972).

208. *See* U.S. CONST. art. I, § 8, cls. 11-16; *id.* art. II, § 2, cl. 1. *Cf. Id* art. I, § 10, cl. 3.

209. The question of the distribution of these powers between the President and Congress is not considered here.

the conduct of national defense. As pointed out below, their authors clearly realized that in this area, above all, they were dealing with unforseeable contingencies and must provide powers rather than limits. Nevertheless, four general policies can be deduced from the enumeration and allocation of these powers.

The Constitution authorizes Congress "to declare war"[210] and to exercise the concomitant powers of raising, training, and financing military forces.[211] It does not expressly restrict either the ends for which the United States may make war or the means that it may employ. With respect to ends it is silent. Experience has shown, though, that the power to wage war goes beyond mere defense. The first regular army created under the Constitution was established for the purpose of compelling the Indians of Ohio to cede their lands, which it accomplished by force.[212] In 1812, 1846, and 1898 the United States initiated foreign wars—twice successful—with the intention in part of acquiring additional territory.[213] Even if it were conceded that the "common defense"[214] is the only legitimate purpose for which war may be fought under the Constitution, there remains the question of how threats shall be judged and how proximate they must be to justify "defensive" war. If there is any issue on which it can be said that the Constitution provides no standard for judicial review, it is the substance of a decision to make war in which the President and Congress together have acted in accordance with the Constitution's apportionment of the decision-making power among them.[215]

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210. U.S. CONST. art. I, § 8, cl. 11.

211. *Id.* art. I, § 8, cls. 12-16.

212. See H. KOHN, EAGLE AND SWORD 91-127, 141-57 (1975).

213. *See* 6 H. ADAMS, HISTORY OF THE UNITED STATES 133-42 (1921); T. WILLIAMS, A HISTORY OF AMERICAN WARS 94-97, 145-49, 152-54, 319-22 (1980). Several portions of Florida were acquired from Spain between 1810 and 1819 either by military occupation or through a treaty prompted by the threat of military occupation. *See* A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWERS: THE ORIGINS 291-326, 336-57 (1976).

214. U.S. CONST. preamble. *But see* THE FEDERALIST, *supra* note 207, No. 25, at 160-61 (A. Hamilton).

During the War of 1812, one member of Congress argued that the Constituiton gave the United States the power to fight only defensive wars and did not permit Congress to declare war for the purpose of conquest. 25 ANNALS OF CONG. 650-53 (1812) (Rep. Wheaton). The argument was not sympathetically received. *See* A. SOFAER, *supra* note 213, at 268-69.

215. *See* Da Costa v. Laird, 471 F.2d 1146, 1154-55 (2d Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 33 (1st Cir. 1971); Atlee v. Laird, 347 F. Supp. 689, 705-09 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973). *Cf.* Gilligan v. Morgan, 413 U.S. 1, 5-12 (1973) (holding that control of the National Guard is reserved by the Constitution to the executive and legislative branches); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (holding that recognition of the sovereign of a foreign state by the executive and legislative branches is binding on the courts); Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 88 (1874) (holding that the President and Congress have the power, acting concurrently, to permit limited commercial intercourse with the enemy in time of war); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29-31 (1827) (holding that the President alone has authority to determine the existence of the conditions under which he may call out the militia). *See generally* Baker v. Carr, 369 U.S. 186, 211-14 (1962); L. HENKEN, FOREIGN AFFAIRS AND THE CONSTITUTION 211-25 (1972). This must be distinguished from the more difficult question whether the courts may determine that the procedures prescribed by the Constitution have not been followed. *See* Massachusetts v. Laird, 400 U.S. 886, 891-900 (1970) (Douglas, J., dissenting). *See generally* L. TRIBE, AMERICAN CONSTUTIONAL LAW, 173 nn.5 & 6 (1978).

With respect to means, the Framers explicitly rejected the idea of constitutional limit. As Hamilton bluntly stated in *The Federalist, No. 23*:

> These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent of the means which may be necessary to satisfy them*. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackle can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to provide for the common defense.[216]

The same point is repeated whenever *The Federalist* discusses the war powers. It is particularly urged in response to the argument that a peacetime standing army was inherently dangerous to liberty and that the Constitution was defective because it did not prohibit or restrict the size of one.[217] Moreover, both Hamilton and Madison argued, constitutional limits on means of war were a danger to constitutional government. Such limits, they contended, would be disregarded when necessity required. These violations would invariably bring into contempt the entire idea of restricting the powers of government when inconvenient.[218] As long as the United States was one nation among many, each of which might use as much force as it could to pursue any end that it chose, its continued independence, and thus its ability to pursue the other ends for which the Constitution was established, required the same powers of action despite the domestic dangers involved.[219]

The Framers were fully sensitive to these dangers. They knew and were part of the Anglo-American tradition of hostility to standing armies that arose from the excesses of Cromwell and James II.[220] The possibility that a military establishment might prove a means of oppression or overthrow the system of government was admitted by the proponents of the Constitution.[221] Their response was to point out that control of the declaration of war and the size, discipline, and financing of any military establishment was vested in Congress. As the representative branch, that body would be restricted from adventurism in ends and excessiveness of means because the cost of war would be borne by its constituents. Its collective self-interest, as well as that of its constituents, would lead it to deny the President the military resources for oppression. Con-

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216. THE FEDERALIST, *supra* note 207, No. 23, at 147 (A. Hamilton) (emphasis in original). *Cf. id.* No. 34, at 210-14 (rejecting arguments favoring constitutional limitations on the federal government's power of taxation).

217. *See id.* Nos. 24, 26 (A. Hamilton); *id.* No. 41 (J. Madison). *See also* 2 M. FARRAND, *supra* note 207, at 329-30.

218. THE FEDERALIST, *supra* note 207, No. 25, at 163 (A. Hamilton); *id.* No. 41, at 270 (J. Madison).

219. *Id.* No. 41, at 270-71 (J. Madison); *cf. id.* No. 24 (A. Hamilton) (outlining potential threats to American security).

220. *See generally* M. CUNLIFFE, *supra* note 178, at 31-43; H. KOHN, *supra* note 212, at 1-17, 81-85.

221. *See, e.g.*, THE FEDERALIST, *supra* note 207, No. 26 (A. Hamilton); *id.* No. 41 (J. Madison).

versely, its representative character would ensure that general consent would be forthcoming for such means as it authorized.[222]

One primary and two secondary policies can be discerned here. The first is simply that the independence of the United States—its freedom from external coercion in its internal affairs—is the foundation on which rest all of the other values implicit in the Constitution. If the nation cannot defend itself, it cannot pursue whatever other concerns its people may have. The first secondary policy is, therefore, that the war powers must be as broad as potential threats, which are potentially unlimited because they come from outside the political system. The second is that the inherent danger to the other principles and policies of the Constitution that unlimited war power creates can be guarded against as far as possible by making the public's representatives supreme judge of both needs and resources in war. Consistent with these doctrines, the Supreme Court has permitted the armed forces to use against belligerents whatever measures the political branch has authorized.[223] It has also spoken of the war power of Congress as a broad, practically unlimited power to control the nation's economy and manpower to prepare for, wage, and repair the effects of war.[224]

The Framers assumed that the military establishment would be small: Madison stated that no country could afford a standing army of more than one percent of the population,[225] which has proved true of the United States in peacetime.[226] Carried to their logical conclusions, however, the policies of unlimited choice of ends and means and representive control would permit a congressional majority to subject the entire population to military discipline. The Supreme Court consistently has refused to permit this. It has rejected the argument that the war power justifies the exercise of military or martial law

222. *See id.* No. 26, at 168-70 (A. Hamilton); *id.* No. 41, at 270-74 (J. Madison).

223. *See, e.g., Ex parte* Quirin, 317 U.S. 1 (1942); Young v. United States, 97 U.S. 39 (1877) (upholding the authority of a presidential order subjecting enemy saboteurs to the jurisdiction of military tribunal); Mrs. Alexander's Cotton, 69 U.S. (2 Wall.) 404 (1864) (upholding the authority of the army to confiscate private property found within enemy territory). The Court has considered this unlimited choice of means, subject only to political enforcement of the norms of international law, to be within the power of any recognized belligerent. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (South American revolutionaries); Ford v. Surget, 97 U.S. 594, 605-08 (1878) (Confederate officer).

224. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 754-65, 778-83 (1948) (upholding the constitutionality of statutes providing for the confiscation of excessive wartime profits); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141-46 (1948) (upholding the constitutionality of congressional regulation of rents after termination of hostilities); Hirabayashi v. United States, 320 U.S. 81, 92-93, 99-102 (1943) (upholding the constitutionality of a wartime curfew order applicable to Japanese-Americans living on the West Coast); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 161-63 (1919) (upholding the constitutionality of a ban on liquor sales for the purpose of increasing war efficiency); Selective Draft Law Cases, 245 U.S. 366, 377 (1918)(upholding as constitutional the power to compel military service). *But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641-46 (1952) (holding President Truman's seizure, without congressional concurrance, of domestic industries during the Korean War unconstitutional).

225. THE FEDERALIST, *supra* note 207, No. 46, at 320 (J. Madison). *See also* 2 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 186 (Everyman's Library ed. 1910).

226. The 1982 complement of the armed forces, 2,094,000, is approximately 1% of the population. 1982 DEP'T OF DEFENSE ANN. REP. 270; BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING, ADVANCE REPORT, at 4. *See also supra* text accompanying note 183.

over persons who are not members of the armed forces performing military duty: civilian residents of the United States,[227] civilians accompanying the armed forces abroad,[228] discharged servicemen,[229] and active servicemen whose offenses are not related to the military community.[230] While the Court might recognize an exception to this rule for an active theater of military operations, it exercises independent judgment regarding when that situtation exists.[231] Only the limited class of persons who actually belong to the armed forces are subject to the full force of the war power.

This doctrine is usually justified by the inferior procedural rights supposedly provided under military jurisdiction.[232] But more importantly, it preserves the existence of political responsibility as the essential check on the war power. There is always the risk that the political branches will use the force provided by popular consent to overawe the population or overthrow the political process.[233] A military establishment has at its command physical force beyond the resources of any police agency, and, unlike the civil authorities, it normally employs force against hostile societies without regard to the individual fault of any member of the society.[234] Both its strength and its doctrine make it able, in effect, to wage war against its own people in disregard of law. Civilian political control, and the restriction of military discipline to a distinct segment of society, restrict its will and ability to misuse that power. There is no perfect security against this, but the best available is to keep legal sanctions against members of the general community under the direct control of the branch most able to protect individual rights—the judiciary. As long as the civil courts control the government's power of coercion against the individual, the war power cannot be used to destroy the public consent which restrains and legitimates it.[235] To preserve the supremacy of the public as a whole over the excercise of the war power, the Constitution therefore contemplates that its full rigor can only be employed within a distinct group who perform characteristic functions—the armed forces.

In the light of these policies—unlimited choice of ends and means, civil-

227. *See* Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

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

229. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

230. O'Callahan v. Parker, 395 U.S. 258 (1969). *Cf.* Relford v. Commandant, United States Disciplinary Barracks, 401 U.S. 355 (1971) (approving trial by a court-martial of a serviceman charged with committing rape inside a military base).

231. *See* Duncan v. Kahanamoku, 327 U.S. 304, 329-30 (1946) (Murphy, J., concurring); *id.* at 335-37 (Stone, C.J., concurring); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126-27 (1866).

232. *See, e.g.,* O'Callahan v. Parker, 395 U.S. 258, 262-65 (1969); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955).

233. *See* THE FEDERALIST, *supra* note 207, No. 26, at 170 (A. Hamilton). *Cf. id.* No. 46, at 320-22 (J. Madison) (discussing the possibility of the federal government using force to control the states).

234. *See* The Benito Estenger, 176 U.S. 568, 571 (1900); Young v. United States, 97 U.S. 39, 58-60 (1877); Miller v. United States, 78 U.S. (11 Wall.) 268, 305-06 (1870). This follows from the nature of war as a contest between political wills. *Young*, 97 U.S. at 60.

235. *Cf.* Duncan v. Kahanamoku, 327 U.S. 304, 322-24 (1946); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-26 (1866).

ian political control, and military segregation—there are three goals that the political branches must keep in mind in the organization and discipline of the armed forces. The first, ability, speaks for itself. The armed forced are merely a useless burden on the public if they cannot effectively exert or threaten force against other states for the purposes chosen by the President and Congress. Before anything else, the political branches must provide themselves with a military establishment whose members can do what will be asked of them.

The second goal is "passive subordination"—freedom of the civil government from direct military coercion. It has been more than 300 years since Pride's Purge, but the career of Cromwell and the New Model Army still haunts the Anglo-American political imagination. There have been too many melancholy examples since of armies that, under their own officer corps or at the behest of a single leader, have imposed their will by force on the nation they supposedly defended. In addition to the outright coup, moreover, armies have tolerated unofficial military terrorism, like that of Japanese junior officers in the 1930's, which reduced the civil governments to subservience while retaining the facade of civilian rule.[236] Commanders, like the Japanese commander in Manchuria, have also used force against foreign countries without authority to commit the government to a policy it had opposed.[237] Moreover, once the military has demonstrated the will and resources to apply force to the civilian government, the mere threat often suffices to impose its will.[238] The policy of a "politically neutral military establishment under civilian control"[239] requires, at a minimum, a system of discipline that will prevent the armed forces from using or threatening force to induce action by their civilian superiors.[240]

Civilian control, however, requires more than the absence of military

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236. *See* S. FINER, THE MAN ON HORSEBACK 90-92, 146-48 (1962); S. HUNTINGTON, THE SOLDIER AND THE STATE 137-38 (1957); J. TOLAND, THE RISING SUN 3-33 (1970); C. YANAGA, JAPAN SINCE PERRY 508-18 (1966).

237. *See* S. HUNTINGTON, *supra* note 236, at 433-34; J. TOLAND, *supra* note 236, at 6-9; C. YANAGA, *supra* note 236, at 498-99.

238. *See* S. FINER, *supra* note 236, at 141-51; Springer, *Disunity and Disorder: Factional Politics in the Argentine Military*, in THE MILITARY INTERVENES (H. Bienen ed. 1968).

While the direct use of military force against the government has usually been instigated by officers who control the levers of military authority, there are instances of enlisted men attempting it. The sailors of the Royal Navy who mutinied at The Nore in 1797, for example, attempted to gain their demands by blockading London. *See* J. DUGAN, THE GREAT MUTINY 261-65 (1965). The enlisted men of the German Navy also played an active role in the overthrow of the Kaiser in 1918. *See* D. HORN, THE GERMAN NAVAL MUTINIES OF WORLD WAR I 198-266 (1969). Although the political assassinations in Japan were exploited by the higher army authorities for their own ends, they were carried out by junior officers and cadets who belonged to a political faction opposed to the army's high command. *See* S. FINER, *supra* note 236, at 90-92; S. HUNTINGTON, *supra* note 236, at 137-38.

239. Greer v. Spock, 424 U.S. 828, 839 (1976).

240. While the general political culture of a country influences the strength of civilian supremacy, one of the principal protections of the civil government is the internalization of values of subordination by the armed forces. *See* S. FINER, *supra* note 236, at 28-30. Huntington has classified two distinct approaches to this subordination: "objective" and "subjective" civilian control. The first aims for an officer corps that considers it a positive good to obey the orders of any civilian group exercising authority through lawful procedures. In contrast, "subjective" civilian control is attained by inculcating the military establishment with the political values of the current

force used against the will of the legal authorities. The armed forces can also impose their will on the civilain goverment by refusing or threatening not to use force in support of policies that officers or enlisted men do not support. The most familiar instance of this is the more or less spontaneous passive mutiny in response to personal hardship.[241] But calculated withholding of services can also be used as a method of political coercion. During the Civil War, for example, General McClellan attempted to control Lincoln's policy on slavery by threatening that his troops would not fight for emancipation,[242] and a large number of British officers, supported by the opposition party, did prevent the grant of Home Rule to Ireland in 1914 by threatening to resign rather than fight against Ulster Protestants.[243] One school of thought in the anti-Vietnam

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civilian regime. *See* S. HUNTINGTON, *supra* note 236, at 80-85. This raises obvious difficulties in the event of political change.

The opinions in Greer v. Spock, 424 U.S. 828 (1976) reflect these opposing concepts. Justice Powell advocates an abstention of the armed forces, as such, from even the appearance of concern with partisan political outcome. *Id.* at 846 (Powell, J., concurring). Justice Brennan, to the contrary, believes that the armed forces are inherently politicized and advocates "moderating" their distinctive attitude by permeation with civilian political ideas. *Id.* at 868-69 (Brennan, J., dissenting).

Justice Brennan, however, misconceives the "political" activity of the American military. Part of the function of the armed forces is to advise the political branches, on request, on questions of military policy. The dispersal of power over military affairs between the President and Congress, its further dispersal within Congress, and the American custom of public discussion make it likely that opposing viewpoints in the armed forces will be requested by one of the dispersed centers of political power and thereby brought to public attention. These views, like all other policy preferences, will contend for the approval of Congress. This activity, however, is a process of advocacy through constitutional channels, as part of official duties, often at the request of some portion of Congress. It carries no actual or implicit threat of coercive action by any group in the military if their advice is disregarded. *See* S. FINER, *supra* note 236, at 142-44; S. HUNTINGTON, *supra* note 236, at 377-84, 400-23.

241. The enlisted men of half the divisions in the French Army mutinied in 1917 after a bloody fiasco, and the men of the Russian Army simply walked away *en masse* that summer. See J. BUNYAN & H. FISHER, THE BOLSHEVIK REVOLUTION 24-27 (1934); R. WATT, DARE CALL IT TREASON 115-205, 211 (1963). The French Army has never disclosed the full extent of the mutinies of 1917. R. WATT, *supra*, at 308-10. Similar incidents on a much smaller scale happened in the United States Army in Vietnam. See D. CORTWRIGHT, *supra* note 3, at 28-49; W. HAUSER, *supra* note 3, at 98-102; C. MOSKOS, THE AMERICAN ENLISTED MAN 143 (1970).

242. *See* 2 A. NEVINS, THE WAR FOR THE UNION: WAR BECOMES REVOLUTION 1862-63, at 159-60 (1960). There is some reason to believe that McClellan's staff would have been willing to use the Army to impose their own policy on Lincoln. *See id.* at 231 n.38. The administration suspected that some of McClellan's senior officers were more loyal to him and his policies than to the government. *See id.* at 330 n.19, 400. *Cf.* M. CUNLIFFE, *supra* note 178, at 322-24, 326-27.

243. This so-called "Curragh Mutiny" of 1914 is an extraordinary episode in English history. Asquith's Liberal Government, needing the votes of the Irish Nationalist members of Parliament to stay in power, had passed a "Home Rule" act giving all Ireland a single Parliament of its own with authority over domestic matters. *See* Government of Ireland Act, 4 & 5 Geo. 5, ch. 90 (1914). This government would have been dominated by the Catholic majority of the Irish population. The Protestants of Ulster formed a paramilitary organization, the Ulster Volunteers, to resist the home rule government by violence. They were supported by the leading figures of the Conservative Party and by the conservative press. The Volunteers were officered by retired army officers, many of Anglo-Irish background. Both Conservative leaders and generals hostile to home rule urged officers to resign rather than suppress an Ulster rebellion, and the commander and officers of a calvary brigade at Curragh did resign. This pressure forced the government to offer to exclude Ulster from home rule. The crisis was aborted only by the outbreak of World War I. *See generally* F. BIRKENHEAD, F.E. 224-39 (1959); K. CHORLEY, ARMIES AND THE ART OF REVOLUTION 91-96 (1943); G. DANGERFIELD, THE STRANGE DEATH OF LIBERAL ENGLAND 342-47 (1935). The decision of a substantial number of Southern officers to fight for the Confederacy provides an interesting parallel. *See* S. AMBROSE, DUTY, HONOR, COUNTRY: A HISTORY OF

War movement also advocated refusal of service by military personnel as a way to end the war.[244] It is evident that the civil government cannot be said to control policy if the armed forces, separately or in alliance with political minorities in the civilian community, can collectively veto measures that they oppose. As long as the Constitution gives the President and Congress the authority to determine the ends for which military force will be used, civilian supremacy requires a system of military discipline that inculcates all ranks with an attitude of active subordination, *i.e.*, the will to carry out the instructions of their civilian superiors despite their own disagreement.

Both forms of civilian supremacy must be maintained even though the members of the armed forces come from a civilian society in the throes of political conflict. The opposition to the Vietnam War was the norm in American history. With the possible exception of World War II and the Korean War, every major war the United States fought since 1789 has been opposed by a vocal and articulate minority. The vehement and telling opposition to the Mexican War by members of Congress, including Lincoln, and antiwar intellectuals such as Thoreau and Lowell, compares favorably to their counterparts in the Sixties,[245] and the arguments of the anti-Imperialists during the Philipine Insurrection prefigure those used against the war in Vietnam.[246] During the Civil War, the opposition impeded recruiting, obstructed conscription, encouraged desertion, impaired public credit, and, until two months before the 1864 election, appeared likely to defeat Lincoln on a peace platform.[247] Similar activities by New England Federalists during the War of 1812 brought the federal government to the point of collapse.[248] On the basis of history, it must

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WEST POINT 169-71 (1966); M. CUNLIFFE, *supra* note 178, at 328-37, 373-75; 1 D. FREEMAN, ROBERT E. LEE 410-68 (1934); S. HUNTINGTON, *supra* note 236, at 212-13. Refusal to defend the government against groups with whom the military sympathizes is not an uncommon mode of military intervention in politics. *See* S. FINER, *supra* note 236, at 151-53. For a contemporary American example, one might imagine the Chief of Staff of the Army, with the support of Southern members of Congress, telling President Kennedy that the Army would not support the admission of James Meredith to the University of Mississippi.

244. *See generally* D. CORTRIGHT, *supra* note 3, at 9-16, 50-75, 106-16, 123-26; H.R. REP. NO. 301, 93d Cong., 1st Sess. 54, 59-73 (1973). The House Report summarizes the testimony in *Investigation of Attempts to Subvert the United States Armed Services*, pts. 1, 2, & 3, 92d Cong., 2d Sess. (1972), three volumes of hearings by the House Internal Security Committee. The prevalence and military effect of politically conscious refusal of duty is a matter of some doubt. Both its advocates, *see, e.g.*, D. CORTRIGHT, *supra* note 3, and its more extreme opponents on the House Internal Security Committee were interested in playing up its scope and effect. Other observers, *e.g.*, L. RADINE, *supra* note 195, at 17-29, believe that the armed forces were able to develop systems of social control that effectively neutralized politically motivated resistance.

245. *See generally* Merk, *Dissent in the Mexican War*, in DISSENT IN THREE WARS (1970).

246. *See generally* Freidel, *Dissent in the Spanish American War and the Philippine Insurrection*, in DISSENT IN THREE WARS (1970).

247. For a discussion of the draft riots in New York, see 3 A. NEVINS, THE WAR FOR THE UNION: THE ORGANIZED WAR 1863-64, at 119-27, 377-78 (1971).

248. The War of 1812 was declared only by a vote of 79-49 in the House of Representatives and 19-13 in the Senate, with substantial defections from the majority party. 6 H. ADAMS, HISTORY OF THE UNITED STATES OF AMERICA 227-29 (1921). It was extremely unpopular in New England, where the financial community boycotted government debt, preferring to lend to England. 8 *id.* at 15-19. An element of the Federalist Party in New England, with popular support, seriously considered secession. *Id.* at 7-11, 287-310.

be assumed that the opponents of any future war will attempt to use the political process to alter the government's choice of ends or means.

Political opposition to an ongoing war, moreover, is an essential aspect of the constitutional system. The legitimacy of the decision to use military force derives solely from the consent of the public through their representatives, and its withdrawal, expressed through the political process, terminates the government's authority. The logic of the war power itself, as well as the first amendment, should preclude its use to preserve a fictitious consent through suppression of civilian criticism of ends and means. While this principle has been too often honored in the breach,[249] it should strictly limit the political branches' power to preserve military willingness to obey by silencing civilian opposition. At the same time, the principle of civilian supremacy requires the armed forces to execute the previously chosen policy of the political branches unless and until the political process induces a change. Reconciling the two requires the members of the armed forces to dissociate their job performance from their own political values as influenced by the civilian community.

To say that the purpose of the armed forces is to fight wars, then, is to say that the Constitution contemplates them as a means through which the United States applies force for whatever reasons and to whatever degree the elected branches of the government decide that the exigencies of international relations require. To say that the armed forces are subject to civilian control is to say that the threat to use or withhold force as a means of imposing the will of members of the armed forces on the elected branches is repugnant to the Constitution. The fundamental military policy of the Constitution, underlying both unlimited exigency and civilian supremacy, is that the members of the armed forces are to be the instruments, and only the instruments, of policies arrived at and legitimated by the public's perceptions of the world developed through an ongoing and vigorous political process.

B. Military Necessity and the Individual

The position of the armed forces under the Constitution requires the individual serviceman to subordinate his own preferences to the demands made on the organization by the political branches of the government. The techniques of achieving that subordination have been widely reflected upon by social scientists and military theorists. As presented below, they consist of a combination of psychological manipulation and formal sanctions, which induce the serviceman to identify his own self-esteem and well being with the success of the organization to which he belongs.

The armed forces are an example of a rational bureaucracy: a hierarchi-

249. The prewar opposition to World War I, for example, was thoroughly repressed after the outbreak and had little effect on majority opinion at the time. *See* R. MURRAY, RED SCARE 19-39 (1955). *See also* United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407 (1921) (upholding revocation of a newspaper's mailing privilege for advocating disloyalty to the United States); Debs v. United States, 249 U.S. 211 (1918) (sustaining the conviction of an antiwar socialist for obstructing recruiting and enlistment efforts of the armed forces).

cal organization characterized by a specialized division of labor according to system and authority based on role rather than personality, in which each individual's role is to pursue goals established by the heads of the hierarchy through methods that they have calculated will attain these goals. In any such organization the needs and desires of an individual member may conflict with the demands of his role; if he chooses to follow the former, the functioning of the organization is impeded. A rational bureaucracy therefore needs a system of discipline that will induce the individual to fulfill the demands of his role even when they are inconsistent with his own interests.[250]

Methods of discipline can be classified into two general types: direct (supervised) and indirect (internalized). The first consists of rules governing individual behavior, sanctions for noncompliance or rewards for compliance, and application of sanctions by superiors in the hierarchy who scrutinize individual behavior. Since it works by deterring deviant behavior through fear of sanctions, it depends on effective surveillance by a sufficiently numerous and motivated group of superiors, who in turn require a discipline of their own.[251] Direct discipline does not meet the organization's needs if the nature of the task or the lack of enough competent supervisors requires the individual to function without pervasive surveillance.

Indirect or internalized discipline brings the individual to identify his own emotional well being with the goals of the organization so that he will consider it in his own interest to fulfill his role even when there is no prospect of scrutiny by superiors. It dissolves the conflict between organizational and individual interest by submerging the individual ego in the well being of the group. It is initially achieved by depriving the new member of the group of self-esteem and permitting him to regain it by successfully conforming to the group's norms, and it is reinforced by devices such as paternalistic concern for the individual, participation in symbolic activities that demonstrate the importance of the group, and isolation of the individual from alternative sources of moral judgment and self-esteem.[252] Indirect discipline, therefore, requires that the individual be directly compelled to do certain things not because they themselves affect the organization's goals, but because they psychologically condition him to act in the future with only the supervision of his "organizational conscience."

Organizations with either system of discipline commonly have a discontinuous hierarchy: management-labor, staff-inmates, officers-enlisted men. The upper group uses substantial judgment and discretion to determine the goals of the organization, while the lower group at best exercises the skills of

250. *See generally* A. ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS (1961). *See also* S. HUNTINGTON, *supra* note 236, at 7-18.

251. *See* A. ETZIONI, *supra* note 250, at 27-31. The use of a reward for individual performance, *e.g.*, promotion or piece-work wages, is merely the reverse of a sanction in that it requires that performance be observed, and it leaves the individual with the incentive to obtain the benefit without the prescribed effort.

252. *See* E. GOFFMAN, ASYLUMS 14-35, 63-64 (1961); B. MOORE, INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT 64-75 (1978); L. RADINE, *supra* note 195, at 38-43.

craftsmen under upper group supervision and at worst, as in a prison, are mere objects for the upper group's control. The upper group considers its directive function the most important and assigns itself most of the material and emotional benefits of the organization's success.[253] Greater discretion requires, and great benefit permits, the discipline of the upper group to depend more on internalization and less on surveillance than that of the lower group. Its members must identify strongly both with the goals of the organization and with the status of their group within it, for their performance, including the supervision of the lower group, depends primarily on their organizational conscience.[254]

The armed forces are peculiarly dependent on internalized discipline. Like any other rational bureaucracy, they need reliable performance by individuals despite fatigue, boredom, indifference, venality, and distraction by competing rewards. Direct discipline is of limited use to them. Their ultimate organizational goal is successful combat,[255] which, for the servicemen who actually do the fighting, has drastic disincentives that outweigh most normal coercive sanctions. The role of the armed forces also presents moral and political justifications for any serviceman to refuse military requirements that he finds burdensome. Finally, those in a position to direct the behavior of large portions of the armed forces for their own ends may have enough power to disregard formal legal sanctions. Despite the common concept of military authority as rigid and formal, the armed forced therefore depend heavily on internalized restraints to assure effectiveness and civilian supremacy.

The most distinctively military activity, and the one that places the greatest strain on the serviceman, is ground combat. The combat infantryman faces the continuing prospect of death, maiming, or injury while tired, hungry, thirsty, and exposed to the worst extremes of climate. He is isolated from his normal sources of esteem, affection, and sexual gratification, and suffers constant, debilitating uncertainty about the intentions of the enemy and his own

253. *See* A. ETZIONI, *supra* note 250, at 16; E. GOFFMAN, *supra* note 252, at 7-9.

254. *See* E. GOFFMAN, *supra* note 252, at 84-92; L. RADINE, *supra* note 195, at 63-55; Little, *Buddy Relations and Combat Performance*, in THE NEW MILITARY 213-15 (M. Janowitz ed. 1964). The elite often work and live apart from the members of the organization, and therefore depend for immediate supervision on "straw bosses"—non-commissioned officers, foremen, *Kapos*, trustees—drawn from the population of the lower group. *See, e.g.*, L. RADINE, *supra* note 195, at 63-65, 75-76.

255. This is true even when combat is not intended to occur, because the usefulness of a threat of force depends on both sides' belief that the threat could actually be carried out. As von Clausewitz puts it:

> Combat is the only effective force in war; its aim is to destroy the enemy's forces as a means to a further end. That holds good even if no actual fighting occurs, because the outcome rests on the assumption that if it came to fighting, the enemy would be destroyed. It follows that the destruction of the enemy's force underlies all military actions; all plans are ultimately based on it, resting on it like an arch on its abutment. Consequently, all action is undertaken in the belief that if the ultimate test of arms should actually occur, the outcome would be *favorable*. The decision by arms is for all major and minor operations in war what cash payment is in commerce. Regardless how complex the relationship between the two parties, regardless how rarely settlements actually occur, they can never be entirely absent.

C. VON CLAUSEWITZ, *supra* note 200, at 97.

superiors. The situation bluntly confronts him with the fact that he is a mere means to his superiors' ends, of no intrinsic human worth to them, caught in circumstances beyond his control. He must overcome his own fear, and he must routinely commit acts that would be grossly immoral by his prior civilian standards.[256] Modern firepower compels troops to disperse and take cover for protection, and the infantryman is often alone, unable to see what is happening around him and out of contact with his superiors.[257] To perform effectively, the infantryman must display both endurance and initiative while frightened, exhausted, disgusted, and beyond the direct supervision of officers.

How men from industrialized Western societies are brought to do this is the subject of a considerable body of literature which agrees on one central point: the soldier's behavior under combat stress is mainly determined by the standards of his "primary group." The primary group is the small number of persons, usually a squad or less, with whom the individual shares the immediate hardships of military life and on whom he depends for safety and success in combat. Each member of the group gives essential help to the others in minimizing risk while meeting the army's demands. Because of this mutual dependence, the group also provides the principal source of personal affection and esteem for the individual. Primary group standards are developed by a consensus dominated by a few "hard core" members whose performance the others admire. Group disapproval and consequent isolation from mutual support is the most powerful sanction the individual faces. As long as the primary group's members are mutually dependent, the soldier will see his main obligation as earning its esteem at the expense of both self-indulgence and the formal goals of the Army. Each will do what he thinks those closest to him expect him to do.[258]

"Primary group solidarity does not automatically ensure that an organization will perform effectively . . . . Studies of industrial organizations have noted that cohesive primary groups can at times supply the basis for group

256. *See* S. MARSHALL, MEN AGAINST FIRE 44-50, 70-78 (1947); C. MOSKOS, *supra* note 241, at 140-41; 2 S. STOUFFER, A. LUMSDAINE, M. LUMSDAINE, R. WILLIAMS, M. SMITH, I. JANIS, S. STAR, & L. COTTRELL, THE AMERICAN SOLDIER: COMBAT AND ITS AFTERMATH 76-89 (1949) [hereinafter cited as AMERICAN SOLDIER: COMBAT]. *Cf.* C. VON CLAUSEWITZ, *supra* note 200, at 113-21 (danger a part of the friction of war).

257. S. MARSHALL, *supra* note 256, at 123-37.

258. *See* AMERICAN SOLDIER: COMBAT, *supra* note 256, at 135-49; George, *Primary Groups, Organization, and Military Performance*, in HANDBOOK OF MILITARY INSTITUTIONS 293 (R. Little ed. 1971); Little, *supra* note 254, at 204-07; Shils & Janowitz, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 PUB. OPINION Q. 280 (1948).

The experience with the Army's rotation policy in Vietnam demonstrates that the strength of the primary group comes from the mutual dependence of its members. During the Vietnam War, soldiers served a 12-month tour in that country, and every man knew his rotation date. Towards the end of their tour, individuals tended to withdraw from involvement in combat out of concern for surviving until their certain escape from danger. Since survival through rotation did not depend on any particular outcome of the war, the result for the "short-timer" was "a perspective that is essentially private and self-concerned." C. MOSKOS, *supra* note 241, at 141-44.

Moskos also points out quite clearly that engagement in the primary group comes from the individual's belief that his self-interest depends on the support of his fellows, which can only be obtained by reciprocal support. The transaction, at bottom, is a pragmatic, self-interested one, limited at the point where the individual sees his contribution as excessive. *Id.* at 144-46.

opposition to the goals of management."[259] The group acts for its own mutual interest, which may not be the same as the organization's. While the "dud" who doesn't pull his own weight is despised, the "hero" who is overeager to court danger is equally disliked.[260] Combat units are therefore most effective when the moral standards of the group move in the same direction as the formal demands of the organization,[261] and any effective system of military discipline influences the primary group to this end.

The first influence on the primary group are certain values its members bring from the larger culture. One is respect for competence; most Americans want to be thought good at their jobs by knowledgeable observers. All of the mummery of decorations, distinctive insignia, and *esprit de corps* bestows praise to this end, within the larger military community, on individuals and groups who meet or surpass its formal standard of performance.[262] A more potent source of approval within the group is the attitude of "aggressive masculinity" that emphasizes the importance of "being a man" and identifies manhood with participation in violence, endurance of pain and hardship, and control of fear in the face of danger. Shame at not "being a man" is a powerful sanction within the combat primary group; esteem from outsiders for such manhood is one of the principal rewards available to combat personnel within the military community.[263] It is in the interest of any military organization to reinforce these values and thereby inculcate the belief that those who display competence in the face of danger and hardship deserve and get esteem.

The second influence on the primary group is the leadership of junior officers and noncommissioned officers (N.C.O.s). The company commander and platoon leaders are the only officers who have regular direct contact with enlisted men, and their principal function, supported by the N.C.O.s, is to transmit to the men the demands of the organization and to represent the interests of the men in dealing with higher authority.[264] The formal sanctions available to the immediate leaders will not exact more than minimum combat performance.[265] To obtain the willing cooperation of the primary group, officers must demonstrate prestige and exercise paternal authority. Prestige requires the officer to justify his formal status in the eyes of the men by demonstrating solidarity in hardship plus superior skill and military virtue. Paternalism requires him to use his formal authority to provide the best avail-

259. Little, *supra* note 254, at 195.

260. *See* T. ASHWORTH, TRENCH WARFARE 1914-1918, at 157-68 (1980); Little, *supra* note 254, at 202-04.

261. Little, *supra* note 254, at 205-07; Shils & Janowitz, *supra* note 258, at 281-82.

262. *See* L. RADINE, *supra* note 195, at 61 nn.28-30; 1 S. STOUFFER, E. SUCHMAN, L. DEVINNEY, S. STAR, & R. WILLIAMS, THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE 166-68, 309-12 (1949) [hereinafter cited as AMERICAN SOLDIER: ADJUSTMENT]; AMERICAN SOLDIER: COMBAT, *supra* note 256, at 309-12.

263. *See* AMERICAN SOLDIER: COMBAT, *supra* note 256, at 131-35, 309. *Cf.* Shils & Janowitz, *supra* note 258, at 292-94. *But see* Little, *supra* note 254, at 205.

264. *See* AMERICAN SOLDIER: COMBAT, *supra* note 256, at 118-19; Little, *supra* note 254, at 208-11.

265. *See* S. MARSHALL, *supra* note 256, at 22, 40-41; AMERICAN SOLDIER: COMBAT, *supra* note 256, at 100-118; Little, *supra* note 254, at 208-09; Shils & Janowitz, *supra* note 258, at 297.

able material comfort and protect his subordinates from unnecessary danger and harrassment insofar as possible. The exercise of superior skill and paternal care demonstrates "status potency"—the officer's power to decrease uncertainty and control the environment in the interest of the primary group. This creates a relation of dependency in which the officer is an important source of esteem and security for the group and in which the demands of higher authority which he transmits are accepted as legitimate because they come through him. Loyalty is returned for care.[266] It follows that the junior officer or noncommisioned officer's personal authority will be increased to the extent that he actually has greater power to control the environment of the primary group than its members do.

The junior commissioned officer has conflicting loyalties that raise difficulties for the higher authorities. On the one hand, his informal authority over his subordinates increases as he identifies with their interests and protects them from the Army's demands. On the other, his informal authority is useful to the Army only because it makes him better able to enforce its demands. It is not uncommon for company-grade officers, and even higher-ranking leaders of combat formations, to identify with the well being of "their" men and resist the demands of the organization. The organization, however, requires that they see the "necessity" of hardships and danger for subordinates primarily in terms of its contribution to the organization's success. It therefore uses the privileges and conventions of rank to segregate officers into a distinct primary group in which committment to the goals of the organization is the principal group value.[267]

Manipulation of the primary group to obtain willing compliance with the Army's demands in combat has its limits. The group is attempting to make the best of a bad situation for its members by cooperative action. Military competence and aggressive masculinity are virtues in combat, but almost all members of the group, given the choice, wouldn't be in combat.[268] Successful paternal leadership is much less common than officers like to think;[269] it is also hampered by rotation of officers because of casualties or personnel policy.[270] In any event, successful paternalism depends on having authority to meet or exceed expectations; it doesn't explain the level of those expectations. The group will do as much or as little as it thinks necessary, perhaps more for a particularly good leader. But the question remains: why do they think it

266. *See* L. RADINE, *supra* note 195, at 60; AMERICAN SOLDIER: COMBAT, *supra* note 256, at 118-27; George, *supra* note 258, at 303; Little, *supra* note 254, at 208-11; Shils & Janowitz, *supra* note 258, at 297-300. *See generally* B. MOORE, *supra* note 252, at 17-23 (analysis of authority relationships in terms of social contract theory). For an example of the exact opposite of this pattern of leadership, and the consequent collapse of military authority, see D. HORN, *supra* note 238, at 27-49.

267. *See* Little, *supra* note 254, at 213-15. *See also* H. MELVILLE, WHITE JACKET 202-04 (1952) (contrasts effects of news of war on officers and common seamen).

268. *See* AMERICAN SOLDIER: COMBAT, *supra* note 256, at 22-23, 244-50, 336; AMERICAN SOLDIER: ADJUSTMENT, *supra* note 262, at 524.

269. There was a wide gap in World War II between officer's self-perception and enlisted men's attitudes. *See* AMERICAN SOLDIER: ADJUSTMENT, *supra* note 262, at 394-98, 410-23.

270. *See* Little, *supra* note 254, at 220-21; Shils & Janowitz, *supra* note 258, at 299.

necessary? Why do members of the group accept the basic situation and forego individual or collective escape from it?[271]

One reason is the apparent power of formal authority. By the time that servicemen reach the combat situation, their experience with formal military discipline should have accustomed them to obedience by demonstrating that the Army does have the power to detect and punish overt resistance or noncompliance by individuals.[272] One of the principal purposes of basic training, for example, is to show the trainees just how easily they can be made to submit to the Army's authority.[273] Moreover, pervasive authority does not merely condition the individual to compliance; it also causes the primary group to protect itself from organizational sanctions by turning against members who are conspicuous deviants.[274]

A second reason is that formal authority can be used to define the limits of the serviceman's environment and thus his expectations. A military organization is what Goffman called a "total institution": work, subsistence, and recreation are all under the control of a single authority.[275] Once such an organization has shown its power to completely withhold esteem, comfort, and leisure, it can establish a baseline of expectation from which any increase will appear to be an act of benevolence by the individual responsible.[276] Paternalism and its fruits therefore depend in part on the power to isolate the serviceman from sources of well being not under military control.

A third reason is moral legitimacy. It is common knowledge that patriotism or devotion to the "cause" provides little positive motivation in combat.[277] Nevertheless, there is no ground for willing cooperation with the organization unless the members of the group at least accept the basic rectitude of their social system and the justice of its subjecting them to their present hardship.[278]

Similarly, principled opposition to the government's demands is rarely the direct cause of the group's rejection of military authority. As the experiences of the French Army and the German Navy in World War I demonstrate, resistance first coalesces around nonideological threats to the group's well being—danger, poor material conditions, degrading use of military au-

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271. In combat, the alternatives for escape are desertion, active surrender, passive surrender, or collective mutiny. *See* Shils & Janowitz, *supra* note 258, at 282-83.

272. *See* M. JANOWITZ, THE PROFESSIONAL SOLDIER 43 (1960); AMERICAN SOLDIER: COMBAT, *supra* note 256, at 112-14.

Conversely, organizational control is on the verge of collapse when a number of individuals are seen to conspicuously defy formal authority without any penalty. If enough disobey at the same time, the resources of formal authority are overwhelmed by numbers. *See* R. WATT, *supra* note 241, at 180-83, 186-87.

273. *See* L. RADINE, *supra* note 195, at 8, 40-42.

274. *See* B. MOORE, *supra* note 252, at 72; L. RADINE, *supra* note 195, at 42, 45-46.

275. *See* E. GOFFMAN, *supra* note 252, at 4-7; *cf.* Parker v. Levy, 417 U.S. 733, 751 (1974) (The Army is a soldier's "employer, landlord, provisioner, and lawgiver in one.").

276. *See* L. RADINE, *supra* note 195, at 38-42. *Cf.* E. GOFFMAN, *supra* note 252, at 14-52; AMERICAN SOLDIER: ADJUSTMENT, *supra* note 262, at 389-91.

277. *See* T. ASHWORTH, *supra* note 260, at 205; AMERICAN SOLDIER: COMBAT, *supra* note 256, at 149-51; Little, *supra* note 254, at 205.

278. *See* AMERICAN SOLDIER: COMBAT, *supra* note 256, at 151; George, *supra* note 258, at 304.

thority. Only then is it rationalized by principled criticism of the government's right to place the group in its situation.[279] Moreover, acceptance or rejection of legitimacy by the "hard core" of the primary group, those individuals who give the other members examples of effective behavior, is particularly important.[280] As Moore points out, individuals are far more likely to assert their own tentative moral objections to an apparently strong authority when they see someone else do so or know they are supported by others.[281] Continued acceptance, then, depends on the absence of persuasive reasons to believe that the situation should not be endured, especially when expressed by individuals around whom primary groups can form.

In conclusion, the combat infantryman from a Western industrial society overcomes the stress of combat because it is expected of him by those on whom he is mutually dependent and because he and his fellows believe they have no choice but to meet the demands of the Army, transmitted through leaders on whom he is emotionally and physically dependent, and from which he does not fundamentally dissent. As far as the expectations of the primary group can be manipulated into harmony with the Army's demands, its members will internalize those demands and fight effectively without direct supervision. On the other hand, when the perceived interests of the group lie in resistance, the Army will lose effectiveness or even disintegrate. Effective manipulation therefore requires the use of formal, coercive authority to place the soldier's environment under the control of his superiors.[282]

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279. *See* D. HORN, *supra* note 238, at 68-93, 98-101, 123-26; L. RADINE, *supra* note 195, at 9-10, 34-38, 78-79, 115-16; R. WATT, *supra* note 241, at 175-78, 180-83, 188-96, 201-05. A critical role in this process is played by members who have pre-existing political convictions. These individuals emerge as the new "hard core" of the group and exercise informal authority within it. *See, e.g.*, D. HORN, *supra* note 238, at 77-78, 101-02; R. WATT, *supra* note 241, at 204-05. *Cf.* B. MOORE, *supra* note 252, at 69-70 (prisoners with strong religious or political convictions most likely to survive concentration camps). As Radine puts it:

> The organizer has the dual task of battling authority and minimizing internal conflict; he must get these alienated men to trust each other, to cooperate, to defend each other, and to be committed to the goals of the resisting organization. (It is interesting that the resistance organizer faces the same problem of morale that military commanders do).

L. RADINE, *supra* note 195, at 78-79.

280. *See* L. RADINE, *supra* note 195, at 12-13, 78-79, 115-17; Shils & Janowitz, *supra* note 258, at 286-87.

281. B. MOORE, *supra* note 252, at 92-100.

282. The origin and suppression of the great French Army mutiny of May-June 1917, in which at least half of the Army's divisions refused to return to the trenches and several units attempted to march on Paris, illustrates the interaction of these elements. The troops rejected control after a much heralded "win the war" offensive failed with appalling casualties. The apparent futility of further suffering led to spontaneous refusals of duty by several infantry units. These, when on a large scale, could not be punished, and the example led to a collapse of formal authority in the divisions that had suffered worst. Some mutineers then began to express political opposition to the war in the same terms as the active French antiwar movement. The cavalry divisions, which had not suffered serious losses, remained obedient and were often used to repress infantry mutineers.

General Petain, appointed Commander in Chief in May 1917, restored control through a combination of placation, paternalism and repression. He first let it be known that he would adopt a new strategy that would minimize French loss of life; his reputation among the troops made this a credible promise, and he kept it. He also improved food, increased leave, and provided rest facilities for men coming out of the trenches. At the same time, though, he encouraged subordinate commanders to shoot a proportion of mutineers, either known informal leaders, or, in

These same considerations apply to noncombat military personnel. As a preliminary matter, the distinction between combat and noncombat is not absolute but a continuum. The infantry rifleman is the extreme case of physical hardship, isolation and danger. Members of combat crews—machinegunners, artillerymen, tankers, sailors and aircrew, for example—typically act in groups with close contact, less exposure to enemy fire, and divided responsibility for the act of killing.[283] Frequently their living conditions are more comfortable and their danger more intermittent. Behind them come the staff, supply, and maintenance personnel who may be the targets of enemy fire but whose own duties do not involve applying violence. Behind them are the totally safe echelons who neither fight nor are fired upon, but whose individual members may be reassigned forward. Finally, there are those servicemen who, for physical or other reasons, will never be exposed and who are in no more, or less, danger than civilians. In peacetime, of course, even "combat" personnel do not face combat stress. At all stages of the continuum, however, the same process of resistance to military demands occurs, and the military demand for a discipline is the same.

Concededly danger, hardship, and moral stress are lower in noncombat positions. Deprivations do exist, however. The rear-echelon serviceman is still removed from his chosen surroundings, cut off from family and friends, required to perform work he often does not find satisfying (not to mention casual labor and "chicken"), subjected to seemingly arbitrary authority, limited in his access to sexual gratification, and forced to accept a lower standard of food, accomodation, and recreation than he knew in civilian life. His own hardships may appear worse by contrast if officers have superior access to the limited supply of comforts and there is no common experience of danger to mitigate the resentment this produces. He lacks the esteem given combat troops and he knows it. The rear-echelon or peacetime enlisted man is therefore likely to be alienated from the armed forces. Even during World War II, the collective attitude of American enlisted men favored a low level of effort, tolerated "gold-bricking" that did not make more work for other members of the group, believed that good work was not rewarded, and disapproved of individuals who conspiciously tried to meet the organization's requirements.[284] Attitudes have hardly improved since. While the incentives to resistance may be less, the armed forces face significant problems of individual alienation from organizational requirements among noncombat personnel.

The military's interest in overcoming alienation among noncombat per-

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some cases, a random selection. Many of the shootings were contrary to French military law. By September 1917 the French Army was again an effective military instrument, and it retained its cohesion to the end of the war. The surviving mutineers, however, won a partial victory: Petain left the main burden of offensive combat for the rest of the war to the British and Americans. *See generally* R. WATT, *supra* note 241, at 146-246.

283. The task structure of the crew strengthens both the group control of the individual and organizational control of the group. *See* S. MARSHALL, *supra* note 256, at 75-76; L. RADINE, *supra* note 195, at 138-41.

284. *See* AMERICAN SOLDIER: ADJUSTMENT, *supra* note 262, at 155-68, 186-89, 211-16, 219-29, 337-61, 364-75, 410-29.

sonnel does not depend on the skills the serviceman uses in his job. The purpose of noncombat personnel is to provide reliable support services to combat units. An army must be fed, clothed, housed, supplied, transported, paid, and administered in order to fight, and its ability to fight depends in large part on how efficiently and reliably these services are performed.[285] A mechanized army away from its own country must have available for support a miniature version of the industrial society that produced it; it cannot live off the country for fuel, ammunition, and parts.[286] If the support components of an army are not as subject to the commander's will as are the combat components, they may withdraw whenever they find their situation to be too far from home, too dangerous, or not remunerative enough. Military history between the Renaissance and the nineteenth century is full of instances of civilian supply contractors, teamsters, and even artillery drivers disappearing when most needed. The commander whose supporting personnel were under military obligations of obedience and attendance had an advantage over an opponent with only an army of combat troops. The result has been the steady militarization of supply, transport, and maintenance since the late seventeenth century.[287] Regardless of the particular duties he performs, the noncombat serviceman is a means to the same end as the combatant. He may not face as much danger, but the armed forces have the same reason to induce him to comply willingly with the requirements of his job.[288]

From the viewpoint of the government, then, the ideal serviceman is one who has mastered the skills of his particular assignment and has internalized enough of the values of the armed forces to do his job without direct supervision despite fear, hardship, or moral or political disagreement with the ends he serves or the means he employs. The ideal is, of course, hypothetical; a real discipline for the armed forces will fall short of it because a rational military organization must adjust to the basic values of the society from which it draws its personnel. An individual enters the armed forces with his convictions about his own dignity already formed by the first 18-20 years of his life. In the United States, he comes from a society that has taught him to think of himself as a person of independent worth, entitled to a fairly high minimum of dignity and identity, able to exercise independent judgement without regard to hierarchy or tradition. By entering the armed forces he has not, unlike a religious novice, for example, renounced this self-concept. Nor is it possible to isolate him completely enough and long enough to eradicate it. He retains his civilian

285. *See* C. VON CLAUSEWITZ, *supra* note 200, at 95, 128-29.

286. Every rule has an exception. During the *Anschluss* of Austria, the German supply arrangements broke down, and the tanks got to Vienna only by filling up at civilian gas stations. H. GUDERIAN, PANZER LEADER 51 (1953).

287. *See generally* C. BARNETT, BRITAIN AND HER ARMY 1509-1970, at 96-97, 127, 144-45, 178, 213-14, 239, 260 (1970); L. MONTROSS, WAR THROUGH THE AGES 179, 273, 350, 402 (3d ed. 1960); T. ROPP, *supra* note 176, at 42; M. VAN CREVELD, SUPPLYING WAR 5-13, 18-19, 21, 26-27, 30, 34, 37, 42-43, 49-53, 77-80 (1977).

288. This is not to say that the means of inducing effective compliance will not be more "managerial" and less coercive than those used for the combat soldier. *See* L. RADINE, *supra* note 195, at 88-142. It merely asserts that the armed forces have the equivalent interest in exercising however much authority is needed to induce willing compliance.

associations, family and friends, desires to communicate with them and to retain their esteem, and has his attitudes reinforced by them. He wants access to the civilian community in his leisure time; temporary release on pass or leave is one of the more valuable amenities his superiors can give him.[289] When in the civilian community, he has access to civilian values through the media and through personal contact. Depriving him of the dignity and identity he had been raised to expect will tend to make him hostile to the armed forces. Therefore, a rational military organization, once it has demonstrated its basic authority over the serviceman during initial entry, would avoid needless friction and hostility by allowing him as much of his preexisting rights as are consistent with social control.[290] The armed forces are not always rational; superiors frequently develop emotional attachment to military practices that do not enhance efficiency but do alienate the men subject to them.[291] Nevertheless, a military organization concerned with effective performance rather than the comfort and emotional well being of its senior officers would tend to adopt its discipline to the culture from which it recruits. It would do so, however, as a manipulative device, providing whatever degree of "civilian" liberties and amenities would best induce its members to submerge themselves in its tasks.

C. Judicial Protection of Individual Rights

At this point it is useful to summarize. The first, and fundamental proposition is that under the Constitution the President and a majority of each House of Congress may, if they use the proper procedures, lawfully employ any degree of military force against any foreign state, for any purpose, so long as they retain the acquiescence of a majority of their voting constituents.[292] The individuals who comprise the armed forces are their instruments with which to accomplish this force. As such they must be made technically efficient.[293] They also must be made subordinate to the result of the civilian political process, unwilling both to turn their proficiency in violence against their own government and to control policy by withdrawing their services. Moreover, in the United States, this must be accomplished without repressing the civilian political activity on which the legitimacy of the use of military force rests. Accordingly, the individual members of the armed forces must be induced to carry out the will of the political authorities for the time being, despite personal hardship or political or moral disapproval. This is accomplished by a system of psychological manipulation, backed by coercion, that

289. *See* L. RADINE, *supra* note 195, at 38, 122-23, 131.

290. *See generally* L. RADINE, *supra* note 195, at 88-142.

291. *See infra* text accompanying notes 358-59.

292. The effective conduct of war on a substantial scale requires, as a practical matter, the assent of far more than half the voters in half the congressional constituencies. It would be unwise for a government that could only command bare majority support to commit the country to war. *See, e.g., supra* note 248. Such a war, however, would be legal.

293. A military organization as a whole is efficient to the extent that it can apply or threaten force for the purposes chosen by the political authorities at the minimum cost to its own society in life and property. *See* A. VAGTS, *supra* note 192, at 13. A serviceman is efficient to the extent that his technical abilities and attitudes contribute to the organization's efficiency.

detaches the serviceman from his civilian associations to make the proper filling of his role in the organization his principal source of self-esteem.

From the viewpoint of the Constitution's war power, then, the individual serviceman is simply a tool for achieving ends that the effective political majority may select as it sees fit. This relation is at first sight inconsistent with the existence of judicially protected individual constitutional rights that may not be overridden by majority action. To determine the extent of the inconsistency and the degree to which either relation should prevail over the other, it is necessary to set out the rationale for judicial development of antimajoritarian rights.

When the political branches act within the limit of their constitutional authority, they are generally free to decide whether to pursue a particular course of action. A basic assumption of the American political system is that this decision should be influenced by democratic responsibility, *i.e.*, fear of losing the next election if the total of any actor's decisions offends a majority of his voting constituents.[294] The system consists of multiple actors representing separate constituencies, and the constituencies consist of many groups with diverse preferences. Since each actor runs on his entire perceived record, the voters must determine whether he has been, on the balance, a desirable representative. To the extent that the President and Congress respond correctly to anticipated voter reaction, the aggregate of their decisions will reflect the aggregate balance of cost and benefit to the voting public as a whole, even though various components of the voting public will oppose particular decisions with varying intensity.[295] To the extent that they are responsive, then, the political branches will decide whether to pursue a course of action on some approximation of the greatest aggregate good to the represented population. The political branches are considered to be democratic to the extent that each adult citizen of the population is equally able to have the nature and intensity of his preferences reflected in that calculation.[296] Political branch decisions are legitimate, which is to say that the individual has a moral obligation to obey those that affect him adversely, because the decisions are based on a responsible democracy which has included his interests in the calculation of the general good.[297]

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294. There may be more noble reasons for an elected official to serve what the public considers its interest, but the desire to be re-elected is a check on even the most venal. *See* THE FEDERALIST, *supra* note 207, No. 57, at 385-86 (J. Madison); *id.* No. 72, at 487-90 (A. Hamilton).

Subordinate executive officials, though not directly responsible to the electorate, are subject to the direction of and can be discharged by the politically responsible President. U.S. CONST. art II, § 1, cl. 1; *id.* art II, § 3, cl. 3. *See* Myers v. United States, 272 U.S. 52 (1926). *Cf.* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (limiting *Myers* to removal of purely executive officers).

295. *See* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 405-08 (1978).

Intensity may be defined as the individual's tendency to vote for or against a candidate on the basis of his performance on a single issue. *Id.* at 407. *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 90-92, 277 (1977) (discussion of collective goals).

296. *See* Reynolds v. Sims, 377 U.S. 533, 561-67 (1964); Wesberry v. Sanders, 376 U.S. 1, 7-18 (1964); Gray v. Sanders, 372 U.S. 368, 380-81 (1963).

297. *See* J. ELY, DEMOCRACY AND DISTRUST 81-87 (1980); H. MAYO, INTRODUCTION TO DEMOCRATIC THEORY 79-85 (1960).

The political effect of a claim that an action is beyond the constitutional power of the political branches is to transfer from them to the judiciary the final authority to decide whether it may be done.[298] On occasion the courts may decide that a course of action is unconstitutional because the end it pursues, such as de jure segregation, is itself forbidden.[299] More often, the courts must determine whether a means chosen by the political branches in pursuit of a concededly lawful end must be forbidden because it infringes an institutional or individual interest protected by the Constitution. When a court determines that a particular means is unconstitutional, it leaves the political branches free to pursue the end by other feasible means. Insofar as the political branches have chosen the means through calculation of the highest aggregate general good, constitutional protection of the conflicting interest requires them to either impose greater costs on unprotected interests or, if that is not politically feasible, to forego the end. If the means held unconstitutional is the only technically or politically feasible one, the courts have in effect precluded the political branches from pursuing an end which is itself permitted by the Constitution.

In adjudicating a claim that an individual has a constitutional right not to be subject to a government action taken in pursuit of a lawful end, the courts decide whether they will allow an individual not to bear a cost that the political branches, have determined he should bear for the benefit of the society as a whole. To determine that the individual has a constitutional right to be free of the government action is therefore to determine that the interest he asserts is important enough that it should not be infringed even when the general good would benefit from doing so.[300] Moreover, the courts receive only limited assistance from the text of the Constitution itself in determining the nature and gravity of the individual interests worthy of protection.[301]

To decide an individual constitutional claim, then, a court must perform three tasks. The first is to define the individual interest involved. It must then determine the effect which protecting that interest will have on the attainment of the ends chosen by the political branches. Having done so, the court must finally decide whether the individual interest is sufficiently important that it should be protected despite the effect. Because of the open ended nature of the constitutional text, defining the scope of the individual interest is predominantly a question of values, as is deciding whether the individual interest outweighs the general goal that will be thwarted. The intermediate step of calculating how far the general interest will be thwarted, however, is a question of fact, or rather, a fact-based prediction of the future behavior of institutions and large numbers of people. The willingness of a court to decide in favor of the individual depends on its confidence that it is superior to the political branches in defining and weighing individual interests, and that it can

298. *See* J. ELY, *supra* note 297, at 4.

299. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

300. *See* R. DWORKIN, *supra* note 295, at 4, 92, 270-71.

301. *See id.*, *supra* note 295, at 135-36, 147, 272-74; J. ELY, *supra* note 297, at 11-41; T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 3-20 (1970); Ely, *supra* note 295, at 412-15.

predict with acceptable accuracy the consequences of preferring the individual.

When the political branches decided to act, they necessarily weighed the affected individual interests; a judicial decision constitutionalizing the individual interest rejects that balance.[302] Since the federal courts are not politically responsible, there has been great disagreement about how far they should substitute their own perception of the relative values involved for that of the more democratic organs of government. The school of thought least willing to defer to the judgment of the political branches has argued that the individual rights protected by the Constitution are the fundamental moral values on which our society rests, that the courts are best able to determine the nature and scope of these values, and that, in the event of conflict, other objectives that the political branches may pursue must defer to the maintenance of these values.[303] These views display the greatest confidence in the court's ability to adjust correctly the relation between individual autonomy and institutional interest; they are characteristic of the dissenting position in the separate community cases.[304] If the power of the political branches to pursue military efficiency at the expense of servicemen's interests can be defended against this strongly judicialist approach to constitutional rights, it can withstand any theory of judicial review that gives greater deference to legislative judgment.[305]

The judicialist position, as set forth primarily by Professor Dworkin, begins with the distinction between "rules," "policies," "principles," and "rights." A rule is an "if-then" statement about government action: if condition A exists, then the government must make consequence X happen.[306] Policies and principles are the two justifications for rules. A policy is a reason for acting to further a goal, i.e., some other social, economic, or political purpose. A principle, on the other hand, is a reason for acting that states the result of the action to be "fair, just, or otherwise moral in itself."[307] Policies are identified with the utilitarian pursuit of the collective well being, while a right is by definition a situation in which the individual interest trumps the collective well being. One has a right to a result if one must obtain that result despite its effect on the collective good.[308] Rights are based on the superiority of a moral principle to the policy in question.

Rights may be either "background" or "institutional." A background

302. *See* R. DWORKIN, *supra* note 295, at 277; Ely, *supra* note 295, at 407-08.

303. *See, e.g.*, R. DWORKIN, *supra* note 295; Fiss, *The Supreme Court 1978 Term, Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Karst, *The Supreme Court 1976 Term, Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). *But cf.* J. ELY, *supra* note 297, at 43-72. *See generally* Dorsen, Book Review, 95 HARV. L. REV. 367, 385 nn.100 & 103 (1981) (reviewing H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)).

304. *See supra* notes 189-96 and accompanying text.

305. *See* R. DWORKIN, *supra* note 295, at 138-40.

306. *Id.*, *supra* note 295, at 24.

307. *Id.*, *supra* note 295, at 22; Wellington, *supra* note 303, at 222-27.

308. *Id.*, *supra* note 295, at 4, 85, 90-92, 137.

right is one that permits, though it does not compel, a political decision. An institutional right is one that entitles the individual to a specific decision from a particular institution.[309] An institutional right, then, is a principle reduced to a rule that entitles an individual in a particular situation to a favorable decision despite a policy to the contrary.

In the judicialist view, the portions of the Constitution, notably the Bill of Rights, that establish fundamental individual rights are not in themselves rules. Instead, they are statements of principle from which the courts as an institution must derive rules to fit particular situations. The courts have a duty to interpret and apply the principles as an internally consistent body despite the accidents of the particular situation. The common core of these principles, by which they may be made to approach consistency, is the moral conception that "government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived."[310] This is said to be the ruling principle of the system of government established by the Constitution; it justifies both democracy and the use of judicial review to check the tendency of democracy to violate fundamental rights.[311] The protection of the right to equal human dignity and concern, as elaborated in free expression, personal privacy, procedural fairness, and freedom from invidious discrimination, is thus the primary purpose of the government. Other principles and policies are subordinate to it.

The courts, in this view, are superior to the political branches in defining and applying these moral principles. This process is ideally one of deriving general principles from history, precedent, text, and philosophy through reason and then applying them to the case at hand.[312] The political branches, insofar as they are responsible to the electorate, reflect the popular desires of the moment on any particular issue. The public may not reflect on the relation of a policy to fundamental principles, or if it does, it may lack the "dialectical skill" to correctly relate the particular policy to the whole body of principle.[313] Moreover, calculations of individual good, which when aggregated produce the political system's view of the general good, are invariably tainted with indifference or hostility to the equal dignity of disfavored groups.[314] The judiciary, on the other hand, cannot refuse to consider questions of principle placed on its agenda by parties, must respond to the arguments presented, and must justify its decisions with reasoned explanations. Its members are free of political responsibility and the concomitant pressure to submit to unreflective pub-

309. *Id.*, *supra* note 295, at 93.

310. *Id.*, *supra* note 295, at 135-37, 272; Fiss, *supra* note 303, at 11, 16-17; Karst, *supra* note 303, at 5-11, 39-42.

311. *See* R. DWORKIN, *supra* note 295, at 274-77.

312. *See id.*, *supra* note 295, at 85, 279-90; Fiss, *supra* note 303, at 12-14; Wellington, *supra* note 303, at 246-48. *But cf.* J. ELY, *supra* note 297, at 43-72.

313. R. DWORKIN, *supra* note 295, at 129.

314. *Id.*, *supra* note 295, at 277.

lic opinion. They can be neutral among the contentions presented, and we expect them to be. The institutional position of the courts therefore makes it possible for willing judges, properly trained in moral philosophy, to reason their way to correct conclusions about the meaning of constitutional principle and its weight relative to political branch policy.[315]

Concededly, judges may reach incorrect conclusions about the nature and importance of the principles involved, but in this view they have a better technique for deciding and are at least as likely to decide correctly as the political branches.[316] Once having valued the relative importance of principle and policy, though, judges might also decide incorrectly that recognizing the individual right in question will only interfere with the policy to an extent proportionate with their relative values.[317] They may, in other words, impose upon the political branches a cost which they would not if they had perfect knowledge of consequences. Alternatively, they may overestimate the adverse effect on policy and needlessly infringe on principle. While exacerbated by the uncertainty of prediction, this problem is basically the same one faced by a trier of fact: determining which of two proffered versions of reality is the more correct.

When the law favors one type of outcome over another, the direction of the trier's likely error is skewed by imposing a higher burden of proof on the disfavored party. For example, criminal defendants who may be "actually" guilty are acquitted for lack of proof beyond a reasonable doubt because the consequence of this type of error is more desirable than the mistaken conviction of those not guilty.[318] If furthering the moral principles incorporated in the Constitution is the primary purpose of government, then error in that direction is more tolerable than the other.[319] Accordingly, when the individual appears to have a fundamental interest, the court must recognize it as a right unless the government can demonstrate that its infringement is no greater than required to serve a policy of an importance proportional to the infringement.

In sum, the judicialist position is that the Constitution contains the components of a moral imperative that each member of the society must be treated as a human being having an intrinsic value in himself, that the primary purpose of our system of government is to protect this core of humanity, that the institutional structure of the courts makes them the government agency best able to translate this moral imperative into rights applicable to specific situations, that other objectives of the government must give way to the protection of these individual rights when they conflict, and that, in case of doubt, it is

315. *See* Fiss, *supra* note 303, at 30-34; Wellington, *supra* note 303, at 246-48.

316. *See* R. DWORKIN, *supra* note 295, at 130.

317. *Compare* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) *with* Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976) *and Kelly*, 397 U.S. at 278-79 (Black, J., dissenting).

318. *See In re* Winship, 397 U.S. 358, 363-64 (1970). *Cf.* Addington v. Texas, 441 U.S. 418, 423-29 (1979).

319. *See* Speiser v. Randall, 357 U.S. 513, 525-26 (1958). *See also* Lego v. Twomey, 404 U.S. 477, 492-95 (1972) (Brennan, J., dissenting); Monitor Patriot Co. v. Roy, 401 U.S. 265, 275-77 (1971); Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Brennan, J., concurring and dissenting).

preferable to err on the side of protecting the individual rights. Elements of this doctrine underlie the "compelling interest," "strict scrutiny" standard of review that the opponents of the separate community doctrine contend is the Supreme Court's normal approach to claims of fundamental individual rights. The court's asserted superior competence to balance individual and governmental interests[320] springs from the nature of the process for defining individual rights. Judicial skepticism about claims of governmental necessity derives not only from suspicion of the government's motives,[321] but also, more importantly, from a willingness to accept the possible failure of the institution to carry out its policies rather than to infringe needlessly individual rights. If the primary purpose of the state is to further fundamental individual rights, it follows that the institutional interests of prison administrators, welfare administrators, school officials, and the national security authorities include an overriding interest in operating their organizations to minimize nonessential harm to those rights.[322] We must now consider why this doctrine of judicial-political relations should not apply to the control of the political branches over servicemen's rights within the armed forces.

D. The Limits of Judicialism

From the viewpoint of the political branches the serviceman should be permitted only those rights that, because they cater to his preexisting expectations that cannot be readily effaced, induce him to be a more willing, and therefore more effective, instrument of the organization's purposes.[323] This concept is completely opposed to the humane equality that, in the judicialist view, underlies both the democratic political process established by the Constitution and the individual rights that the Constitution raises above democratic outcomes. The individual as a means contradicts the individual as an autonomous personality who believes in his own intrinsic worth.

The desire, or even the need of the armed forces to operate from this assumption does not self-evidently justify itself. The war power is but one of the substantive powers of the national government that can be carried out through complex organizations. The management of any hierarchical organization would find it in the institution's interest to submerge its members in their roles: those who manage total institutions, such as prisons, may have the

320. *See supra* note 193 and accompanying text.

321. *See supra* note 192 and accompanying text.

322. *See supra* note 189 and accompanying text.

323. This must be distinguished from two similar views of the relation: that the serviceman should have no legal rights at all, or that the judgment of his military superiors of what rights he should be given always serves the armed forces' best interest. The first is inconsistent with the utility of certain rights as a manipulative device. *See supra* notes 289 & 290 and accompanying text. The second ignores the tendency of supervisory personnel in the armed forces, as discussed below, to confuse their own comfort and prestige with the goals of the organization unless checked. *See infra* notes 350-59 and accompanying text.

It should also be noted that the operation of the political system tends to prevent the political branches from carrying the relation to its logical extreme. *See infra* notes 366-77 and accompanying text. *Cf.* C. VON CLAUSEWITZ, *supra* note 200, at 80-81, 579-81, 589-93.

physical capacity to do it.[324] Judicial deference to the military concept of individual rights against the armed forces must be justified by the unique function that they perform, the equally unique consequences of erroneous interference with that function on behalf of the individual, the likelihood of unacceptable judicial error, and the superior ability of the political authorities to accommodate individual interests to the armed forces' unique needs.

The distinctive aspect of the armed forces is that they are the government's instrument of coercion against entities that are entirely outside the system of domestic law. In its relations with residents of the United States, the government acts only through legal authority and the persons against whom it acts are under a reciprocal obligation to obey its legal commands.[325] This is not to say that every resident always agrees with and obeys the law, but rather that the United States commands sufficient force and the acquiescence of enough of the population that it can secure obedience through procedures regulated by preexisting law. The limits of its capacity to control the behavior of its residents are self-imposed in the sense that the "self" includes the constitution-making and constitution-applying authority. The system of law is a pyramid, in which the obligation of the resident to the government and his institutional rights against it both derive from the apical Constitution. All relations within the system are governed by the distribution of authorities at its summit. Individuals and the government receive their rights against one another from what they recognize as a common superior, the political will embodied in the Constitution. Conversely, the permissible goals of all actors within the system are limited by that political will.

The limit of legal action is reached when enough people deny their obligation to obey the government and command enough collective physical force to resist coercion by legal procedure. The authors of *The Federalist* considered the essential difference between a government and a mere association of states to be the distinction between the "coertion of the magistracy, or . . . the coertion of arms."[326] In the first, a government meets disobedience through legal process against individuals subject to its authority; in the second, it acts against the will of an independent political body by violence carried to any necessary

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324. *See* A. ETZIONI, *supra* note 250, at 3-22; E. GOFFMAN, *supra* note 252, at 5-12.

325. The term "resident" is used in the sense of an individual who, because of United States citizenship or physical presence in the United States, is obliged to obey United States law and, concomitantly, is protected by the Constitution. *See* Reid v. Covert, 354 U.S. 1 (1957) (U.S. citizen abroad); Blackmer v. United States, 284 U.S. 421 (1932) (U.S. citizen abroad); Wong Wing v. United States, 163 U.S. 228 (1896) (illegal alien in U.S.); The Schooner Exchange, 11 U.S. (7 Cranch) 116 (1812) (alien vessel in U.S.). *Cf.* Johnson v. Eisentraeger, 339 U.S. 763, 771-73 (1950)(enemy alien abroad); Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144, 152-53 (D.D.C. 1976) (friendly alien abroad).

The reciprocal relation of obedience to law and protection by it, based on the permanent status of nationality or the temporary accident of physical presence in the jurisdiction, derives from the common law concept of permanent or temporary "allegiance" to the King and ultimately from the reciprocal nature of political obligations in the feudal system. *See* O. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 363-64 (5th ed. 1973); E. WADE & G. PHILLIPS, CONSTITUTIONAL LAW 193-94 (4th ed. 1955); 1 W. BLACKSTONE COMMENTARIES *366-71.

326. THE FEDERALIST, *supra* note 207, No. 15, at 95 (A. Hamilton).

extreme.[327] The limits of legal authority, and the contrasting relation of warfare, are illustrated clearly by the reaction of the Supreme Court to the massive disobedience that resulted in the Civil War.

The Court had to determine the relation to the government of pro-secession individuals within the loyal states and of allegedly loyal individuals in territory that had been under the control of secessionist governments. It classified them, not by individual attitude, but by the collective attitudes of the inhabitants to legal obedience. In *Ex parte Milligan,* the Court held that the petitioner, accused of disloyal conduct in Indiana, retained the rights of a person under the legal authority of the United States because the "courts were open."[328] This is to say that no sufficient body of people had denied the authority of the United States in the area involved and prevented its normal institutions from functioning by legal process. On the other hand, when the population of an area had withdrawn its collective assent to federal authority and set up an effective de facto government, the Court consistently held that individual residents were subject to whatever force the United States political authorities considered necessary to subdue the hostile body, without regard to its personal loyalty or disloyalty to the United States. Because the United States and the hostile de facto government recognized no common superior, the only way in which the United States could assert its authority was to overcome the force and break the will of the other through war. Its effect on individual residents of the belligerent area was only incidental to its effect on the hostile government. Given the desire to destroy the Confederacy, the means that the United States had to use depended not on its self-imposed priorities but on the strength behind the hostile will. They were imposed, in effect, by the resistance of the other belligerent.[329]

War, the activity for which the armed forces exist, thus differs from any other activity in which the United States imposes its will. When acting internally, the political branches of the government act within a hierarchy of values that applies both to it and the persons it acts against. The goals which the government pursues are attained through means derived from the legal system. Therefore the ability to attain them is limited by the higher goals of the system, which are to further the fundamental principles found in the individual guarantees of the Constitution. When seen from the perspective of the system as a whole, a government institution is most effective when it attains its particular purpose with the least infringement of fundamental principles. An effective prison is one that immobilizes and, one hopes, corrects prisoners without unnecessary infringement of their intellectual and personal privacy;[330]

327. *Id.* No. 16, at 99-101 (A. Hamilton); *id.* No. 8, at 44-46 (A. Hamilton).

328. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122-27 (1866).

329. *See* Young v. United States, 97 U.S. 39, 58 (1877); Lamar v. Browne, 92 U.S. 187, 194 (1875); Mrs. Alexander's Cotton, 69 U.S. (2 Wall.) 404, 417-20 (1864); The Venice, 69 U.S. (2 Wall.) 258, 274 (1864); The Prize Cases, 67 U.S. (2 Black) 635, 666 (1862); *id.* at 686-87 (Nelson, J., dissenting). *See also supra* note 234 and accompanying text.

330. *See* Procunier v. Martinez, 416 U.S. 396 (1974). *But cf.* Bell v. Wolfish, 441 U.S. 520 (1979).

an effective welfare system is one that provides benefits to those legally entitled without arbitrary indignity;[331] an effective school is one that maintains orderly instruction without preventing students from expressing their political views.[332] What is true of those on whom the government acts is equally true of those, its officers and employees, through whom it asserts itself.[333] An institution that seeks to submerge the individual in his role takes too narrow a view of its proper function, and it is the office of the courts, as spokesmen for the political will, to enforce the wider perspective that underlies the Constitution.

When acting in relation to another state, however, the United States is not limited by principles made binding upon it and its adversary by a political will superior to both. Unless it can reach agreement, it can assert its own will only by force. The exercise of that force is limited only by the will and resources of its antagonist. Because war is directed externally, against entities that have no legal relation to the United States government under the Constitution, no goal for which it is fought and no injury that is inflicted is inconsistent with the constitutional principles governing the relation of the United States to its own residents. Since the objects on which the armed forces act are outside the constitutional system, the effectiveness of the armed forces cannot be defined in terms of the system's higher purposes. In this they differ from all other coercive organizations within the government.

It follows that the consequence of judicial intervention in the relation between the armed forces and its members is different in kind. Given that the policy the government pursues is itself permissible,[334] a court that recognizes a claim of individual constitutional right limits the means by which the policy may be pursued to the extent necessary to protect a principle from collateral harm. If the court underestimates the effect that recognizing the right will have on the government's ability to pursue the policy, its mistake may prevent the government from attaining its goal. While the accomodation of policy and principle in that case is imperfect, the direction of error assures protection of the higher values of the legal system.[335] The court hinders attainment of a lesser goal to further the higher purpose of the system.

That is not the case when the armed forces are involved. A personnel practice that contributes to military efficiency fosters the attainment of the goals set by the political branches at the least human and material cost to the armed forces.[336] A court may determine that the practice is inconsistent with constitutional principles as applied to civilian authority—this is not unlikely in the light of the assumptions underlying military discipline. If there is an equally effective technique that does not infringe these principles, the court

331. *See* Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970).

332. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07 (1969).

333. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16 (1979); Pickering v. Board of Educ., 391 U.S. 563, 568-70 (1968).

334. This, of course, is not always the case. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 61-64 (1982); Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969).

335. *See supra* text accompanying notes 316-22.

336. *See supra* note 293.

may protect individual rights without loss of military efficiency. If no such alternative exists, the court's intervention raises the cost in lives and material of reaching the government's goals. At some point, the increase will deprive the government of the will or the means to overcome the adversary. If the political branches realize the loss of efficiency, the judicial decision will deter them from pursuing ends they otherwise would. If the loss of efficiency goes unnoticed until war is undertaken,[337] military failure, incomplete success, or success at a higher cost result. In either case, judicial preclusion of military personnel practices based on an incorrect belief that military effeciency will be unimpaired decreases the ability of the political branches to impose their will on another state. At the worst, it permits the imposition of the will of another state on the United States.

These consequences cannot be justified by their service to the higher principles of the legal system. The goals that the United States chooses to pursue as a nation among nations are wholly independent of the principles that control the relation of its government to those subject to its laws.[338] As long as the constitutional process is complied with,[339] the courts have no basis to determine that any decision to use force internationally is substantively improper. Moreover, the decision to use force depends in part on the actions of other states, which are entirely outside the control of the legal system. The armed forces are the government's instruments of international coercion. Since the courts cannot assign values to the purposes for which the armed forces will be used, they cannot decide that the United States' inability to reach any particular military goal is outweighed by the enhanced rights of members of the armed forces.[340] A mistaken judicial conclusion that servicemen's individual rights can be protected without impairing military efficiency has the court do inadvertently what it has no standard for doing deliberately. Because the uses to which the armed forces are put cannot be judged by the principles of the legal system, mistaken balancing that impairs those uses is not offset by vindication of the hierarchy of values within the system.

The consequence of judicial error is even more serious with respect to the secondary function of military discipline—protection of civilian supremacy. The armed forces, as practitioners of international violence, have the ability both to physically coerce their own society and to dictate its foreign policy by

337. The political branches undertake war either when they initiate the use of force or when they refuse to accept the will of the adversary on a point despite the adversary's possible use of force. *See* L. HENKEN, *supra* note 215, at 100-02; A. SOFAER, *supra* note 213, at 100-03, 207-09.

338. *See supra* notes 202-15 and accompanying text.

339. That process includes the existence of a system of political liberty which constrains the choices of the President and Congress. *See supra* text accompanying notes 232-35, 245-49.

340. Moreover, military efficiency is neutral with respect to the purposes that the government pursues. Positive ideological commitment, as opposed to mere acceptance, has little to do with motivating effective performance by servicemen. *See supra* text accompanying notes 277-78. Most manipulative techniques within the armed forces are based on factors independent of the purpose of any particular war. *See supra* notes 254-88 and accompanying text. For the courts to deny the armed forces the constitutional authority to use a particular method of discipline because of *sub rosa* aversion to the present war they are involved in is to deny them the power to use it to prepare for any other conflict, including future conflicts which might be more favorably received.

refusing to act. As noted above, active coercion and obstruction have been used both by officers and by enlisted personnel to impose their views on civilian governments. These military usurpations have one common characteristic: they consist of collective action, either under the control of existing leaders who misuse their position in the institution or of ad hoc leaders who derive their authority from the assent of the disobedient group. They are an expression of political views through collective action in the capacity of soldiers rather than as members of the political system.[341] The effect on civilian supremacy is obvious when a segment of the armed forces attempts to impose its political will on the remainder of society by force. It is equally serious when it occurs through inaction. If a substantial segment of the military refuses to execute a policy with which it disagrees, the political power to make that policy has been transferred from the President and a majority of Congress, acting through the political system, to the armed forces. Both are a direct contravention of the principle of civilian supremacy. A judicial decision that mistakenly weakens restraints on collective action in a military capacity therefore does more than frustrate a legitimate policy without corresponding enhancement of principle; it leads to the direct overthrow of the democratic political system established by the Constitution.

Not only are the consequences of judicial error uniquely serious; it is peculiarly likely to occur when the courts assess the effect of a practice on military effectiveness. Three possible reasons suggest themselves for this: inability to understand the technical aspects of the problem, aversion to the basic assumptions of military discipline, and absence of feedback from military experience. The first can be dismissed: there is no basis to conclude that judges are distinctly less able to comprehend the technical aspects of military discipline than any other complex scientific or economic issue with which they are presented.[342] Moreover, as explained below, no one else can be certain of superior knowledge. The second reason is somewhat more substantial. The moral assumptions that underlie military discipline are opposed completely to those which are embodied in the Bill of Rights, and it might well be difficult for judges thoroughly imbued with the latter system to view sympathetically the needs of the armed forces from the perspective of the former. This, however, is speculative; it cannot be said that judges who know their own predispositions will not make a conscientious effort to overcome them once they

341. *See supra* notes 241-43. *See also* D. HORN, *supra* note 238, at 214-25.

342. Notwithstanding the language of Gilligan v. Morgan, 413 U.S. 1, 7-8 (1973), the subject is no more intrinsically difficult than the scientific and economic predictions that the courts must make in the review of adminstrative rulemaking. *See, e.g.*, United Steel Workers v. Marshall, 647 F.2d 1189, 1288-1311 (D.C. Cir. 1980). The distinction is rather in the consequences of a mistake and the inability to detect it.

It should be noted, however, that the majority of the Burger Court has become increasingly modest about judicial ability to review "expert" decisions on points of fact and predicton. *See, e.g.*, Youngberg v. Romeo, 102 S. Ct. 2452, (1982); Parham v. United States, 442 U.S. 584, 607 (1979); Bell v. Wolfish, 441 U.S. 520, 544 (1979); Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978).

have been made aware of the armed forces' singular needs.[343] The principal reason why judicial error is uniquely probable is the inability to measure the effect of any decision against the reality of military performance.

One of the distinctive virtues of judge-made law is its ability to adjust the application of a rule in the light of its practical consequences. If it turns out that the court's understanding of social conditions was incorrect or has changed, the application of the rule in subsequent cases generates incorrect, undesirable, or unjust consequences that provide a basis for modifying it. When the court, in a constitutional case, has decided that an individual right can be protected at an acceptable cost to some other government policy, the continuing experience of the institution responsible for pursuing that policy will demonstrate the actual cost. If it turns out to be excessive, doctrine can be changed.[344] The process depends, though, on the ability of the affected institution to produce results that can be judged in terms of its policy goals.

The armed forces cannot do this. The primary function of a military organization is to wage war, and the only true measurement of its effectiveness is how well it performs in war. Anything else is an approximation: training and exercises cannot approach the actual danger, dislocation, fear, and uncertainty of war itself. Wars, particularly major ones against a relatively equal enemy, occur only infrequently. The activity of a rational military organization in peacetime is directed toward preparing for the uncertain outbreak of war, but all thinking in the interim about the effects of changes in doctrine, discipline, and equipment is speculation. Much of it will turn out to be grossly wrong.[345] If judicial intervention does impair the effectiveness of military discipline, there is no way to determine and correct the mistake until it has produced the substantial and sometimes irreparable cost of failure.

To conclude, the conditions which justify the creation of individual constitutional rights that impede the attainment of other policies by government institutions are not present in the relation between the serviceman and the armed forces. Unlike the other agencies of government, their function cannot be defined to include implicitly furthering the moral principles implicit in the Constitution. Impairment of their functions carries consequences that hinder, rather than assist, the attainment of those principles. Mistaken impairment is particularly likely because they exercise their true function only sporadically. Without the assistance of overriding moral principle, the courts are badly situated to mediate between the institutional needs of the armed forces and the individual autonomy of the serviceman.

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343. *But see* Parker v. Levy, 417 U.S. 733, 766 (1974) (Douglas, J., dissenting); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980).

344. *Compare* Betts v. Brady, 316 U.S. 455 (1942) *with* Gideon v. Wainwright, 372 U.S. 335 (1963); *compare* Goldberg v. Kelly, 397 U.S. 254 (1970) *with* Mathews v. Eldridge, 424 U.S. 319 (1976).

345. In a particularly notorious example, all the best professional thinkers before World War I were convinced that it would be a short war dominated by the offensive. *See* T. ROPP, *supra* note 176, at 215-18, 222-30.

III. Review of Political Rationality

Because of the unique nature and function of the armed forces, the mode of judicial review that gives primacy to individual rights is unsuited to overseeing the relation between the serviceman and the military organization. This, though, is hardly the end of the matter. The peculiar status of members of the armed forces as instruments of the political branches is justified only by the two constitutional principles of unrestricted choice of military means and civilian political supremacy. To the extent that a military practice does not further these principles, it is subject to civilian constitutional standards.[346] The courts must still determine, therefore, whether a decision by the military authorities or their political superiors to depart from civilian constitutional norms does further instrumental effectiveness or subordination. In evaluating the military or political decision, the courts require a conception of the confidence that can be placed in other authorities' judgment and a standard of review that will skew the direction of judicial error to reflect this confidence.[347] Finally, the courts must preserve the free functioning of the civilian political process, on which the legitimacy of politico-military decisions depends, by protecting it from even rational military practices that have the collateral effect of distorting it.

A. The Competence of Nonjudicial Decision Makers

A military departure from civilian constitutional norms necessarily involves a judgment, however inarticulate, that the loss of liberty or entitlement to the serviceman is outweighed by the gain in effectiveness or subordination. The decision may have been made overtly by Congress,[348] or it may have been delegated, through general statutory provisions, to the executive—in practice, the military—authorities.[349] The confidence that can be placed in the accomodation of civilian liberties to military needs differs markedly between the two.

Neither the legal responsibilities nor the institutional behavior of the armed forces gives confidence that they can properly balance individual and institutional interests. Their formal mission is, of course, to apply military force effectively.[350] Their internal authorities, recruited from those trained in the pursuit of effectiveness, are not directly responsible to those who assert the

346. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); O'Callahan v. Parker, 395 U.S. 258 (1969); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

347. *See supra* text accompanying notes 320-322.

348. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25 (1976); 10 U.S.C. § 820 (1982).

349. There are two types of delegation to the military authorities. The first is the general statutory authority of the three services to make all necessary regulations. See 10 U.S.C. §§ 3012(g), 6011, 8012(f) (1982). The access regulations at issue in Greer v. Spock, 424 U.S. 828 (1976), for example, arose from this authority. The second is specific statutory authority to develop more detailed standards on a particular subject. The power to punish conduct "to the prejudice of good order and discipline in the armed forces" is conferred by statute, 10 U.S.C. § 934 (1982), while the definition of such conduct is left to the military and the courts of military review. *See* Parker v. Levy, 417 U.S. 733 (1974); *supra* notes 45-63 and accompanying text.

350. *See* 10 U.S.C. §§ 3062, 5012-5013, 8062 (1982).

claim of individual liberty. Accordingly, their institutional bias is toward what they believe will maximize their effectiveness; they are not concerned with furthering other values by accepting less than what they consider effective performance.[351] Even from the viewpoint of maximizing effectiveness, moreover, the armed forces are not always competent judges of how to attain what they consider their own best interests. Instead, senior military authorities not infrequently emphasize the authoritarian aspect of discipline over the paternalistic or manipulative, even when the hostility produced in their subordinates by "chicken" outweighs any gain in control over performance.

Three reasons might be assigned for this. The first, isolation from civilian values, is the converse of the possible judicial phenomenon mentioned above. The underlying moral premise of military discipline is the abnegation of the needs of the individual before the needs of the organization, and the moral code in which the officer is socialized denigrates the value of self as against duty.[352] Even if this code is honored in the breach, the ideal of putting the performance of the task and the well being of subordinates ahead of personal benefit remains.[353] One who believes himself bound by and complying with this code of self-denial and subordination cannot be expected to completely sympathize with contrary values of diversity and autonomy.[354]

The second is a reaction to the uncertainty inherent in the armed forces' functions. The essence of the commander's job in wartime is to make decisions with dangerous consequences, using inadequate, conflicting, and misleading information, under physical and mental stress imposed by the enemy's initiative.[355] In peacetime there is no adversary, but uncertainty arises from the lack of feedback from actual performance. Many of the distincitve aspects of military society can be explained as attempts to alleviate or repress uncertainty by creating the appearance of order and control.[356] One aspect of this is the tendency of senior military personnel to insist on the outward appearance of conformity and subordination as an end in itself. Increasing the serviceman's automony, even when it produces more intelligent and enthusiastic performance, may be resisted because it decreases the appearance of control.[357]

Linked with the concentration on externals rather than performance is the

351. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 302 n.41, 309-10 (1978); Hampton v. Mow Sun Wong, 426 U.S. 88, 103-05, 114-15 (1976).

352. *See* N. DIXON, *supra* note 192, at 189-207 (1976); S. HUNTINGTON, *supra* note 236, at 63-64; M. JANOWITZ, *supra* note 272, at 215-16 (1960).

353. *See* L. RADINE, *supra* note 195, at 54-56, 67-68; AMERICAN SOLDIER: ADJUSTMENT, *supra* note 262, at 382-88.

354. *See* N. DIXON, *supra* note 192, at 185-86, 261-62; M. JANOWITZ, *supra* note 272, at 248-49.

355. *See* C. VON CLAUSEWITZ, *supra* note 200, at 117-18; N. DIXON, *supra* note 192, at 27-34; S. MARSHALL, *supra* note 256, at 85-93, 101-09.

356. *See* N. DIXON, *supra* note 192, at 186-87, 189-94; M. JANOWITZ, *supra* note 272, at 51. As sympathetic a commentator as Huntington has noted the tendency of military professionals to view risk with comprehensive pessimism and, therefore, to ask for as much of all resources as they can get. S. HUNTINGTON, *supra* note 236, at 66-67.

357. *See* N. DIXON, *supra* note 192, at 176-89; AMERICAN SOLDIER: ADJUSTMENT, *supra* note 262, at 391-97.

degeneration of military discipline into militarism, which Vagts has defined as the ideology that values, ideas, and practices associated with armies as ends in themselves, without regard to the effective use of military force as a means to rational ends.[358] One aspect of militarism is that, without feedback from performance in war, the superiors in a military organization tend to promote their own comfort, self-esteem, and prestige at the expense of effectiveness. Conspicious among those aspects of military life that are vulnerable to militaristic degeneration is the structure of subordination and deference, which directly feeds the self-esteem of those in its upper reaches.[359]

Experience abroad and in the United States has demonstrated the possiblity that the military authorities will not adjust their practices to changing social conditions. The Prussian Army of 1806 and the British Army of 1916 are familiar examples of armies that could not make the most effective use of their societies' military potential because they would not modify training and discipline to accomodate the intelligence and enthusiasm of segments of the population from which they had not previously recruited.[360] In the United States, the senior officers of the Army and Navy resisted the statutory abolition of corporal punishment during the 19th century, despite the fact that flogging deterred higher quality personnel from enlisting.[361] During the Second World War, the Army's system of discipline, which emphasized formal rather than manipulative control, antagonized large numbers of enlisted men. Their officers, however, generally believed that it was fair and satisfied the troops.[362] The Army persisted with segregated units of black personnel even after combat experience in World War II demonstrated that racial integration used them more effectively; a direct order of President Truman was needed to end the practice.[363] Both services opposed the post-World War II revision of the military justice statutes in the direction of more legal rights for the court-martial defendant; this resulted from civilian initiative both inside and outside of the Defense Department.[364] While these instances are not determinative,[365] they demonstrate a resistance by senior military personnel to outside values, even those which enhance effectiveness, that justifies skepticism about the bal-

358. *See* N. DIXON, *supra* note 192, at 172; A. VAGTS, *supra* note 192, at 11-13. The classic statement is that of the Russian grand duke who "hated war because it spoiled the armies." *Id.* at 13.

359. *See* N. DIXON, *supra* note 192, at 182-84; M. JANOWITZ, *supra* note 272, at 50-51.

360. *See* W. GOERLITZ, HISTORY OF THE GERMAN GENERAL STAFF 1657-1945, at 23-32 (1953); J. KEEGAN, THE FACE OF BATTLE 215-27 (1976); B. LIDDELL-HART, THE REAL WAR 1914-18, at 224-25 (1930).

361. *See* H. LANGLEY, SOCIAL REFORM IN THE UNITED STATES NAVY 1798-1862, *passim* (1967).

362. *See* AMERICAN SOLDIER: ADJUSTMENT, *supra* note 262, at 374, 391-97, 410-23.

363. *See* Ambrose, *Blacks in the Army in Two World Wars*, in THE MILITARY AND AMERICAN SOCEITY 177-91 (S. Ambrose ed. 1972).

364. *See* W. GENEROUS, SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM MILITARY CODE OF JUSTICE 16-18, 22-29, 34-47, 50-53 (1973).

365. Since the end of the Vietnam War, the Army has systematically adjusted its disciplinary procedures in the light of social science research about enlisted personnel. *See generally* L. RADINE, *supra* note 195.

ance they will draw between military effectiveness and the individual autonomy that characterizes civil society.

Both the structure of Congress and its actual performance, on the other hand, 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.[366] This is particularly true when war and preparation for war are concerned. The cost of pursuing any given military policy includes the number of people who will be subjected to the burden of military service, their identity, the incentive or compulsion needed to make them available, and the strictness of the discipline under which they will serve. If it is assumed that any particular size, composition, recruitment, or discipline of the armed forces does contribute to the effective attainment of some objective by military means, it is Congress which must decide whether that end is worth the cost it will impose on the particular segment of society that bears it.[367]

It is true that in making this decision, Congress receives much professional advice from the armed forces and political input from those who see their self-interest in supporting the military establishment.[368] This is input, however, not direction. Those who are burdened with military service and discipline are by no means underrepresented. They and their families are dispersed throughout the congressional districts and form a racially and ethnically diverse group.[369] Any attempt to enlarge their number, through more active recruitment or through conscription, only increases the constituency of persons interested in the internal condition of the armed forces. Moreover, since most members of even the all-volunteer services tend to leave after a single enlistment,[370] there are substantial numbers of ex-servicemen. They do not always retain fond memories: organized veterans groups exerted significant pressure for military justice reform after World War II.[371] These political forces have led Congress, over military opposition, to modify disciplinary and personnel practices in the direction of civilian norms, exercising its own judgment on both the effect of the changes on military efficiency and their desirability despite potential harm.

366. *See generally* Fullilove v. Klutznick, 448 U.S. 448, 483 (1980); *id.* at 498 (Powell, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978); Hampton v. Mow Sun Wong, 426 U.S. 88, 103-05 (1976); *supra* notes 294-97 and accompanying text.

367. The primacy of Congress was clearly brought out by the majority's treatment of the Defense Department testimony in Rostker v. Goldberg, 453 U.S. 57, 73-78 (1981). *But cf. id.* at 97-102 (Marshall, J., dissenting) (emphasizing testimony adverse to Congress' judgment).

368. *See* S. HUNTINGTON, *supra* note 236, at 400-27; M. JANOWITZ, *supra* note 272, at 353-60, 372-92, 401-12. *But cf.* A. YARMOLINSKY, THE MILITARY ESTABLISHMENT 38-68 (1971).

369. In 1981 the enlisted strength of the armed forces was 21.6% black, 4.4% Hispanic, 4% other minorities and 70% white. The Army had the highest proportion of minority personnel, 41%, and the Navy the lowest, 20%. 1982 DEP'T OF DEFENSE ANN. REP. 278.

370. *See supra* note 184.

371. *See* W. GENEROUS, *supra* note 364, at 23-24, 29.

An early instance is the abolition of flogging in the Navy over the opposition of most senior naval officers. The political opponents of flogging within and without Congress raised arguments that combined moral principle and military expediency. Flogging was criticized as contrary to the moral spirit of the time. Its existence, it was argued, therefore deterred from enlisting the kind of intelligent, self-respecting Americans who would make the best sailors.[372] The same blend of pragmatism and principle has been appled in subsequent controversies. Thus, the unhappy experience of large numbers of citizen-soldiers with military justice during the two World Wars led Congress to revise the Articles of War in 1920 and to replace them with the Uniform Code of Military Justice in 1949. In both instances the change was in the direction of the legal norms of civilian criminal procedure; in both it was supported by the argument that a relatively arbitrary system of discipline harmed, rather than aided, military effectiveness, because it would not be tolerated by the men who had to live under it.[373] More recently, Congress has responded to changing attitudes on gender, at the same time increasing the population available for recruitment, by increasing the promotion prospects of female officers,[374] decreasing restrictions on sea duty for women,[375] and opening the military academies to female students.[376] Congress' refusal to apply draft registration to women, on the other hand, 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.[377]

Both the military and political authorities, then, will require those departures from civilian individual rights that, in their judgment, will maximize the efficiency and responsiveness of the armed forces to the extent tolerable to civilian political opinion. While the military authorities have, through train-

372. *See* H. LANGLEY, *supra* note 361, at 136-93.

373. *See* W. GENEROUS, *supra* note 364, at 9, 29.

374. *See* Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, § 820, 92 Stat. 1627 (1978); Act of Nov. 8, 1967, Pub. L. No. 90-130, § 1(19), 81 Stat. 378.

In 1980 Congress enacted the Defense Officer Personnel Management Act which, *inter alia*, provided gender-neutral appointment and promotion procedures for officers, removed gender restrictions on command authority and flight training, and repealed the statutory authorization for regulations requiring discharge based on pregnancy. *See* Pub. L. No. 96-518, §§ 104, 105, 107, 212, 236, 237, 373, 94 Stat. 2835 (1980) (codified at 10 U.S.C. §§ 532, 619-21, 6911, 8257 (1982)); H.R. REP. No. 1462, 96th Cong., 2d Sess. 34-36, 40-211 (1979); S. REP. No. 357, 96th Cong., 1st Sess. 9, 36-37, 41 (1979). The Department of Defense supported these changes. S. REP. No. 395, 96th Cong., 1st Sess. 81 (1979).

As one result, the statutory dual promotion system at issue in Schlesinger v. Ballard, 419 U.S. 498 (1975), has been abolished. *See supra* notes 121-25 and accompanying text.

375. *See* Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, § 808, 92 Stat. 1623 (1978) (codified at 10 U.S.C. § 6015 (1982)).

The Department of Defense has requested the repeal of the remaining restrictions on women for duty on combat vessels and aircraft. 1982 DEP'T OF DEFENSE ANN. REP. 280; *see* 10 U.S.C. § 6015 (1982), 10 U.S.C. § 8549 (1982).

376. *See* Department of Defense Appropriation Authorization Act of 1976, Pub. L. No. 94-106, § 803, 89 Stat. 538 (1975).

377. *See* S. REP. No. 826, 96th Cong., 2d Sess. 159 (1980).

ing and experience, specialized professional knowledge of their technical requirements, their professional judgment may be clouded by institutional irrationality, and they are not directly responsible to civilian opinion, which is willing to accept less than technical perfection for other reasons. Congress, on the other hand, has available to it as much military professional advice as it desires (and perhaps more), offset by direct responsibility to civilian opinion that has been able to impose its views about the limits of military discipline on its representatives. Not only the text of the Constitution, but also institutional structure and historical performance, make the political authorities the superior nonjudicial balancers of military needs and civilian values.

B. Reviewing Military Rationality

The problems raised by the Supreme Court's balancing technique in the separate community cases have been considered, and it is now possible to state the appropriate judicial role in reconciling servicemen's claims of individual constitutional right with the needs of their organization. From the peculiar function of the armed forces and the concomitant consequences of judicial error, it follows that the proper standard of judicial scrutiny favors organizational claims of necessity over individual claims of autonomy. Since utility within the scope of the substantive power is the limit of the government's powers in this area, it follows that a military practice which restricts servicemen's autonomy with respect to their organizational role is "militarily necessary" if it meets the standard of rational relation to governmental purposes used by Chief Justice Marshall in *McCulloch v. Maryland*.[378] In part because of the technical problems involved in reviewing the substance of military discipline, but primarily because of the consequences of judicial error in the individual's favor, the courts should not find military departures from civilian standards of individual rights within the armed forces to be unconstitutional unless manifestly irrational in terms of successful military performance. Irrationality, however, takes distinctly different forms with respect to practices generated by the armed forces themselves, using delegated authority, and those initiated or clearly ratified by Congress.

With respect to the practices generated by the armed forces, the court should remain aware of the difference between military rationality and rationalizing militarism. The tendency of senior military officers, in common with the staff of institutions generally, to redefine the institution's function in terms of their own well-being has been remarked upon, as have the peculiarities of the military situation that exaggerate this fault. The recurrent failure of military leaders effectively to adapt disciplinary systems to the social and psychological background of their human material is notorious. That a practice has proven militarily effective, or a least not downright harmful, in the past, is not conclusive evidence that it remains so in present circumstances. While the Army itself relies on extensive sociological research to modify its disciplinary

378. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416-19 (1819).

system,[379] it is difficult to argue that the reasons a practice is effective cannot be understood except by experienced military authorities. Military discipline can be rationally criticized in terms of military effectiveness, but the armed forces are not necessarily rational self-critics. Therefore, the courts, while conscious of their own technical limitations, should insist on an explanation, in the light of the criticisms raised by the serviceman, of the need served and how the practice relates to it. The burden of persuasion would remain on the serviceman, but the armed forces would have to provide a rational articulation of the usefulness of the practice.

Review by this standard presents no insuperable burden to the parties concerned and offers the additional benefit of explicit judgment by the political branches. As long as they remain sufficiently modest about their substantive knowledge, the federal courts have proven able to judge the rationality of government decision making in quite complex technical fields.[380] Moreover, when the problem is one of adjustment of discipline to changed mores, it must be borne in mind that the professional heads of the armed forces are neither equipped by training nor competent by law to respond to extra-military changes in values.[381] If they are unable to explain the rational basis, for example, of a requirement that pregnancy is a disqualification per se for military service,[382] a judicial finding of irrationality would require Congress to expressly consider the extent to which traditional thinking on the point should be changed.[383] Given the nature of the subject and the consequent presumption of rationality, it would be a rare instance in which armed forces could not meet their burden,[384] but in that rare case the courts will have done the service

379. *See*, M. JANOWITZ, *supra* note 272, at 44; L. RADINE, *supra* note 195, *passim*.

380. *See, e.g.*, Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975). The experience of the District of Columbia Circuit in reviewing administrative decisions on complex scientific and economic points for rationality has produced considerable judicial discussion of the problems of overseeing substantive decisions in areas in which the judges lack specialized technical training. *See, e.g.*, AFL-CIO v. Marshall, 617 F.2d 636, 650-51 n.66 (D.C. Cir. 1979); Ethyl Corp. v. EPA, 541 F.2d 1, 34-38 (D.C. Cir. 1976); *id.* at 68-69 (Statement of Leventhal, J.); *id.*, at 97-99 (Wilkey, J., dissenting); Portland Cement Ass'n. v. Ruckleshaus, 486 F.2d 375, 402 (D.C. Cir. 1973). *See also* Levental, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511-12 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 391-93 (1974). While the procedural requirements of 5 U.S.C. § 553 would not apply to congressional or military decisionmaking, *see* 5 U.S.C. § 553(a)(1) (1982), the approach of the D.C. Circuit to future uncertainty in a complex technical situation might provide useful guidance to courts evaluating questions of military necessity.

381. *See supra* text accompanying notes 351-65.

382. *See, e.g.*, Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976).

383. *See, e.g.*, *supra* note 374.

384. The military practices involved in Brown v. Glines, 444 U.S. 348 (1980); Greer v. Spock, 424 U.S. 828 (1976); and Parker v. Levy, 417 U.S. 733 (1974), satisfy this standard of review when viewed in the light of a system of discipline that works by manipulating primary group solidarity through pervasive control of the environment. The critical connection between the group's interest and the organization's needs are the immediate leaders: the "hard core" within the group and the noncommissioned and junior officers above it. The organization is especially concerned to prevent the development of alternative groups or alternative leadership; the particular danger of collective activity is that it develops leaders, communicates sympathies, and informs individuals that they are not alone in their opposition to the organization. *See supra* notes 279-82 and accompanying text. Thus, the vice of the activity repressed by the Air Force in *Glines* was not so much the content of the material but its unauthorized circulation among the troops by an officer, which represents the beginning of collective activity outside the control of the organization. *Cf. Glines*,

of placing the matter on the political agenda.

Congressional decisions do not warrant the same skepticism. When Congress decides that a military practice is useful and that its departure from civilian constitutional norms is acceptable, it has calculated the cost of a level of military effectiveness and imposed it upon the military. A statutory system of military practice is rational in the same sense that a tax increase to pay for weapons is rational. It derives its legitimacy from the representation of the affected interests in the calculation of ends and means. Given its receptivity to political input and its constitutional responsibility for the size and the structure of the armed forces, Congress is particularly competent to exercise political judgment in this area.[385] It follows that the reviewing court has but three roles to play: to determine that congressional judgment has been exercised, to confine the power of Congress to deal with constitutional liberties in a utilitarian way to its proper sphere, and to prevent utilitarian decisions from being made on the basis of a defective process of representation.

C. *The Limits of the Separate Community*

These restrictions on the review of constitutional claims by servicemen derive from the proposition that subordinating the serviceman is a cost of military effectiveness which, because of the function of the armed forces as instruments of international coercion, can only be measured against standards of utility and acceptability developed by the political process. To state the proposition is to state its limits. First, it applies only to those military practices that concern the serviceman's performance of his organizational role. Second, and more importantly, it assumes a properly functioning, representative political process. 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

444 U.S. at 356-58. A second concern is to preserve the organization's control over its junior officers on whom it depends for detailed control of the men. A junior officer who identifies with his subordinates cuts the organization's lines of control over them; moreover, his status and ability to develop informal loyalty to himself make him a particularly effective leader of collective action against the organization. *See supra* notes 253-54 and accompanying text. Captain Levy was hardly Fletcher Christian, but the Supreme Court correctly viewed him as a member of the same *genus* when it held his advocacy to enlisted men of disobedience to be unprotected by the first amendment. *See Levy*, 417 U.S. at 761. Finally, instilling internalized discipline requires that the serviceman be isolated from conflicting sources of values during the initiation period. *See supra* text accompanying notes 272-76. As a training base, Fort Dix was, therefore, a particularly unsuitable forum for political appeals addressed to the troops. *See Greer*, 424 U.S. at 848-49 (Powell, J., concurring).

385. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 497-99 (1980) (Powell, J., concurring); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976); Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980).

confine the broad authority of the political branches to the relation between the serviceman and the demands of the organization upon him.

Since the questions first were presented in the early 1950's, the Supreme Court has always used its independent judgment to determine which persons and activities could constitutionally be subject to military discipline. By requiring that servicemen's crimes be "service-connected" to confer court-martial jurisdiction, it has explicitly recognized that not all off post, off duty behavior by servicemen affects military authority, the performance of military duty, or the safety and well-being of others within the military community.[386] In holding that a gender-based difference in dependents' allowances denied female officers equal protection, the Court applied the prevailing test for gender discrimination after noting that the difference was not related to officers' duties or responsibilities.[387] Similarly, in a decision that avoided the constitutional point, the Court held that the Army lacked statutory authority to give a less than honorable discharge because of the serviceman's preenlistment political activity.[388] The common element in these decisions is the Court's independent determination that the claimed power of the government did not relate to the serviceman's present subordination to the armed forces for the purpose of performing his duties.

The role of the reviewing court in determining whether Congress has exercised its judgment is minimal. A congressional decision to authorize a practice concerning individual roles in the armed forces has two components: a technical conclusion that the practice will increase military effectiveness and a political conclusion that the increase is worth any accompanying departure from civilian constitutitonal norms. A court is in no position to believe that its technical judgment is superior to Congress'. That body has equal or greater access to technical advice and such adversary input as the political process generates; moreover, Congress is free of the temptations of self-interest in military prerequisites to which the military authorities may be prone. Because of the unique function of the armed forces, the court has no exterior standard against which to measure the balance of interests Congress has struck. What remains is the determination that Congress followed the political process that legitimates its balance—that it actually did consider the necessity of its decision.[389]

The primary source of information on this point is, of course, the pub-

386. *See supra* notes 31-35 and accompanying text.

387. Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973).

388. *See* Harmon v. Brucker, 355 U.S. 579 (1958); *id.* at 585-86 (Clark, J., dissenting).

389. *Cf.* Wright, *supra* note 380, at 391-93 (arbitrary, capricious standard for review of agency rulemaking).

In the light of Congress' constitutional responsibility for the organization and discipline of the armed forces, it should be noted that the majority of the Supreme Court has consistently declined to bind Congress to the opinion of the military authorities that a practice was not essential. *See* Rostker v. Goldberg, 453 U.S. 57, 79-83 (1981); *cf.* Middendorf v. Henry, 425 U.S. 25, 65-67 (1976) (Marshall, J., dissenting) (equity and justice above military necessity); Schlesinger v. Ballard, 419 U.S. 498, 517 (1975) (Brennan, J., dissenting) (without need, military policy is not overriding).

lished legislative history, but the courts are not confined to that. As Justice Powell has observed in a related context, Congress, as a representative body, is not bound to support its decisions from a formal record but may rely on its collective knowledge and experience to make policy judgments. It follows, in his view, that the thought process of Congress is to be found not merely in the formal legislative history but in "the total contemporary record."[390] This would include the historical, legal, and cultural context that provided those facts or policy considerations which were so uncontroverted that they did not have to be discussed.[391] The result is that Congress' accomodation of individual and organizational interests must be accepted by the courts when it appears from the entire context that Congress had not acted inadvertently but had deliberately subordinated the serviceman's autonomy to what it considers to be military needs.

The political process malfunctions with respect to the armed forces when exclusion from the political process affects a group's participation in military service and when exclusion from military service results in exclusion from full participation in political life. Military service, particularly combat service, is plainly considered a severe burden by many. If that burden were deliberately limited to members of an identifiable racial minority, whether willing or not, it would plainly show, first, that the remainder of the political nation consider this group expendable pariahs, and, second, that the group is so isolated from the political process that it cannot defend itself against such a severe loss by coalition building.[392] Paradoxically, deliberate exclusion of an identifiable racial or ethnic minority from military positions would also stigmatize it and would result from the same isolation. Defending the state's existence is its most important function, on which all others depend. Exclusion of a group from that responsibility is both a statement that it cannot be relied upon and the occasion to reproach it with not being directly concerned in decisions involving war and peace.[393] Since classical times, the right to perform military

390. Fullilove v. Klutznick, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring).

391. *See, e.g.*, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 238-39 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196-206 (1978); United States v. Union Pac. R.R., 91 U.S. 72, 79-82 (1875); Mohegan Tribe v. Connecticut, 638 F.2d 612, 615-23 (2d Cir. 1980).

The decisions in Schlesinger v. Ballard, 419 U.S. 498 (1974), and Middendorf v. Henry, 425 U.S. 25 (1976), satisfy this standard of review. The legislative history of the disparate promotion systems in *Ballard* indicates that Congress was aware of the different promotion and retention prospects for male and female officers under those statutes and considered it to satisfy the Navy's needs. *See Ballard*, 419 U.S. at 508 n.12. Similarly, Congress had twice, at the time of *Henry*, considered and refused proposals to abolish the form of court martial at which counsel is not required. *See Henry*, 425 U.S. at 44 n.21.

It should also be noted that even the dissent considered the statutory system of nonjudicial, nonadversary punishment provided by article 15 of the U.C.M.J., 10 U.S.C. § 815 (1982), to be acceptable despite the fact that it permits confinement without benefit of counsel. *See Henry*, 425 U.S. at 58, 64 (Marshall, J., dissenting); *cf.* Note, *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481 (1973) (procedural inadequacy of article 15 punishments).

392. *See* R. DWORKIN, *supra* note 295, at 234-38; J. ELY, *supra* note 297, at 102-04, 136-48.

393. *See* M. JANOWITZ, MILITARY CONFLICT 74-76 (1975); Goodman, *Women, War and Equality: An Examination of Sex Discrimination in the Military*, 5 WOMEN'S RTS. L. REP. 243, 246-49 (1979). *Cf.* Scott v. Sanford, 60 U.S. (19 How.) 393, 415 (1856) (members of African race not treated as citizens of the state).

service has been a sign of full membership in the political community.[394] This has been equally true in the United States. The consistent demand of black political leaders from the Civil War until the Truman Administration, first for the right to perform military service at all and then for the right to perform it without discrimination came from the desire to be recognized as full Americans; opposition was motivated in part by the desire to deny recognition.[395] Racial segregation in the armed forces was finally ended through an executive order in 1948 because discrimination in civilian society made it impossible to get legislation through Congress.[396] Statutory arrangements within the armed forces that intentionally discriminate against an identifiable racial, ethnic, or religious minority in imposing military service, or in denying the opportunity to serve, would arise from a manifest failure of the political process and would reinforce the minority's inferior position in civilian society. Both their causes and their principal collateral effects are outside the armed forces. It follows that the courts would apply the same standard of review as they would to any such congressional decision.[397]

IV. CONCLUSION

The problem of how the courts should respond to restricting of individual liberties and access to opportunity in the armed forces is not likely to disappear. The experience of the Vietnam War era makes it likely that future political opposition to any controversial war will include efforts by disaffected servicemen to resist military authority and by civilians to support them. Even in peacetime, the basic value differences between the military and civilian cultures will continue to produce litigation to bring the one into harmony with the other. Present changes in cultural attitudes toward gender roles and sexual preference can only increase the conflict between the aggressive, paternalist,

394. ARISTOTLE, POLITICS 1265a 27, 1297a 29-35, 1297b 1-27, 1329a 2-19 (Loeb ed. 1972); W. FORREST, THE EMERGENCE OF GREEK DEMOCRACY 87-97, 111-14, 215-18 (1966).

395. *See* D. CORNISH, THE SABLE ARM: NEGRO TROOPS IN THE UNION ARMY, 1861-1865 (1966); U. LEE, THE EMPLOYMENT OF NEGRO TROOPS 3-15, 51-88, 108-09 (United States Army in World War II, Special Studies Vol. 8 pt. 8 1966); 2 A. NEVINS, *supra* note 242, at 515-19.

396. Exec. Order No. 998, 3 C.F.R. 722 (1948); *see* Ambrose, *supra* note 363, at 189-91.

397. Whether the collateral effects of gender-based discrimination should be met with equal judicial hostility depends on whether the disparate treatment of women in the military is considered to have the same derogatory effect as racial or religious discrimination. *See, e.g.*, Goodman, *supra* note 393, at 250-55, 258-64; Karst, *supra* note 303, at 53-56; *cf.* Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1547-52 (1973). If, on the contrary, one postulates that women as a class are so numerous and so interpenetrate society that they are not in the permanent jeopardy faced by racial or religious minorities, then it is arguable that a contemporary political decision to limit their participation in the armed forces does not have the same stigmatizing effect. *See* J. ELY, supra note 297, at 164-70, 253 n.75.

It should be noted that the response of the political branches to lower court decisions finding unconstitutional gender discrimination in statutory restrictions on women's sea duty and exclusion of women from the military academies was not to seek Supreme Court review but rather to amend the statutes to conform. *See* Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1974); Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978); Department of Defense Appropriation Act of 1979, Pub. L. No. 95-485, § 808, 92 Stat. 1623 (1978); Department of Defense Appropriation Act of 1976, Pub. L. No. 94-106, § 803(a), 89 Stat. 537 (1975). Thus, we lack the benefit of the Supreme Court's views on the subject.

authoritarian armed forces and individuals who want the benefits of a military career without fitting the traditional model of a serviceman.[398]

The Supreme Court's discussion of the judicial relation to such claims has not provided an intellectually satisfying conclusion for the guidance of the lower courts. The minority position implicitly, and sometimes overtly,[399] rejects the entire idea of a justifiably distinct, self-contained military culture. In the process it ignores the historical experience of the United States and other Western societies with effective and ineffective military organizations. The majority, on the other hand, accepts the validity of this experience, but it presents as self-evident conclusions that are not intuitively obvious to those for whom World War II is not even a memory. This Article has attempted to articulate the basis of those conclusions.

The conclusions rest on the proposition that the substantive power of the United States to wage or threaten war is not limited by the Constitution, which merely allocates the authority to determine the ends for which war will be fought and the means available between Congress and the President. The war power is exercised against sovereign entities whose response is not limited by American domestic law. As a sovereign entity itself, the United States has under its domestic law the authority to use against other sovereigns however much force appears necessary to attain its chosen ends despite the resistance of its adversaries. The only check on this unlimited choice of ends and means is the distribution of power between the President and Congress that subjects their choices to the control of the political process.

These basic propositions lead to three conclusions about the constitutional claims of individual members of the armed forces. The first is that the Constitution permits, if it cannot be said to require, such measures of individual control as will make the armed forces, as an organization, responsive instruments of the political will. In individual terms this means using the techniques of coercion and manipulation that will make the serviceman both technically effective and unwilling to use the resources of his position to actively or passively thwart the decisions of the elected authorities. The second is that the political nature of the war powers, in addition to the first amendment, severely limits, if not precludes, attempts to preserve military effectiveness and subordination by controlling public discussion as it affects the civilian political process. The third is that the primary purposes for which the armed forces exist, the successful use or threat of force against other sovereigns, is outside the constitutional system, and the courts therefore have no basis on which to decide that a military practice which rationally furthers that purpose is less important than its cost to servicemen's liberty interests. Finally, the consequences of a mistaken conclusion that a military practice serves no

398. *See, e.g.*, Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied sub nom.* Beller v. Lehman, 452 U.S. 905 (1981); benShalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980). *See generally* Comment, *Employment Discrimination in the Military: An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 VILL. L. REV. 351 (1981).

399. *See* Brown v. Glines, 444 U.S. 348, 368-71 (1980); Greer v. Spock, 424 U.S. 828, 868-69 (1976) (Brennan, J., dissenting).

rational purpose may be so severe that the courts should exercise considerable self-skepticism about such conclusions.

The result is an approach to judicial review that accepts the segregation of a relatively limited class of persons from the constitutional norms of civilian society. It accepts that the "separate community" is one in which, both for reasons of efficacy and political supremacy, individuals exist not as ends in themselves but as means to their superiors' ends. While bearing in mind the inherent flaws in military judgment, it views the rationality of military claims of necessity from this perspective. Finally, this approach leaves to the political process the chief responsibility for balancing military efficacy against individual autonomy and dignity, for it recognizes that only the political branches are competent to weigh both sides of the balance.

It will be objected that the courts, from this perspective, must sit idly by while the military, the military authorities, and Congress inflict corporal punishment, denial of the right against self-incrimination, overt racial discrimination, and similar outrages upon helpless servicemen. Though perhaps possible, like any *reductio ad absurdum*, this argument ignores the continuing tendency of the political process to ameliorate the condition of the serviceman and assimilate his rights, insofar as practical, to the civilian's. This tendency has been continued by the recruitment needs of the volunteer system; it would be furthered by a new draft that imposed military discipline on a cross-section of the nation's young people. Though possible, it is hardly plausible that Congress will return the armed forces to the conditions of 1915, or even 1945. Moreover, the separate community doctrine as interpreted by this Article contains safeguards against such abuse. In the first instance, it subjects the military authorities to substantive review of their practices in which they must articulate the rational basis for departing from civilian norms. It tends to force the more serious departures from civilian norms to the express consideration of Congress. Once there, it leaves in place the strict judicial review of political decisions based on grounds that are presumably irrational and unrepresentative.

The separate community doctrine presented here has two additional virtues. Because it emphasizes the free political process as the foundation of the war powers, it reinforces the first amendment's doctrinal support for uninhibited civilian political activity in precisely the circumstances when there is the most temptation to repress it.[400] Because it emphasizes the primary activity of the armed forces, foreign war, as one that takes place against persons outside the system of domestic law, it clearly separates their functioning from the operation of prisons, schools, the police, the civil bureaucracy, and other hierarchical, goal-centered institutions that might otherwise be analogized to the military. By distinctly drawing the boundaries of military society, it insures

400. *Compare* Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) *with* Debs v. United States, 249 U.S. 211, 213-15 (1919) *and* Schenk v. United States, 249 U.S. 47, 52 (1919). *See also supra* note 249.

that the departures from individual liberty required by the international use of force are confined there.

What does remain, it must be admitted, is alien to our basic concepts of humanity and law—an aggregation, now numbering two million people, whom Congress, in accord with the political process, may treat as if they exist only to be used. This cannot be helped. As long as war remains available to the independent national state, the Constitution must provide for effective war in whatever exigencies arise. As Madison pointed out nearly 200 years ago, legal restraints on the size and discipline of military forces will be disregarded whenever the political system perceives a genuine danger.[401] The power is made necessary by a world without higher authority; the only effectual check on war is our own reluctance to submit ourselves and our children to it except for the gravest causes.

401. The means of security can only be regulated by the means and danger of attack. They will in fact ever be determined by those rules, and by no others. It is vain to impose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurptions of power, every precedent of which is the germ of unnecessary and multiplied repetitions.

THE FEDERALIST, *supra* note 207, No. 41, at 270 (J. Madison); *accord id.* No. 25, at 163 (A. Hamilton). In confirmation, it is worth noting that the Supreme Court has rarely picked up a hot potato in this area until the war was safely over. *Compare* Duncan v. Kahanamoku, 327 U.S. 304 (1946), *and Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), *with* Korematsu v. United States, 323 U.S. 214 (1944), *and Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863). *See also supra* note 215 and cases cited therein. *But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).