The Camouflaged Canary in the Coalmine: The Seeming Erosion of Judicial Deference to the Department of Defense

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ABSTRACT

Jurists broadly defer to the expertise of those in uniform to opine on not only life in uniform, but also the particular operational requirements in place to protect our nation and further its strategic objectives. While there have always been guardrails and limits to this deference, it has been the status quo for much of our nation's history. In recent years, however, the juridical tides have apparently begun to turn, and the assumption of deference appears to no longer be the courts' default posture, particularly within certain facets of life that transcend one's military service. This Article traces the judicial-military relationship through the Nineteenth and Twentieth centuries and highlights evidence of a seeming shift in the relationship in more recent years, namely a greater willingness to intervene in military matters, and proposes a new understanding of when the judiciary may do so in future cases.[1]

Table of Contents

I. INTRODUCTION 512
II. FRAMING MILITARY JURISPRUDENCE AND CONSTITUTIONAL PROTECTIONS 514

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1. The authors take no position whatsoever on the normative value *vel non* of this change, especially while both remain in the Navy.

III. OVERT DEFERENCE IN THE 20TH AND EARLY 21ST CENTURY 516
A. Military Necessity Amidst World War 516
B. Overt Deference of Other Stripes: Retirement, Uniforms, Free Speech, and Academics... 519
1. The Uniform... 521
2. Speech 522
3. Fitness to Serve 524
4. Affirmative Action 526
IV. COVERT DEFERENCE AND JUSTICIABILITY DOCTRINES 527
A. Vietnam, the Political Question Doctrine, and Covert Deference... 527
B. Political Questions Abound... 529
C. The Feres Doctrine 532
V. A BRAVE NEW WORLD 533
A. Recent Developments.. 533
B. New Understanding 543
VI. CONCLUSION 545

I. INTRODUCTION

Most scholars agree that the political question doctrine dates back to the founding, largely an embodiment of separations-of-powers jurisprudence.[2] The doctrine holds that when adjudicating causes of "action would cut very deep into the very being of Congress[,] [c]ourts ought not to enter th[e] political thicket" and entertain them.[3] Questions of day-to-day military affairs and operations, courts have held, fall squarely within the political question doctrine, as Congress and the Executive jointly oversee the military.[4] To that end, many, if not most courts, hold that this is not only by constitutional design, but also good policy: as the Fourth Circuit once summarized, "[t]he judicial branch is by design the least involved in military matters . . . . Even apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy."[5] Thus, notwithstanding substantive disputes as

2. *See, e.g.*, Major Chad C. Carter, *Halliburton Hears a Who? Political Question Doctrine Developments in the Global War on Terror and Their Impact on Government Contingency Contracting*, 201 MIL. L. REV. 86, 95–96, nn.41–51 (2009) (noting that the political question doctrine "arrived in America as a component of the common law," citing *The Federalist Papers* and *Marbury v. Madison*).

3. Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J., U.S. Army).

4. *See, e.g.*, Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) ("The Supreme Court has generally declined to reach the merits of cases requiring review of military decisions, particularly when those cases challenged the institutional functioning of the military in areas such as personnel, discipline, and training.").

5. Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) (Wilkinson, J., U.S. Army).

to its pedigree and deployment in American jurisprudence,[6] the political question doctrine's role in the American judiciary over the last half-century has yielded one fairly consistent outcome: respectful deference to the military, and a strong reluctance to intervene in matters that affect military operations.[7]

However, recent cases appear to challenge this status quo—or at least demonstrate the judiciary's willingness to do so. Specifically, where fundamental *individual* rights—most notably religious rights—are at issue, courts are poised to intervene, "damn the [operations], full steam ahead."[8] This most notably includes recent jurisprudence regarding the military's COVID-19 vaccination requirements, accommodations for religious attire, and the potential for reversing race-conscious admissions policies at the nation's service academies. This Article offers a review of the political question doctrine's use in military operations, particularly in the twentieth century as well as the early twenty-first century and then does the same in more recent years, highlighting the altered relationship between the judiciary and the military.

We begin with a review of the groundwork, making clear the frameworks and guidelines that dictated just how wide a berth the judiciary provided to uniformed leadership on matters of constitutional protections dating back to the early days of the Republic. Thereafter, the Article discusses cases of overt deference in the twentieth and early twenty-first centuries. The following Section then discusses implicit deference in the form of the judiciary's reliance on the political question doctrine to dismiss challenges to the military's judgment. Set against this backdrop, we review more recent developments which, when viewed together, suggest that the judiciary will no longer automatically yield to the military's express wishes when cases and controversies involving those in uniform come before them. Accordingly, we propose a new understanding of the judiciary position vis-à-vis military matters that acknowledges the judiciary's new willingness to intervene in military matters notwithstanding the operational effects when constitutional rights are at issue. The Article concludes with some final thoughts and issues for further consideration and study.

6. *See generally*, *e.g.*, Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015) (discussing the history of "political questions" and arguing that the concept has evolved through history rather than remained a consistent concept since the nineteenth century).

7. *See supra* note 3 and accompanying text.

8. In an article written by two Navy officers—one a graduate of the Naval Academy—it is a veritable requirement to allude to the Navy's hallowed war cry, "Damn the Torpedoes, Full Steam Ahead."

II. FRAMING MILITARY JURISPRUDENCE AND CONSTITUTIONAL PROTECTIONS

We "[b]egin at the beginning."[9]

The military constitutes a "specialized community separate from civilian society,"[10] so it stands to reason that "[m]ilitary law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[11] So too has the Court recognized that "the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."[12] Article I Section VIII, Clause XIV of the Constitution provides that "[t]he Congress shall have Power . . . . To make Rules for the Government and Regulation of the land and naval Forces[.]"[13] In other words, Congress is "permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than it is when prescribing rules for [civilian society]" under this Constitutional provision.[14] Accordingly, the Supreme Court has blessed Congress's efforts to regulate military society, framing the adjudication by noting that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty[.]"[15]

Though deferential, it must also be said that despite Congress's power in this arena, courts will step in as necessary to ensure that the congressional framework enacted, while concededly a delicate and "precise balance,"[16] does not sink below a floor of certain minimum constitutional protections. Indeed, as Chief Justice Earl Warren once said, "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."[17] As the discussions below elucidate, some curtailment of liberties in the military context may well be appropriate without foregoing those rights altogether. At bottom, the

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9. LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 106 (Peter Hunt ed. 2009) (1872).

10. Parker v. Levy, 417 U.S. 733, 743 (1974) (Rehnquist, J., U.S. Army) (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)).

11. Burns v. Wilson, 346 U.S. 137, 140 (1953) (Vinson, C.J., U.S. Army).

12. *Id.*

13. U.S. CONST. art. I, § 8, cl. 14.

14. *Parker*, 417 U.S. at 756; *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968) (Warren, C.J., U.S. Army) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.").

15. *Parker*, 417 U.S. at 744 (quoting *Burns*, 346 U.S. at 140).

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

17. Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

restriction of rights for those in uniform is akin to "finding the Goldilocks solution—not too large, not too small, but just right."[18]

The arc of the Supreme Court's jurisprudence regarding the constitutional "floor" of rights the armed forces cannot restrict largely begins around the Civil War.[19] In 1857, the Supreme Court announced a near-absolute deference to the military's courts martial system and its form of due process:

> With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.[20]

The Court reiterated as much six years later in *Ex parte Vallandigham*.[21] In that case, soldiers arrested Senator Clement Vallandigham of Ohio for violating standing Army orders during the Civil War that banned expressions of Confederate sympathies.[22] While Vallandigham was not in the military, he was tried by a military tribunal; the Supreme Court held that Vallandigham's petition for certiorari concerning the due process afforded in such tribunals was not "within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court."[23]

The upshot of these cases is that in our Nation's infancy, civilian courts were inappropriate venues to adjudicate the merits of a military appellant's arguments. As the Supreme Court summarized several decades later: "To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal, acting within the scope of its lawful powers, cannot be reviewed or set aside by the [civilian] courts."[24]

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18. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 760 (2011) (Kagan, J., dissenting).

19. Indeed, most pre-Civil War military-related jurisprudence does not touch or concern related queries. *See generally, e.g.*, Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (challenging the validity of call-up of militia member during War of 1812).

20. Dynes v. Hoover, 61 U.S. 65, 82 (1857).

21. 68 U.S. 243 (1863).

22. *See id.* at 243–44.

23. *Id.* at 251.

24. Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); *see also* United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343 (1922) (McKenna, J., Texas National Guard) ("It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the

Though implied during the Civil War era,[25] it was not until the mid-twentieth century when courts martial were affirmatively subjected to habeas attacks in a civilian context.[26] This could be a product of history: to that point, many constitutional protections had not yet been established, let alone fully fleshed out, meaning they could not have been applied to military contexts.[27] So once those rights were more exhaustively developed and understood, civilian appellate courts then held that "a collateral habeas attack could inquire into the deprivation of constitutional rights [in the military context]."[28] Much of the constitutional protections afforded to servicemembers were thus prescribed far later into the country's maturation.

III. OVERT DEFERENCE IN THE 20TH AND EARLY 21ST CENTURY

Since civilian courts began considering questions surrounding servicemembers' constitutional protections—or lack thereof—they have regularly been tasked with confronting thorny legal questions surrounding military service. These questions ranged—and still range—from the individual religious or free speech rights of those serving to the legality of a given military operation. Through the twentieth and early twenty-first centuries, courts have nearly universally dismissed suits in express or covert deference to the armed forces. A review of such caselaw proves instructive.

A. Military Necessity Amidst World War

Several cases in the World War II era demonstrate the judiciary's early deference to the military and purported national security needs, though none more widely known—and reviled—than suits arising from anti-Japanese bias in the early- and mid-twentieth century and the

classification and reduction in number of the officers of the army . . . . In its nature it belongs to the executive and not to the judicial branch of the government.").

25. *See e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 4 (1866); *see also Due Process in Criminal Courts Martial*, 20 U. CHI. L. REV. 700, 701 (1953) ("[W]hile the Constitution does not authorize direct review in the federal courts of court martial convictions, it does make such convictions subject to attack by habeas corpus under Article I, Section 9.").

26. *See generally* Burns v. Wilson, 346 U.S. 137 (1953).

27. For example, "[t]he development of free speech doctrine is generally traced to the beginning of the twentieth century." Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 622 (1991). Practical examples abound: midway in the twentieth century, the Supreme Court had not yet articulated the constitutional protections established in such cases as *Gideon v. Wainwright*, 372 U.S. 335 (1963), or *Miranda v. Arizona*, 384 U.S. 436 (1966).

28. Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971) (first citing Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969); then citing Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); then citing Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968); and then citing Angle v. Laird, 429 F.2d 892 (10th Cir. 1970)).

internment of Japanese-Americans as well as Japanese citizens living in America.[29]

Following the attack on Pearl Harbor, President Roosevelt issued Executive Order (E.O.) 9066,[30] which "authoriz[ed] the Secretary of War, and military commanders he might designate, to prescribe 'military areas' in their discretion, and either to exclude any or all persons from such areas, or to establish the conditions on which any or all such persons might enter, remain in[,] or leave such areas."[31] In *Hirabayashi v. United States*, the Supreme Court heard a challenge to regulations promulgated pursuant to E.O. 9066 installing a curfew for Americans of Japanese descent and requiring such individuals to report for relocation to an internment camp.[32] The Court unanimously upheld the regulations and the conviction pursuant thereto, saying that "it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made."[33]

"The Supreme Court similarly deferred to the military's judgment the following year in Fred Korematsu's case."[34] In one of the most infamous cases ever decided,[35] the Supreme Court—following both Congress and the Executive—yielded to military officials in upholding Japanese internment as a military necessity. Justice Hugo Black, along with five colleagues, upheld the action,

> because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security

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29. As civil rights attorney Yolanda C. Rondon noted, "[b]oth Japanese Americans and Japanese residing in the United States had endured harsh discrimination before Pearl Harbor . . . . These fears were translated into themes of espionage and potential sabotage following Pearl Harbor." *Is Korematsu Really Dead?*, HUM. RTS., Summer 2015, at 23. The authors wish to make clear that highlighting these cases in no way suggests our endorsement or support for their holdings. As stated more recently by Chief Justice John Roberts, "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful . . . [and] 'has no place in law under the Constitution.'" *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

30. *See* Amanda L. Tyler, *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens During World War II and Their Lessons for Today*, 107 CAL. L. REV. 789, 835 (2019) (citing Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 124 (Mark Tushnet ed., 2005)).

31. Eugene V. Rostow, *The Japanese American Cases-A Disaster*, 54 YALE L.J. 489, 497 (1945); *see also* Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407 (Feb. 19, 1942).

32. *See* Hirabayashi v. United States, 320 U.S. 81, 83 (1943).

33. *Id.* at 102.

34. Tyler, *supra* note 30, at 839.

35. *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 422 (2011) (calling *Korematsu* part of the "Anticanon," "embod[ying] a set of propositions that all legitimate constitutional decisions must be prepared to refute.").

> measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.[36]

Fundamentally, in *Korematsu* and *Hirabayashi*, "[t]he Justices were [] deferential to governing officials" such that "[i]f the military had some basis for determining that real differences existed between Japanese Americans and other citizens, that was good enough during World War II to sustain a race conscious measure discriminating against some persons of color."[37]

Even when the Supreme Court later sought to buck the Executive and refused to defer to military expertise and necessity by ruling that the Government could not detain loyal Japanese Americans indefinitely in *Ex parte Endo*,[38] the Court still announced its decision on "December 18, 1944—one day after the Roosevelt Administration announced that it would release the internees," which "[m]any believe" was the result of the Court's deliberate delay "to allow the President, rather than the Court, to end the internment."[39]

In World War II's shadow, courts are properly viewed as overtly deferential to those in uniform charged with the nation's security; with such a lens, the Supreme Court blessed—or, at least, did not impede—actions taken in furtherance of the national security at the behest of those seemingly warranting deference.[40]

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36. Korematsu v. United States, 323 U.S. 214, 223 (1944) (Black, J., U.S. Army).

37. Mark A. Graber, *Korematsu's Ancestors*, 74 ARK. L. REV. 425, 470 (2021).

38. 323 U.S. 283 (1944).

39. Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1385 n.280 (2012) (citing ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 174–75 (2001); then citing Brief for Fred Korematsu as Amicus Curiae Supporting Petitioners at 17, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343); and then citing PETER IRONS, JUSTICE AT WAR 344–45 (1983)).

40. *See e.g.*, *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 870 (D.C. Cir. 1980) ("To understand fully the Supreme Court decision in *Connell*, it is essential to view the case in its proper historical context."); Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2442 (2004) (noting that "a Supreme Court decision must be read in the context of the era in which it was decided"); *cf.* Charles J. Tabb, *The Bankruptcy Clause, the Fifth Amendment, and the Limited Rights of Secured Creditors in Bankruptcy*, 2015 U. ILL. L. REV. 765, 790 (2015) ("The *Radford* holding perhaps can be understood in its historical context as part of the Supreme Court's little war with President Roosevelt over the legitimacy of his New Deal legislative agenda, and the subsequent cases apparently recanting *Radford* as part of the Court's apologetic response to FDR's Court-packing plan."); Hiroshi Motomura, *Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 551 (1990) (discussing the *Chinese Exclusion Case* and noting that, in the context

B. Overt Deference of Other Stripes: Retirement, Uniforms, Free Speech, and Academics

The judiciary's overt deference did not end with cases arising out of World War II, nor was it limited to cases that bore directly on military operations like internment. Rather, "[t]he Supreme Court has generally declined to reach the merits of cases requiring review of military decisions, particularly when those cases challenged the institutional functioning of the military in areas such as personnel, discipline, and training."[41] The Supreme Court has gone as far as to say:

> [I]t is difficult to conceive of an area of governmental activity in which courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.[42]

This belief continued well through the twentieth century and into the early twenty-first century, taking its cues from the Fifth Circuit.

In 1971, that appellate court—which then oversaw Alabama, Florida, and Georgia in addition to its current jurisdiction of Texas, Louisiana, and Mississippi—heard a case regarding Air Force Captain Milbert Mindes's separation from active duty.[43] Judge Charles Clark, himself a Naval officer who served during World War II and the Korean War, adroitly framed courts' deference:

> Traditional trepidation over interfering with the military establishment has been strongly manifested in an unwillingness to second-guess judgments requiring military expertise and in a reluctance to substitute

of understanding the Court's decision, "[w]e must bear in mind that this was an earlier era of constitutional law, when equal protection was well on its way to 'separate but equal,' and judicial recognition of the substantive and procedural rights of individuals was still far beyond the constitutional horizon"); Kyle Voils, Note, *Making Sense of Sovereignty: A Historical Understanding of Personal Jurisdiction from* Pennoyer *to* Nicastro, 110 NW. U. L. REV. 679, 696 (2016) ("When considered in light of the Supreme Court's historical approach to personal jurisdiction, it is not at all surprising that sovereignty continues to play a role in personal jurisdiction. Understanding this historical context is essential to parsing the allegedly confounding approach to personal jurisdiction the Court has taken in recent years."); *accord* W. Andrew Scott & R. Samuel Snider, *California Populism, Contract Interpretation, and Franchise Agreements*, 24 FRANCHISE L.J. 248, 256 (2005) ("When viewed in the historical context, however, the decisions of the California courts simply continue the thread of populism that serves as a background for much of California's constitutional, legislative, and judicial environment."). *See generally* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) (explaining, and ultimately defending, decisions of Supreme Court by placing them in their respective historical contexts).

41. Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) (citations omitted).
42. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
43. *See* Mindes v. Seaman, 453 F.2d 197, 198 (5th Cir. 1971) (Clark, J., U.S. Navy).

> court orders for discretionary military decisions. Concern has also been voiced that the courts would be inundated with servicemen's complaints should the doors of reviewability be opened. But the greater reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission.[44]

As a result, the circuit court "set out a framework for determining whether a court should review a military decision."[45] First, there must be an "allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations."[46] Second, a plaintiff must have exhausted all "available intraservice corrective measures."[47] If both requirements were met, a court was to balance four factors:

> 1. The nature and strength of the plaintiff's challenge to the military determination. . . .
>
> 2. The potential injury to the plaintiff if review is refused.
>
> 3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.
>
> 4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and expertise of professionals in matters such as promotions or orders directly related to specific military functions.[48]

The *Mindes* test, as it became known, was almost universally adopted by circuit courts of appeal.[49] Pursuant to these four factors, *Mindes* led federal courts to conclude that they retained jurisdiction to hear "internal personnel matters such as challenges to convening of retention boards and military discharge."[50] Conversely, *Mindes* militates against reviewing issues like "[d]uty assignments," which "lie at the heart of military

44. *Id.* at 199.
45. Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991) (Ervin, C.J., U.S. Army).
46. *Mindes*, 453 F.2d at 201.
47. *Id.*
48. *Id.* at 201–02.
49. *See* Khalsa v. Weinberger, 779 F.2d 1393, 1396 (9th Cir. 1985) (Beezer, J., U.S. Marine Corps) ("The *Mindes* test has been adopted by seven other federal circuits, including ours."); *see also* Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 397, 402 (1984) (noting that eight circuits have adopted the *Mindes* test, and that the Third and District of Columbia Circuits have not followed it).
50. Aikens v. Ingram, 811 F.3d 643, 648 (4th Cir. 2016) (amended Feb. 1, 2016).

expertise and discretion" such that "[s]ubjecting every such assignment to judicial review would have a deleterious effect on the military's performance of its vital operations and would impede its overall preparedness."[51] In other words, "the *Mindes* test insure[d] that judicial intrusions into military matters are limited to the vindication of federal interests."[52]

While the Supreme Court has never expressly adopted *Mindes*, it nevertheless has espoused its reasoning, namely by refusing to entertain causes of action that speak to the essence of military service, including but not limited to military operations. As the Supreme Court pronounced in 1990, for example: "When the Court is confronted with questions relating to military discipline and military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."[53] Courts, whether citing *Mindes* or not, "must—at least initially—indulge the optimistic presumption that the military will afford its members the protections vouchsafed by the Constitution, by the statutes, and by its own regulations."[54] Some jurists have even made this presumption of deference in personal terms: District Judge Tilman Self wrote, "[a]s a former Army artillery officer, the Court absolutely understands that judges don't make good generals and 'are not given the task of running the [military].'"[55] This presumption can be found in multiple arenas.

1. The Uniform

One of the easiest ways to distinguish someone serving is by the uniform he or she wears. So, too, will our review begin here.

In 1973, Simcha Goldman, an Orthodox Jew, "was accepted into the Armed Forces Health Professions Scholarship Program and placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago."[56] Opposing counsel objected to Goldman's testimony at a court martial because he wore his yarmulke indoors, breaking uniform regulations requiring removal of head coverings indoors.[57] He refused and was later ordered to remove the yarmulke in accordance with applicable Air Force regulations, prompting Goldman to sue the Department of Defense on First Amendment grounds

51. Harkness v. Sec'y of Navy, 858 F.3d 437, 444–45 (6th Cir. 2017).
52. Watkins v. U.S. Army, 875 F.2d 699, 736 (9th Cir. 1989) (Hall, J., dissenting).
53. North Dakota v. United States, 495 U.S. 423, 443 (1990) (Stevens, J., U.S. Navy).
54. Walch v. Adjutant Gen.'s Dep't of Tex., 533 F.3d 289, 304 (5th Cir. 2008) (Southwick, J., U.S. Army, Mississippi National Guard) (quoting Hodges v. Callaway, 499 F.2d 417, 424 (5th Cir. 1974)).
55. Air Force Officer v. Austin, 588 F. Supp. 3d 1338, 1348 (M.D. Ga. 2022) (Self, J., U.S. Army) (quoting Orloff v. Willoughby, 345 U.S. 83, 93 (1953)).
56. Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (Rehnquist, J., U.S. Army).
57. *See id.* at 505.

to enjoin the regulation.[58] The Supreme Court upheld the regulation, reasoning that uniforms encourage subordination of the individual to the group, which instills order and provides for more effective military operations and personnel when needed.[59]

Shortly after *Goldman*, the Ninth Circuit addressed the permissibility of several Army uniform regulations that, in concert, prohibited a soldier from donning a turban, sporting unshorn hair, and wearing iron bracelets—three expressions of one's adherence to Sikhism.[60] In that case, decided the year after *Goldman*, the panel concluded:

> If the military may regulate the wearing of a relatively unobtrusive yarmulke in the interests of uniformity, surely it may prohibit the wearing of turbans, unshorn hair, and iron bracelets, which are obviously a more significant departure from uniform appearance standards. The *Goldman* decision broadly upholds the professional judgment of the military that uniform appearance standards are necessary for a unified and disciplined military service in the defense of our country.[61]

The lesson of *Goldman* and *Khalsa v. Weinberger* is the judiciary's deference, at that time, to the "professional judgment of the military" in weighing servicemembers' freedom of expression and freedom of religion against the government's interest in uniformity across the armed forces as a means to maintain a unified and effective fighting force.

2. Speech

Another key facet of the judiciary's deference to the military during this era concerns speech constraints and the military. Two chief cases endorsed the military's strict control of expressions or speech on its property and by its members.

In *Greer v. Spock*,[62] the Court upheld regulations that banned partisan or political speeches or demonstrations of political nature as well as the distribution of literature on a military base or installation without prior approval of the post's commanding officer.[63] Justice Potter Stewart,

58. *See id.*
59. *See id.* at 508–10.
60. *See generally* Khalsa v. Weinberger, 787 F.2d 1288 (9th Cir. 1985). The Ninth Circuit had decided the case the year prior but withdrew the opinion once the Supreme Court granted certiorari in *Goldman*, recognizing that the Court's opinion in *Goldman* was likely to address the issues in *Khalsa*. *See id.* at 1288–89.
61. *Id.* at 1290.
62. 424 U.S. 828 (1976) (Stewart, J., U.S. Navy).
63. *See id.* at 838–40.

another Naval officer who served in World War II,[64] distinguished military installations from other government buildings notwithstanding that both may be open to the public. Writing for a majority of the Court, Stewart noted that "[a] necessary concomitant of the basic function of a military installation has been 'the historically unquestioned power of its commanding officer summarily to exclude civilians from the area of his command.'"[65] Accordingly, regulations upholding that power—and thus barring speech that the commanding officer "perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command"—does not disturb constitutional order.[66]

This thinking extended to the speech of those in uniform. Following *Spock*, Justice Powell, a decorated veteran,[67] issued *Brown v. Glines* on behalf of a 6-3 court.[68] In that case, the High Court adjudicated the constitutionality of Air Force regulations that "prohibit 'any person within an Air Force facility' and 'any [Air Force] member . . . in uniform or . . . in a foreign country' from soliciting signatures on a petition without first obtaining authorization from the appropriate commander."[69] The majority upheld the regulations, noting that they "protect a substantial Government interest unrelated to the suppression of free expression": "maintaining morale, discipline, and readiness" of military fighting forces.[70]

At bottom, the Court deferred to the military's determination in both *Spock* and *Brown* as to what expressions would or would not jeopardize the fighting force's readiness.

64. Indeed, legend tells that Justice Stewart's most famous—or infamous—contribution to American jurisprudence, the "I know it when I see it" definition of pornography in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), was the result of his conversations with a former Marine officer and law clerk about the materials the two veterans saw while in uniform. *See* Peter Lattman, *The Origins of Justice Stewart's "I Know It When I See It"*, WALL ST. J. (Sept. 27, 2007), https://perma.cc/S566-22BE.

65. *Greer*, 424 U.S. at 838 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 893 (1961)).

66. *Id.* at 840.

67. At the age of thirty-three and "in no danger of being drafted," following the attack on Pearl Harbor, Justice Powell "volunteered for service in the Army Airforce, rising in rank from First Lieutenant to a full Colonel, and winning the Legion of Merit and the Bronze Star." The Honorable William H. Rehnquist, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV. 3, 4 (1999). Justice Powell's biographer is quoted as saying that the Justice would name his service in World War II as his crowning achievement. *See* Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST (Aug. 26, 1998), https://perma.cc/CLL4-D8NE.

68. 444 U.S. 348 (1980) (Powell, J., U.S. Army).

69. *Id.* at 350 (quoting U.S. DEP'T OF THE AIR FORCE, REGUL. 30–1(9) (1971)).

70. *Id.* at 354, 356.

3. Fitness to Serve

One of the foremost examples of the judiciary's overt deference is in its review of the fitness of *who* may serve. For example, in the 1970s, two former lieutenant colonels in the Alaska Air National Guard were forced to retire because a Vitalization Board recommended the two be retired against their will, albeit with severance pay and full military retirement benefits.[71] The three-judge district court decision dismissed the case, noting that it

> will of necessity have to defer to the expertise of the military in determining the fitness of these plaintiffs to continue in the service of the Alaska Air National Guard. Although the court could substitute its judgment for that of the Vitalization Board, the function of determining which officers are sufficiently qualified for retention in active service is one properly left to the experience and discretion of the military, those professionally trained for that purpose.[72]

In other words, the court could not "assume[] review of the board's decision," as that would inhibit the Alaska Air National Guard—or any military organization—from "conducting an orderly training program directed to sharpening its operational readiness."[73]

Prior to 2011, questions of fitness to serve also incorporated questions of sexual orientation, as many individuals barred from serving as a result of their sexual identities filed suit. Military regulations regarding the ability of openly gay individuals to access, serve, and reenlist ebbed and flowed during the twentieth century.[74] In the 1970s, the Army defined an "unsuitable" soldier subject to discharge as one "who 'evidences homosexual tendencies, desire, and interest.'"[75] Accordingly, a Board of Officers recommended discharging Miriam Ben-Shalom, a drill sergeant whom the Army acknowledged was "a fine candidate for drill sergeant school, a capable soldier, and an excellent instructor," as "unsuitable" in light of her sexual identity[76]—which she concededly acknowledged "during conversations with fellow reservists, in an interview with a reporter for her division newspaper, and in class, while teaching drill sergeant candidates."[77] A federal district court struck down

71. *See* Turner v. Egan, 358 F. Supp. 560, 561 (D. Alaska), *aff'd*, 414 U.S. 1105 (1973).

72. *Id.* at 564.

73. *Id.*

74. *See* Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 72–79 (1991).

75. Ben-Shalom v. Sec'y of Army, 489 F. Supp. 964, 969 (E.D. Wis. 1980) (citing U.S. DEP'T OF THE ARMY, REGUL. 135-178 ¶ 7-5b(6) (1980)).

76. *Id.*

77. *Id.*

the regulation, holding that its "broad sweep . . . substantially impinges the First Amendment rights of every soldier to free association, expression, and speech."[78] And absent any evidence Ben-Shalom "caused [any] disturbances except in the minds of those who chose to prosecute [the soldier]," the district court made clear that her "First Amendment interests carry the day over the needs of the military."[79]

Analogous scenarios arose concerning the Navy and the Air Force[80] in companion cases.[81] In the former, a separation board with discretion to retain a gay officer recommended discharging an ensign, but because the board failed to articulate "the actual considerations which went into the Navy's ultimate decision not to retain [the officer,]" the court could not countenance the decision.[82] And in the latter, the Air Force's failure to articulate exactly when exceptions to its policy to discharge gay airmen applied doomed its attempt to discharge otherwise exceptional servicemembers.[83] In sum, when military branches had yet to say that *all* gay servicemembers created a disturbance with the unit *per se*, the courts deferred to the military regarding whether a gay servicemember *actually* disrupted the unit in any way and only stepped in where the service branches failed to provide details or explanations to which a court could reasonably defer.[84]

The year after the Army's decision about Ben-Shalom, however, the "Department of Defense issued a directive in 1982 that made this total exclusion policy uniform throughout all the services."[85] Implementing that regulation,

78. *Id.* at 974.

79. *Id.* at 973, 795.

80. The authors, two Naval officers, resist the strong temptation to refer to their brethren and sistren in arms as the "Chair Force." They would never make such a disparaging joke, lighthearted as it may be in this context.

81. *See* Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978); *see also* Matlovich v. Sec'y of Air Force, 591 F.2d 852 (D.C. Cir. 1978).

82. *Berg*, 591 F.2d at 851.

83. *See Matlovich*, 591 F.2d at 854.

84. Among the clearest examples of this phenomenon is *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469 (9th Cir. 1994). There, a Petty Officer in the Navy made a statement on national news that he was gay. *See id.* at 1472. The Navy discharged him, but because the applicable regulations only permitted discharge based on conduct and not status, the court could intervene. Nonetheless, the Ninth Circuit made clear that the conduct-based regulation, which was itself subject to repeated litigation, was constitutional because it "defer[s] to the Navy's judgment that the 'presence of persons who engage in homosexual conduct, or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission.'" *Id.* at 1477 (citations omitted).

85. Davis, *supra* note 74, at 79 (citing U.S. DEP'T OF DEF., DIRECTIVE 1332.14 (1982)).

> the Army revised the enlisted separations regulation, AR 635-200, to create a separate chapter for separations due to homosexuality. The policy made it clear that all personnel fitting the definition [] of a homosexual were to be separated, with no exceptions. In the area of homosexual acts, an exception could be made if a soldier met five criteria that essentially meant the soldier was not really a homosexual.[86]

A decade later, Congress enacted "Don't Ask, Don't Tell."[87] While this statute in theory codified the distinction between statements regarding sexual identity or preference and intent to engage in or actually engaging in homosexual conduct, in practice it was arguably more onerous: The burden was placed on a servicemember to demonstrate that "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[88] Further, Judith A. Miller, General Counsel for the Department of Defense, issued an implementing memorandum that demanded the burden *not* shift back to the military upon such a showing, which effectively rendered the ban ironclad. Nevertheless, multiple circuit courts of appeal upheld the policy amidst claims of constitutional violations by military members sounding in Due Process concerns, First Amendment concerns, and Equal Protection concerns, expressly deferring to the military—and less so, Congress—on matters regarding military personnel and preparedness.[89]

4. Affirmative Action

Finally, years ago, the Supreme Court heeded the wisdom of military leaders in upholding the practice of affirmative action in higher education admissions. When the High Court considered the constitutionality of the practice some twenty years ago in *Grutter v. Bollinger*, an "affected group" of national security professionals including General Norman Schwartzkopf and National Security Advisor Bud McFarlane filed an

86. *Id*. at 78–79.

87. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670–73 (1993); U.S. DEP'T OF DEF., DIRECTIVE 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (1993); *see also* Robert Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 416 (2008) ("['Don't Ask Don't Tell'] replaced an outright ban on service by homosexuals in the United States military.").

88. 10 U.S.C. § 654(b)(2) (repealed 2010).

89. *See* Able v. United States, 155 F.3d 628, 633–35 (2d Cir. 1998) (Walker, J., U.S. Marine Corps) (detailing the ways in which courts regularly defer to the Executive and Legislative branches in matters of military operations, including with regard to restrictions on the First Amendment, to justify the policy); *see also* Cook v. Gates, 528 F.3d 42 (1st Cir. 2008); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996) (Wiggins, J., U.S. Army); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (Wilkinson, J., U.S. Army).

amicus brief arguing that, while the case did not *directly* consider the national security implications of affirmative action, the Justices ought to, as affirmative action is essential for a "battle-ready" military insofar as a racially diverse officer cadre is required to lead a racially diverse enlisted corps.[90] "To say that the Court found the brief persuasive would be an understatement," as it "repeatedly singled out the military brief during oral argument" and its decision upholding affirmative action "contained more cites to the military brief than to any other brief submitted to the Court."[91] Specifically, the Court relied on the military's narrow, compelling interest to uphold the practice.[92]

IV. COVERT DEFERENCE AND JUSTICIABILITY DOCTRINES

The judiciary's deference to the military during the twentieth and early twenty-first centuries was not always an overt rubber stamp on the military's actions and decisions. In some instances, jurists declined to weigh in and relied instead on justiciability doctrines such as the political question doctrine and standing, effectively deferring to the military's judgment in a less direct way.

A. Vietnam, the Political Question Doctrine, and Covert Deference

In addition to the overt deference of World War II-era cases, much of the judiciary's deference over the last half-century relied on the political question doctrine.[93] As summarized elsewhere, "[a] true political question . . . is present when it is necessary for a court to *defer* to the political branch determination of the constitutionality of its own action because interference with that action would cause intolerable consequences."[94] This line of reasoning explains the judiciary's covert deference to the military.

The political question doctrine's modern incarnation emerged in the mid-twentieth century with the Supreme Court's 1962 decision in *Baker v. Carr*,[95] wherein seven justices articulated the categories of issues that

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90. *See* Consolidated Brief for Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents at 27, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

91. Mark K. Moller, *Race, "National Security," and Unintended Consequences: A Sideways Glance at* Brown v. Board of Education *at Fifty*, 36 LOY. U. CHI. L.J. 257, 265–66 (2004) (citations omitted).

92. *See Grutter*, 539 U.S. at 330–31.

93. *See* 13C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3534.2 (3d ed. 2024) (citing the political question doctrine as a matter of deference to the political branches).

94. Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 233 (1985) (emphasis added).

95. 369 U.S. 186 (1962) (Brennan, J., U.S. Army).

"constitute[] a nonjusticiable 'political question.'"[96] Two such categories included "[f]oreign relations" and the "[d]ates of duration of hostilities."[97] This principle was quickly put to the test when litigants began challenging the constitutionality of the Vietnam War.

In district and appellate courts across the country, federal jurists relied on either standing grounds or the political question doctrine "to justify not reaching the merits of a wide range of litigants' challenges to the constitutionality of the war, the draft, and a host of other Vietnam-era measures."[98] In one noteworthy example, District Judge Orrin Judd of the Eastern District of New York issued an injunction prohibiting the Department of Defense from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia,"[99] which the Second Circuit promptly stayed on political question grounds.[100] Subsequently, Justice Thurgood Marshall, the Circuit Justice for the Second Circuit, denied an application to vacate the stay, concluding it would "be inappropriate" to do while "acting as a single Circuit Justice."[101] Moreover, Justice Marshall stated, the Circuit panel's view is "entitled to great weight."[102] But days later, Justice William O. Douglas issued a ruling that sought to reinstate the injunction and stated that the question was justiciable,[103] prompting Justice Marshall to override Justice Douglas's order over Justice Douglas's dissent.[104] With a stay in place following this tête-à-tête, and Congress's subsequent restriction of funding so as to effectuate Judge Judd's injunction,[105] the Supreme Court denied certiorari on the case,[106] so the rare ruling assuming the justiciability of the war's permissibility died with a whimper.

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96. *Id.* at 226.

97. *Id.* at 211–14.

98. Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK U. L. REV. 47, 48 (2016); *see also, e.g.*, Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971).

99. Holtzman v. Schlesinger, 484 F.2d 1307, 1308 (2d Cir. 1973) (Mulligan, J., U.S. Army).

100. *Id.* at 1313 ("[T]he argument that continuing Congressional approval was necessary[] was predicated upon a determination that the Cambodian bombing constituted a basic change in the war not within the tactical discretion of the President and [] that is a determination we have found to be a political question").

101. Holtzman v. Schlesinger, 414 U.S. 1304, 1305 (1973) (Marshall, J., in chambers).

102. *Id.* at 1314.

103. *See* Holtzman v. Schlesinger, 414 U.S. 1316, 1319–20 (1973) (Douglas, J., U.S. Army, in chambers).

104. *See* Holtzman v. Schlesinger, 414 U.S. 1321, 1323–26 (1973) (Marshall, J., in chambers).

105. *See* Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973); Continuing Appropriations, 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973).

106. *See* Holtzman v. Schlesinger, 416 U.S. 936 (1974).

At bottom, aside from matters ancillary to the war itself—such as First Amendment principles of free speech regarding war protests[107] or publication of Vietnam-era documents[108]—the Supreme Court simply "declined review of every case presenting claims that the war and conscription in aid of the war were unconstitutional."[109] The practical effect, then, of this reliance on standing and the political question doctrine was a deference to the military, and the Executive as Commander-in-Chief, on issues that would impinge its operations.

B. Political Questions Abound

Following the avoidance of the political questions raised by Vietnam, cases challenging the constitutionality of later military operations continued to be swatted away as nonjusticiable political questions as well as by standing principles, depending on the particular plaintiffs and causes of action at issue. As with the Vietnam War, the constitutionality of nearly all major military operations thereafter were challenged and subsequently dismissed as nonjusticiable.

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107. *See, generally*, *e.g.*, Cohen v. California, 403 U.S. 15 (1971) (Harlan, J., U.S. Army) (considering the constitutionality of wearing clothing with "Fuck the Draft" emblazoned on it); Watts v. United States, 394 U.S. 705 (1969) (discussing the limits of political hyperbole, when a threat did not constitute a knowing and willful threat against the President); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (Fortas, J., U.S. Navy) (adjudicating the constitutionality of regulations prohibiting students from wearing black armbands as measures of protest against the war); United States v. O'Brien, 391 U.S. 367 (1968) (Warren, J., U.S. Army) (holding that criminal statutes prohibiting burning a draft card did not violate the First Amendment because, while such conduct was expressive, the criminal prohibition was justified based on the government's interest and the law's narrow tailoring).

108. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (allowing the publication of the Pentagon Papers over the federal government's objection and attempted censorship).

109. Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275, 275 (1994); *see also, e.g.*, Vladeck, *supra* note 98, at 49. As Professor Vladeck stated:

> Every time, however, a litigant sought to contest the substance of U.S. military or paramilitary activities in Southeast Asia, or the means by which soldiers were conscripted to participate in those operations, the Court ducked and declined to review lower court decisions, virtually all of which concluded that such disputes were not justiciable.

Id. For a list and overview of such cases brought, see generally Schoen, *supra*, at 280–98. As Schoen notes, too, the Supreme Court *arguably* weighed in with its per curiam summary affirmance in *Atlee v. Richardson*, 411 U.S. 911 (1973) (per curiam), which affirmed a three-judge district court that itself decided the issue was nonjusticiable. *See* Atlee v. Laird, 347 F. Supp. 689, 708 (E.D. Pa. 1972). But absent specific discussion on the matter from the Supreme Court, and given the potential standing and mootness arguments forwarded by the government, it is difficult to read anything into *Atlee*. *See* Schoen, *supra*, at 303 (concluding that *Atlee* "should be viewed as deciding nothing about the Vietnam War" as it is "no different in precedential effect than the other Vietnam cases in which the court refused discretionary review"). Accordingly, the Authors agree with Schoen and Vladek that the Court was effectively silent on the Vietnam War's constitutionality.

Consider the initial post-Vietnam military operations. A mix of Congresspersons and citizens of Guatemala sued President Ronald Reagan and members of the Executive Branch, alleging that the President, "through his officers and appointees, [] violated the neutrality laws, the War Powers Resolution, the National Security Act of 1947, especially the Hughes-Ryan Amendment . . . , and the Boland Amendment, by carrying on an undeclared war against the Nicaraguan government."[110] The D.C. District Court dismissed the case, concluding that "judicial resolution of this matter is not proper at this time because it involves a nonjusticiable political question."[111] And when 110 Congresspersons sued President Reagan regarding the "initiation of United States escort operations in the Persian Gulf and by the September 21, 1987 attack on an Iranian Navy ship laying mines in the Persian Gulf," the district court "decline[d] to exercise jurisdiction" because of the political question doctrine.[112] To wit, the district court referred to the lawsuit as "evidence[ing] a by-product of political disputes within Congress regarding the applicability of the War Powers Resolution to the Persian Gulf situation."[113] Years later still, the D.C. Circuit relied on standing principles to dismiss a cause of action filed by "31 congressmen opposed to U.S. involvement in the Kosovo intervention . . . seeking a declaratory judgment that the President's use of American forces against Yugoslavia was unlawful under both the War Powers Clause of the Constitution and the War Powers Resolution."[114] As Professor Stephen Vladeck aptly summarized, "from the end of the Vietnam War through September 11th, courts faced with lawsuits challenging overseas military operations consistently relied on the same two doctrines—standing and the political question doctrine—to avoid reaching, let alone resolving" the constitutionality of those operations.[115]

The Global War on Terror, while marking a new epoch in the country's national security timeline, did not change the juridical tides, as federal courts continued to dismiss causes of actions seeking to place limits on the use of force in certain ways.[116] For example, in 2010, the D.C.

110. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983) (Corcoran, J., U.S. Army) (citations omitted), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

111. *Id.* at 601.

112. Lowry v. Reagan, 676 F. Supp. 333, 334, 337 (D.D.C. 1987) (Revercomb, J., U.S. Air Force). The court also cited the remedial discretion doctrine. *See id.* at 337–38.

113. *Id.* at 338.

114. *See* Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (Silberman, J., U.S. Army).

115. Vladeck, *supra* note 98, at 49–50.

116. *See id.* at 50 ("Since September 11th, however, a number of courts have relied on these justiciability constraints—especially the political question doctrine—to dismiss an ever-expanding array of challenges to U.S. military operations overseas, including claims that such operations violate individual rights under federal statutes, the Constitution, and/or international law.").

Circuit, sitting en banc, held that the political question doctrine precluded judicial review of whether a decision to execute a missile attack on a Sudanese pharmaceutical plant with the goal of defeating Osama Bin Laden's terrorist network was mistaken and/or not justified.[117] Judicial review of drone attacks[118] (including the inadvertent strike of a civilian fishing vessel[119]) and classifications of combat operations[120] have also been dismissed under this doctrine. In one of the more unusual examples of this doctrine's application, a court refused to adjudicate a request for the United States to publicly declare its standard for selecting targets for strikes, as well as an injunction prohibiting executive branch leaders from intentionally killing a United States citizen who was allegedly "targeted" as a suspected terrorist, unless he met the requested standard.[121] Even claims filed in the post-September 11th era not strictly related to the constitutionality of combat operations have been dismissed as nonjusticiable political questions, including the removal of residents for the sake of a military base.[122] In other words, the judiciary's reluctance to determine the constitutionality or legality of military operations continued in the years following September 11th in favor of these avenues of covert deference.[123]

117. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842–44 (D.C. Cir. 2010). Years earlier, the Federal Circuit relatedly held that it lacked jurisdiction to review whether the object of that strike was properly considered enemy property:

> We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies.

El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1365 (Fed. Cir. 2004).

118. *See, e.g.*, Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017) (dismissing claims arising from drone strikes in Yemen).

119. *See* Wu Tien Li-Shou v. United States, 777 F.3d 175, 179 (4th Cir. 2015).

120. *See* Grell v. Trump, 330 F. Supp. 3d 311, 318 (D.D.C. 2018).

121. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 46–52 (D.D.C. 2010). The compelling coda to this case is that the individual in question was, in fact, later killed by the United States, and the individual's father, who had brought the declaratory and injunctive action, again sued, yet a different D.C. district judge relied on a distinction between property rights (*El-Shifa*) and killing of an American without due process to "find[] that this case is justiciable and that it ha[d] subject matter jurisdiction." Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 70 (D.D.C. 2014). Nevertheless, however, the court dismissed the case because there existed "no available remedy under U.S. law for this claim." *Id.* at 74.

122. *See* Bancoult v. McNamara, 445 F.3d 427, 433 (D.C. Cir. 2006).

123. That this subsection principally discussed covert deference is not to say instances of overt deference were not evident in this time period. For example, in *Winter v. Nat. Res. Def. Council*, the Supreme Court reversed a lower court injunction that had restricted the Navy's training operations. Specifically, the lower courts enjoined the U.S. Navy's use of mid-frequency active sonar, which the Navy relies on to detect threats of

C. The Feres Doctrine

The Federal Tort Claims Act (FTCA) of 1948 provides: "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."[124] Notwithstanding this "broad waiver of the Federal Government's sovereign immunity,"[125] the FTCA also "contained an exception, by which the Government withheld consent to be sued for '[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.'"[126] And two years after the FTCA's passage, "this exception was broadened significantly by the Supreme Court, which held in *Feres v. United States* that 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity *incident to service*.'"[127] "This broad exception," "labeled 'the *Feres* doctrine,'"[128] was premised on three policy justifications: (1) the relationship between the Government and a member of the Armed Forces is federal in character, (2) the Veterans' Benefits Act provides a substitute path to coverage, and (3) because the military's operations would be hampered if a solider could sue in the event of, for example, negligent orders.[129]

The scope of the *Feres* doctrine has expanded substantially since the doctrine's birth. To begin, it has been applied to students in the Reserve Officer Training Corps[130] and in military academies,[131] expanding the

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enemy submarine vessels, in training exercises under the National Environmental Policy Act. *See* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 17, 25 (2008). The Supreme Court reversed, noting that "[t]he lower courts failed properly to *defer* to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises," and then relied on those same judgments to state that the "ecological, scientific, and recreational interests in marine mammals . . . are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines." *Id.* at 27, 33 (emphasis added). And for good measure, the Chief Justice began and concluded the opinion with quotes about the importance of training from Presidents Washington and Roosevelt, two war heroes in their own right. See *id.* at 12, 33.

124. 28 U.S.C. § 2674.

125. Costo v. United States, 248 F.3d 863, 866 (9th Cir. 2001).

126. *Id.* (quoting 28 U.S.C. § 2680(j)).

127. *Id.* (quoting Feres v. United States, 340 U.S. 135, 146 (1950)) (emphasis added).

128. *Id.*

129. *See* United States v. Johnson, 481 U.S. 681, 684 n.2 (1987) (Powell, J., U.S. Army) (citation omitted).

130. *See* Lovely v. United States, 570 F.3d 778, 783–84 (6th Cir. 2009); *see also* Brown v. United States, 151 F.3d 800, 805 (8th Cir. 1998); Wake v. United States, 89 F.3d 53, 57–59 (2d Cir. 1996).

131. *See*, *e.g.*, Miller v. United States, 42 F.3d 297, 306 (5th Cir. 1995); Collins v. United States, 642 F.2d 217, 222 (7th Cir. 1981).

universe of individuals to whom it may apply. Notably, the liability shield now extends to circumstances in which a civilian caused the servicemember's injuries[132] and includes state law claims.[133] Finally, the acts, conduct, and injuries covered by the liability have grown. The doctrine now "encompass[es], at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military.'"[134] Indeed, "'"[i]ncident to service"' is not . . . a narrow term restricted to actual military operations such as field maneuvers or small arms instruction,' but instead has been applied to various recreational activities by active-duty service members, even when they were temporarily in off-duty status."[135] Accordingly, the *Feres* doctrine has been applied to injuries sustained in horse-back riding or boating.[136] Courts have also applied *Feres* to bar liability arising from injuries sustained without specific actions, recreational or not—such as prenatal care or injuries sustained by servicemembers while incarcerated in military penitentiaries.[137]

In sum, the *Feres* doctrine is simply another way in which the judiciary broadly, if covertly, defers to the military, namely deferring to its interpretation of what acts are "incident to service" and thus barred from giving rise to liability.[138] As the Ninth Circuit noted, the doctrine and its expansion "ha[ve] been guided by an increasing sense of awe for all things military"[139]—deference by another name.

V. A BRAVE NEW WORLD

A. Recent Developments

Recent developments suggest that the judiciary is poised to lower its inhibition and dive into military affairs as needed.

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132. *See Johnson*, 481 U.S. at 691–92.

133. *See*, *e.g.*, Morris v. Thompson, 852 F.3d 416, 418–21 (5th Cir. 2017); Matreale v. N.J. Dep't of Mil. & Veterans Affs., 487 F.3d 150, 154–55 (3d Cir. 2007); Day v. Mass. Air Nat. Guard, 167 F.3d 678, 683 (1st Cir. 1999); Chapman v. Westinghouse Elec. Corp., 911 F.2d 267, 270–71 (9th Cir. 1990) (citing Stauber v. Cline, 837 F.2d 395, 400 (9th Cir. 1988)).

134. Pringle v. United States, 208 F.3d 1220, 1223–24 (10th Cir. 2000) (quoting Persons v. United States, 925 F.2d 292, 296 n.7 (9th Cir. 1991)).

135. Nacke v. United States, 783 F. App'x 277, 281 (4th Cir. 2019) (quoting Hass *ex. Rel*. v. United States, 518 F.2d 1138, 1141–42 (4th Cir. 1975)).

136. *See Hass ex rel.*, 518 F.2d at 1139; McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007).

137. *See, e.g.*, Atkinson v. United States, 825 F.2d 202, 203 (9th Cir. 1987) (prenatal care); Tootle v. USDB Commandant, 390 F.3d 1280, 1281 (10th Cir. 2004) (incarceration).

138. *See* Feres v. United States, 340 U.S. 135, 146 (1950).

139. Persons v. United States, 925 F.2d 292, 295 (1991).

Consider first as a foundation the case of *Ortiz v. United States*,[140] wherein Airman First Class Keanu Ortiz was convicted by a court-martial of possessing and distributing child pornography and subsequently sentenced to two years' imprisonment and a dishonorable discharge.[141] The issue in the case concerned the appointment of one of the jurists who heard Ortiz's case on appeal, and while that issue is itself irrelevant for our purposes, whether the Supreme Court had jurisdiction to hear the appeal from the Court of Appeals for the Armed Forces (CAAF) is far more telling.[142] In fourteen pages, Justice Elena Kagan soundly defeated an amici's argument that reviewing CAAF decisions, and courts martial more broadly, exceeds the Court's constitutional authority, ultimately "conclud[ing] that the judicial character and constitutional pedigree of the court-martial system enable[s] [the Supreme] Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex."[143]

This is not the Court's only subtle sign. In the Supreme Court's 1981 decision in *Rostker v. Goldberg*,[144] seven justices voted to uphold the male-only Selective Service—or military draft—requirement.[145] In reaching this conclusion, the Court employed "a healthy deference to legislative and executive judgments in the area of military affairs," including the role of women in combat operations.[146] Forty years later, the Court revisited the question in light of the changing role of women in our nation's uniformed fighting force.[147] Though the Court maintained its overt deference to the political branches in matters of military affairs, Justice Sonia Sotomayor's statement concurring in the denial of certiorari—with which Justice Stephen Breyer and Justice Brett Kavanaugh joined—conditioned this deference, making clear it would only keep its powder dry "*while Congress actively weighs the issue*."[148] In other words, further inaction on the topic in light of these changes in the American military demographic could lead to judicial intervention down the road. *Ortiz* and *Rostker* represent smaller cracks in the dam, but several others show a substantial leakage in this seemingly ironclad principal.

First, courts have recently intervened in military determinations as to whether an individual is fit to serve, notwithstanding courts' prior

140. 585 U.S. 427 (2018).
141. *See id.* at 432.
142. *See id.* at 433–36.
143. *Id.* at 428.
144. 453 U.S. 57 (1981) (Rehnquist, J., U.S. Army).
145. *See id.* at 57.
146. *Id.* at 66.
147. *See generally* Nat'l Coal. for Men v. Selective Serv. Sys., 141 S. Ct. 1815 (2021) (Sotomayor, J., concurring in denial for certiorari).
148. *Id.* at 1816 (emphasis added).

reticence to do so. For example, an Eastern District of Virginia court enjoined the Air Force from "separat[ing] [Airmen] because of their HIV status."[149] In broad strokes, an enlisted Airman brought suit against the branch's policies on deployment and separation of HIV-positive members, and in the interim, sought an injunction to enjoin the Air Force from discharging or separating the member, who had been diagnosed with the virus.[150] The district court concluded that it was not barred under *Mindes*; instead, the general deference typically owed to military branches was immaterial because plaintiffs "request[ed] only that military decisionmakers evaluate whether they are fit for service with more careful attention to their individual characteristics," which it was required to do by regulation, rather than paint all HIV-positive members with the same brush.[151] The Fourth Circuit upheld the injunction, including the *Mindes* analysis. "Requiring the military to follow its own policies does not interfere with its functions," wrote Judge James Wynn, himself a former high-ranking Navy lawyer; "by declining to make individualized determinations regarding servicemembers' fitness for service, the military failed to apply its expertise to the evidence before it. And the military cannot claim that a failure to follow its own written policies is discretionary."[152]

Following affirmance, the district court granted plaintiffs' motions for summary judgment, barring the Air Force's: (1) refusal to deploy "asymptomatic HIV-positive service members with undetectable viral loads based on their HIV-positive status"; (2) automatic denial of applications by "HIV-positive service members with undetectable viral loads to commission as officers based on their HIV-positive status"; and (3) "discharging or otherwise separating . . . any other asymptomatic HIV-positive service members with undetectable viral loads based on their HIV-positive status."[153] While this line of cases did not *directly* influence or change operations, that the courts unanimously rejected pleas for deference exemplifies courts' willingness to get involved in military affairs.

Second, recall two discussions previously undertaken: affirmative action and uniforms. As stated above, in each situation, the Supreme Court

149. Roe v. Shanahan, 359 F. Supp. 3d 382, 409 (E.D. Va. 2019), *aff'd sub nom.* Roe v. U.S. Dep't of Def., 947 F.3d 207 (4th Cir. 2020) (amended Jan. 14, 2020).

150. *See id.* at 391–92.

151. *Id.* at 406.

152. *Roe*, 947 F.3d at 218. The unanimous opinion was also joined by Judge Alberto Diaz, a former Marine Corps Lt. Col.

153. Harrison v. Austin, 597 F. Supp. 3d 884, 915–16 (E.D. Va. 2022), *appeal dismissed sub nom.* Roe v. U.S. Dep't of Def., No. 22-1626, 2022 WL 17423458 (4th Cir. July 11, 2022).

upheld specific deference in these arenas.[154] That is seemingly no longer the case.

When the Supreme Court reconsidered the topic of affirmative action in 2023, it discarded the expertise and wishes of the Department of Defense and military officials. During oral argument in *Students for Fair Admissions v. University of North Carolina*, Solicitor General Elizabeth Prelogar began her argument by highlighting the importance of national security:

> When students of all races and backgrounds come to college and live together and learn together, they become better colleagues, better citizens, and better leaders. That truth is vitally important to our nation's military. Our armed forces know from hard experience that when we do not have a diverse officer corps that is broadly reflective of a diverse fighting force, our strength and cohesion and military readiness suffer. So it is a critical national security imperative to attain diversity within the officer corps.[155]

Later in the argument, General Prelogar made clear that "more officers come from ROTC programs [than other sources of a military commission]" such that this interest permeated all college campuses rather than pertaining only to military academies.[156] So, too, did she remind the Court that "we have had experiences in our past where the officer corps and its racial composition did not reflect the diversity in enlisted service members and that [] caused tremendous racial tension and strife."[157]

And as occurred decades ago, a group of military leaders contributed as amici. Comprising "four Chairmen of the Joint Chiefs of Staff; Chiefs of Staff of the Army and the Air Force; Chief of Naval Operations of the Navy; Commandant of the Marine Corps; Medal of Honor recipients; and other military leaders who also serve as university presidents, chancellors, and professors," amici argued that "[p]rohibiting educational institutions from using modest, race-conscious admissions policies would impair the military's ability to maintain diverse leadership, and thereby seriously undermine its institutional legitimacy and operational effectiveness."[158]

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154. *See supra* Sections II.B.i, iv.

155. Transcript of Oral Argument at 144, Students for Fair Admissions v. Univ. of N.C., 600 U.S. 181 (2023) (No. 21-707).

156. *Id.* at 150.

157. *Id.* at 146–47. General Prelogar also referenced those arguments in the companion case, *Students for Fair Admissions v. President & Fellows of Harvard College*. *See* Transcript of Oral Argument at 96, Students for Fair Admissions v. President & Fellows of Harvard Coll. 600 U.S. 181 (2023) (No. 20-1199).

158. Brief for Adm. Charles S. Abbott et al. as Amici Curiae in Support of Respondents at 1, 3, Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199, 21-707). *See also id.* at 3 (noting that in *amici*'s "professional judgment, the status quo—which permits service academies and civilian

It mattered not. The Supreme Court struck down the practice of affirmative action in college admissions in both public and private institutions on Equal Protection grounds.[159] The Court seemingly tried to mitigate these concerns in a footnote by noting the amici's argument and cabining the case's reach: "No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present."[160] And yet, this will still impact the vast majority of the officer corps, as ROTC programs are—by far—the largest source of commissioned officers across the uniformed fighting forces.[161] Justice Sotomayor noted this reality in her dissent: "[t]he majority recognize[d] the compelling need for diversity in the military and the national security implications at stake . . . but it end[ed] race-conscious college admissions at civilian universities implicating those interests anyway."[162]

While the Supreme Court indeed cleaved off service academies from its ruling, Students for Fair Admissions (SFFA), the plaintiff in the two consolidated cases, have already pushed forward with such litigation, having filed similar suits against the United States Military Academy at West Point, the United States Naval Academy, and the Air Force Academy.[163] As of the time this Article is to be published, the district court in the West Point case denied plaintiffs' motions for preliminary injunctions.[164] However, Judge Richard Bennett—a 20-year veteran of the U.S. Army Reserve and Maryland National Guard—upheld The Naval Academy's practices following a multi-week bench trial, concluding:

> The Naval Academy's race-conscious admissions policies are narrowly tailored to further a compelling governmental interest in national security. Defendants have proven that the Naval Academy's

universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U. S. military").

159. *See Students for Fair Admissions*, 600 U.S. at 190. The authors reiterate that this Article does not take a normative position on the legal accuracy or policy wisdom of any judicial decisions or action taken, only placing them together to elucidate a pattern or an emerging sea change.

160. *Id.* at 213 n.4.

161. *See id.* at 181–231 (failing, in the majority opinion, to address or discuss ROTC programs).

162. *Id.* at 380 (Sotomayor, J., dissenting).

163. *See generally* Complaint, Students for Fair Admissions v. U.S. Mil. Acad. at W. Point, No. 23-CV-8262 (S.D.N.Y. Sept. 19, 2023) (Dkt. No. 1); Complaint, Students for Fair Admissions v. U.S. Naval Acad., No. 23-CV-2699 (D. Md. Oct. 5, 2023) (Dkt. No. 1); Complaint, Students for Fair Admissions v. U.S. Air Force Acad., No. 24-CV-03430 (D. Co. Dec. 10, 2024) (Dkt. No. 1).

164. *See* Students for Fair Admissions v. U.S. Naval Acad., 707 F. Supp. 3d 486, 507–08 (D. Md. 2023); Students for Fair Admissions v. U.S. Mil. Acad. at W. Point, 709 F. Supp. 3d 118, 123–24 (S.D.N.Y. 2024).

> limited use of race in admissions has increased the racial diversity of the Navy and Marine Corps, which has enhanced national security by improving the Navy and Marine Corps' unit cohesion and lethality, recruitment and retention, and domestic and international legitimacy.[165]

Judge Bennett's findings, though, are not the end of the story. To begin, SFFA filed a notice of appeal the same day as Judge Bennett's decision[166] and has vowed to appeal the ruling to the Supreme Court if necessary.[167] Further, SFFA filed its action against the Air Force Academy *after* Judge Bennett's ruling.[168] And finally, prior to the Maryland district court's decision, the Supreme Court denied SFFA's emergency application for a writ of injunction pending appeal against West Point but, in so doing, the High Court added in rare yet telling commentary: "The record before this Court is underdeveloped, and this order should not be construed as expressing any view on the merits of the constitutional question."[169] This additional note, while seemingly an innocuous repetition of how courts are in fact supposed to view denials for preliminary injunctions, could be more akin to a harbinger of the Court's willingness to alter the academies' operations, effectively involving itself in military affairs. As Professor Melissa Murray highlighted on the popular legal podcast *Strict Scrutiny*, "the court doesn't always or even usually give reasons for denying requests for emergency relief. So it was notable that they issued that statement, making clear that going forward, maybe not this year, maybe not next year, but soon they would be more than happy to entertain this question . . . . There's more to come."[170]

The third avenue by which the judiciary has involved itself in military affairs, albeit with Congress's express blessing, is in the arena of religious rights.[171] The year after the Supreme Court decided the above-discussed

165. Students for Fair Admissions v. U.S. Naval Acad., No. 23-CV-2699, 2024 WL 5003510, at *62 (D. Md. Dec. 6, 2024).

166. *See generally* Notice of Appeal, Students for Fair Admissions v. U.S. Naval Acad., No. 23-CV-2699 (D. Md. Oct. 5, 2023) (Dkt. No. 152).

167. *See* Ian Round, *Naval Academy's Admission Policies Upheld in Affirmative Action Ruling,* DAILY REC. (Dec. 6, 2024), https://perma.cc/9P49-QHTV.

168. *See* Nate Raymond, *Affirmative Action Opponents Sue US Air Force Academy*, REUTERS (Dec. 11, 2024, 2:11 PM), https://perma.cc/7DMJ-JSKL.

169. *See* Students for Fair Admissions v. U.S. Mil. Acad. at W. Point, 144 S. Ct. 716 (2024) (mem.).

170. Strict Scrutiny, *The Alabama Supreme Court Embraces Fetal Personhood*, CROOKED MEDIA, at 24:26–25:11 (Feb. 26, 2024), https://perma.cc/PD2J-UZZ3.

171. *See* Xiao Wang, *Religion as Disobedience*, 76 VAND. L. REV. 999, 1018 (2023) ("The statutory text [of RFRA and RLUIPA] expressly instructs courts to 'construe[] [these statutes] in favor of a broad protection of religious exercise, to the maximum extent permitted.' The laws themselves, further, 'operat[e] as a kind of super statute, displacing the normal operation' of other federal and state law." (some alterations in original) (footnotes omitted)).

yarmulke case, *Goldman v. Weinberger*, Congress "instructed the military not to ban religious apparel in uniform unless it would 'interfere with the performance of the member's military duties' or disrupt a 'neat and conservative' appearance."[172] Several years later, Congress passed the Religious Freedom Restoration Act ("RFRA"),[173] prohibiting the federal government from "substantially burden[ing] a person's exercise of religion" unless the government "demonstrates that application of the burden to the person" is the "least restrictive means" of furthering a "compelling" interest.[174] As courts have repeatedly found, RFRA "undoubtedly 'applies in the military context.'"[175]

Earlier this decade, three Sikh practitioners whose religion requires them to "maintain unshorn hair and beards" and to don certain articles of clothing sought to enlist in the Marine Corps.[176] The Corps, however, refused to accommodate these individuals because

> [t]hose religious practices conflict[ed] with the Marine Corps' standard grooming policy for the initial training of newly enlisted recruits, commonly known as boot camp. The Corps [] agreed to accommodate Plaintiffs' religious commitments (with some limitations not relevant here) after each of them finishes basic training. But it [would] brook no exception for the Sikh faith during those initial thirteen weeks of boot camp.[177]

The D.C. Circuit cited Congress's response to the Supreme Court's *Goldman* decision and applied RFRA to the cause of action.[178] Having done so, the panel then engaged in traditional preliminary injunction analysis, concluding that these would-be Marines "have shown both an overwhelming likelihood of success on the merits and that the balance of the equities and public interest weigh in their favor."[179]

To be sure, getting involved in fitness determinations, the military training pipeline, and uniform standards evince a willingness to adjudicate military concerns, but arguably the most compelling evidence of the judiciary's changed posture was its willingness to adjudicate policies bearing on the deployment of combat-ready personnel and materiel—done

172. Singh v. Berger, 56 F.4th 88, 92 (D.C. Cir. 2022) (quoting Pub. L. No. 100–180, § 508, 101 Stat. 1019, 1086–1087 (1987) (codified at 10 U.S.C. § 774)).

173. *See* Pub. L. No. 103–141, § 3, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*).

174. 42 U.S.C. § 2000bb-1(b)(1)–(2).

175. U.S. Navy SEALs 1–26 v. Biden, 27 F.4th 336, 346 (5th Cir. 2022) (quoting United States v. Sterling, 75 M.J. 407, 410 (C.A.A.F. 2016), *cert. denied*, 137 S. Ct. 2212 (2017)).

176. *Singh*, 56 F.4th at 91.

177. *Id.*

178. *See id.* at 92.

179. *Id.* at 110; *see also id*. at 92–110.

in the context of the Department of Defense's COVID-19 vaccine mandate.[180] In brief, myriad suits were filed by members of each branch as well as federal contractors regarding the Department of Defense's COVID vaccination requirements.[181]

Given both the number and the rapidity of these suits as well as their distinctive nature—differing hardships alleged or forms of relief requested, for example—prior to the Supreme Court's involvement, district courts were inconsistent in their willingness to adjudicate the constitutionality or legality of the Department of Defense's vaccine mandate. Some declined to wade into it citing jurisdictional concerns such as ripeness.[182] Others dismissed cases because the plaintiff brought the wrong claim, thereby lacking merit to succeed.[183] Still others more overtly deferred to the President, "declin[ing] to intrude upon the authority of the Executive in military affairs and [not attempting] to adjudicate the wisdom of professional military judgments."[184] But even the courts that sought to avoid interference recognized that claims of religious discrimination could not survive such overt deference.[185] Indeed, several trial courts enjoined the vaccination requirement, holding that it could not withstand challenges based on the servicemembers' religious rights.[186]

Appellate courts were somewhat similarly split on the topic, divided between dismissing cases for mootness (occurring after the Department of Defense rescinded the vaccination requirement)[187] and affirming (or,

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180. LCDR Aliano, in his former capacity as his capacity as Deputy General Counsel for the Naval Academy, was involved in these and related matters. No privileged or confidential information was used in or considered for this Article.

181. *See, e.g.*, Oklahoma v. Biden, 577 F. Supp. 3d 1245, 1250 (W.D. Okla. 2021) (Oklahoma and its Governor sued the federal government regarding its mandate on uniformed military personnel on behalf of Oklahoma National Guardspeople and Air National Guardspeople); Creaghan v. Austin, 602 F. Supp. 3d 131, 134 (D.D.C. 2022) (servicemember suing to enjoin the U.S. Space Force from taking adverse action as a result of her religious objection to the vaccination mandate); *see also* Navy SEAL 1 v. Austin, 600 F. Supp. 3d 1, 4–5 (D.D.C. 2022) (Navy service member requested preliminary injunction in relation to a COVID-19 vaccination requirement); Navy SEAL 1 v. Austin, 586 F. Supp. 3d 1180, 1182–83 (M.D. Fla. 2022) (same); Short v. Berger, 599 F. Supp. 3d 844, 848 (D. Ariz. 2022) (same); Roth v. Austin, 603 F. Supp. 3d 741, 746–47 (D. Neb. 2022) (same); Air Force Officer v. Austin, 588 F. Supp. 3d 1338, 1343–44 (2022) (same).

182. *See* Miller v. Austin, 622 F. Supp. 3d 1105, 1113 (D. Wyo. 2022); Vance v. Wormuth, No. 21-CV-730, 2022 WL 1094665, at *2 (W.D. Ky. Apr. 12, 2022); Robert v. Austin, No. 21-CV-02228, 2022 WL 103374, at *3 (D. Colo. Jan. 11, 2022).

183. *See* Guettlein v. U.S. Merch. Marine Acad., 577 F. Supp. 3d 96, 103 (E.D.N.Y. 2021).

184. *E.g.*, Hyatt v. Austin, No. 22-CV-1188, 2022 WL 2291660, at *1 (M.D. Fla. June 24, 2022).

185. *See id.*

186. *See Air Force Officer*, 588 F. Supp. 3d at 1357; *Navy SEAL 1*, 586 F. Supp. 3d at 1205.

187. *See* Robert v. Austin, 72 F.4th 1160, 1162 (10th Cir. 2023); Navy SEAL 1 v. Austin, No. 22-5114, 2023 WL 2482927, at *1 (D.C. Cir. Mar. 10, 2023) (per curiam),

alternatively, refusing to stay) an injunction.[188] Regarding the latter universe of caselaw, these appellate courts cited RFRA's extension "to every 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States'" as applying to military personnel.[189] Quoting the Supreme Court's decision in *Bostock v. Clayton County*, for example, the Fifth Circuit held that "RFRA 'operates as a kind of super statute, displacing the normal operation of other federal laws'" such that "abstention based on the *Mindes* test"—in other words, abstention based on deference to those in uniform to maintain operational readiness—"is no longer permissible" when adjudicating religious liberty claims in a military context.[190] Furthermore, the Fifth Circuit cited support from the Second Circuit's Judge Walter R. Mansfield, a former Marine Corps officer, who once wrote that "service members 'experience increased needs for religion as the result of being uprooted from their home environments, transported often thousands of miles to territories entirely strange to them, and confronted there with new stresses that would not otherwise have been encountered if they had remained at home.'"[191]

Ultimately, the Supreme Court stayed the nationwide injunction "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions."[192] While the High Court's stay did not detail its thinking, Justice Kavanaugh wrote a concurrence relying on the aforementioned deference:

> In this case, the District Court, while no doubt well-intentioned, in effect inserted itself into the Navy's chain of command, overriding military commanders' professional military judgments. The Court relied on the Religious Freedom Restoration Act. But even accepting that RFRA applies in this particular military context, RFRA does not justify judicial intrusion into military affairs in this case. That is because the Navy has an extraordinarily compelling interest in

cert. denied sub nom. Creaghan v. Austin, 144 S. Ct. 97 (2023); Creaghan v. Austin, No. 23-5101, 2023 WL 8115975, at *1–2 (D.C. Cir. Nov. 21, 2023); U.S. Navy SEALs 1-26 v. Biden, 72 F.4th 666, 669 (5th Cir. 2023); Order, U.S. Navy SEAL 1 v. Sec'y of the U.S. Dep't of Def., No. 22-10645 (11th Cir. Mar. 30, 2022) (per curiam) (Dkt. No. 30), https://perma.cc/S4AX-SAMD.

188. *See* U.S. Navy SEALs 1–26 v. Biden, 27 F.4th 336, 353 (5th Cir. 2022) (denying motion to stay injunction pending appeal); Doster v. Kendall, 48 F.4th 608, 610–11 (6th Cir. 2022) (same); Doster v. Kendall, 54 F.4th 398, 405–06 (6th Cir. 2022) (affirming injunction).

189. *U.S. Navy SEALs 1–26*, 27 F.4th at 345–46 (quoting 42 U.S.C. § 2000bb-2(1)); *see also Doster*, 48 F.4th at 612–13.

190. *Id.* at 346 (quoting Bostock v. Clayton County, 590 U.S. 644, 682 (2020)).

191. *Id.* (quoting Katcoff v. Marsh, 755 F.2d 223, 227 (2nd Cir. 1985) (Mansfield, J., U.S. Marine Corps)).

192. Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301, 1301 (2022) (mem.).

> maintaining strategic and operational control over the assignment and deployment of all Special Warfare personnel—including control over decisions about military readiness. And no less restrictive means would satisfy that interest in this context.
>
> The Court "should indulge the widest latitude" to sustain the President's "function to command the instruments of national force, at least when turned against the outside world for the security of our society." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring). That fundamental principle applies here. As Admiral William Lescher, Vice Chief of Naval Operations, explained: "Sending ships into combat without maximizing the crew's odds of success, such as would be the case with ship deficiencies in ordinance, radar, working weapons or the means to reliably accomplish the mission, is dereliction of duty. The same applies to ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions."[193]

Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas, disagreed.[194] The former two jurists issued a dissenting opinion agreeing with the Fifth Circuit's opinion and concluding that the Navy's vaccine program was not the least restrictive means of furthering the Government's (and thus, the Navy's) vital interest in protecting our nation.[195]

Despite the ultimate outcome—the Supreme Court's stay of an injunction and the rescission of the mandate—that multiple district and appellate courts and a third of the Supreme Court *would* interfere with the Navy's COVID-19 vaccination policy demonstrates courts' increased

193. *Id.* at 1302 (Kavanaugh, J. concurring) (citation omitted).

194. *See id.* at 1301 ("Justice Thomas would deny the application for a partial stay."); *see also id.* at 1302–08 (Alito, J., U.S. Army Reserve, dissenting, with whom Justice Gorsuch joins).

195. See *id.* at 1304–06. Notably, the Department of Defense undertook a wholesale change to its vaccination policy in the wake of these suits prior to the Supreme Court's nationwide stay while some appellate courts' involvement was still good law. *See generally* Memorandum from Sec. Lloyd Austin, U.S. Dep't of Def., to Senior Pentagon Leadership, Commanders of the Combatant Commands, & Defense Agency and DOD Field Activity Directors, Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces (Jan. 10, 2023), https://perma.cc/R2MB-S7QL.

willingness to adjudicate claims that would impact military operations and thus their decreased deference to the military.[196, 197]

B. New Understanding

These developments, particularly when placed in historical context, suggest the emergence of a slightly new paradigm, narrowing down *Mindes* and focusing on two different factors. First, does the question arise during more pronounced times of war or active hostilities, directly

196. This procedural pattern in some way follows the courts' handling of President Trump's ban on transgender military personnel, wherein some courts, over the course of years-long, protracted litigation, enjoined the ban, while others stayed such an injunction, resulting in a mixed bag of intervention. For preliminary injunctions, see Karnoski v. Trump, No. 17-CV-1297, 2017 WL 6311305, at *1 (W.D. Wash. Dec. 11, 2017) (enjoining enforcement of President Trump's decision to ban transgender personnel serving in the military); Doe 1 v. Trump, 275 F. Supp. 3d 167, 177 (D.D.C. 2017) (same on October 30, 2017); Stone v. Trump, 280 F. Supp. 3d 747, 769 (D. Md. 2017) (same on November 21, 2017); Stockman v. Trump, No. 17-CV-1799, 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017) (same on December 22, 2017). For appellate stays, see Doe 2 v. Shanahan, 755 F.App'x 19, 22 (D.C. Cir. 2019) (per curiam) (dissolving the stay on January 4, 2019); Trump v. Karnoski, 139 S. Ct. 950, 950 (2019) (mem.) (dissolving the stay in *Karnoski* over the dissent of Justices Breyer, Ginsburg, Kagan, and Sotomayor); Trump v. Stockman, 139 S. Ct. 950 (2019) (mem.) (dissolving the stay in *Stockman* over the dissent of Justices Breyer, Ginsburg, Kagan, and Sotomayor). For a more fulsome summary of the procedural discussion, see Karnoski v. Trump, 926 F.3d 1180, 1186–87 (9th Cir. 2019), and for additional discussion on the degree of deference the district court owes the military, see *id.* at 1199–1202.

197. Over the years, there has also been some judicial appetite to overturn *Feres*. *See* United States v. Johnson, 481 U.S. 681, 700–01 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." (quoting *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984))); Lanus v. United States, 570 U.S. 932, 933 (2013) (Thomas, J., dissenting from denial of certiorari) (agreeing with Justice Scalia's statement in *Johnson* that *Feres* was "wrongly decided," and stating that "[a]t a bare minimum, it should be reconsidered."); *see also* Daniel v. United States, 139 S. Ct. 1713, 1713 (2019) (mem.) ("Justice Ginsburg would grant the petition for a writ of certiorari"). Calls to curtail or eliminate the doctrine have ebbed as jurists and academics alike observe that it has metastasized such that "the Supreme Court [as well as other courts] have all consistently extended *Feres* beyond the FTCA." Cummings v. Dep't of the Navy, 279 F.3d 1051, 1058 (D.C. Cir. 2002) (Williams, J., U.S. Army, dissenting); *see* Ortiz v. U.S. *ex rel.* Evans Army Cmty. Hosp., 786 F.3d 817, 818 (10th Cir. 2015) ("In the many decades since its inception, criticism of the so-called *Feres* doctrine has become endemic."); *see also* Estate of McAllister v. United States, 942 F.2d 1473, 1475–77 (9th Cir. 1991) (O'Scannlain, J., U.S. Army) (discussing and citing to critiques of the *Feres* doctrine); Persons v. United States, 925 F.2d 292, 295 (9th Cir. 1991) (noting that "countless courts and commentators" have "express[ed] a general distaste for the *Feres* doctrine"); C.R.S. v. United States, 761 F. Supp. 665, 669 n.1 (D. Minn. 1991) (Doty, J., U.S. Marine Corps) (compiling law review articles and noting that "[n]umerous commentators have criticized the *Feres* doctrine."). But of the current Court, only Justice Thomas has publicly called for reconsidering the doctrine. *See* Clendening v. United States, 143 S.Ct. 11, 11–14 (2022) (Thomas, J., dissenting in denial of certiorari). Thus, the authors concluded that discussing the likelihood or impact of overturning the doctrine here was unwarranted.

impacting military *operations* (as distinct from training, uniform regulations, or other more indirect yet still vital military matters). Second, does the case concern specific individual constitutional rights, especially religious rights?[198]

On the former, while *Ex parte Milligan* makes clear that the Constitution applies "equally in war and in peace,"[199] the Supreme Court's actions in *Korematsu* and *Hirabayashi* as well as—to a lesser extent—its decision to lift the injunction on the Department of Defense's COVID-19 vaccine policy suggests that actions taken during times of war or active hostilities (particularly those that concern active operations) have, in their own right, a compelling interest that transcends constitutional considerations.[200, 201] The same is true for lower courts' sidestepping review of drone strikes and other operations-related questions. And the latter? Individual rights, we argue, would likely receive closer judicial scrutiny than blanket deference to the military so long as active hostilities and operations are not directly implicated—as made clear with cases of training pipelines, uniform regulations, and fitness to serve.

Other post-September 11th national security and constitutional jurisprudence evidences the vitality of this two-prong framework, too. *Rasul v. Bush*,[202] *Hamdi v. Rumsfeld*,[203] *Hamdan v. Rumsfeld*,[204] and *Boumediene v. Bush*[205] all concerned detainee rights and were considered justiciable. Thus, even amidst active hostilities, cases that concerned individual constitutional rights (even of detainees) and bore chiefly on support actions rather than operations were within the judiciary's ambit and did not command deference to those in uniform. The *Feres* doctrine's continued existence—if not growth—also fits this pattern, as such cases rarely arise from constitutional concerns.

There will, of course, be "mesh points," namely when these factors contradict one another. The COVID-19 policy is a good example: a case arising out of individual religious rights with implications for military operations. To date, then, the overall thrust of the judiciary's deference to

198. This is not to say other individual rights are less important. Rather, religious rights likely take a higher priority in light of Congress's clear subordination of military rules by enacting RFRA and the above-discussed precedent enforcing this superstructure.

199. 71 U.S. 2, 120–21 (1866).

200. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J., U.S. Army) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

201. The authors do not wish to engage in a further, equally thorny debate as to what constitutes hostilities and whether we remain at war.

202. 542 U.S. 466 (2004).

203. 542 U.S. 507 (2004).

204. 548 U.S. 557 (2006).

205. 553 U.S. 723 (2008).

the miliary remains, though some lower courts' decisions suggest an increased appetite—or at least willingness—to shirk this posture. Time will tell if the dam holds, or if the preliminary leaks foretell larger cracks in the foundation.

VI. CONCLUSION

There is no easy way to resolve any legal conflict that bears on the military. Indeed, there are strong policy rationales to defer to those in uniform on how best to main, train, equip, and deploy others in uniform. So, too, is there a strong reason to harken back to Benjamin Franklin's famed (if ill-understood) notion that "[t]hose who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[206] And to be clear, the authors take no position whatsoever on whether deference should be maximal, minimal, or somewhere in between; this is instead an exercise in observation. It is simply hard to dispute that, whether of its own volition or after seeming invitation from Congress through statutes, the judiciary has recently become involved in matters that, at the very least, impact military readiness, if not operations themselves. Gone are the days of outright, near-automatic deferral to those in uniform, they are giving way to more nuanced analyses of whether cases in fact "involves 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force'"[207] and increased "mindful[ness] that 'military interests do not always trump other considerations.'"[208]

To that end, neither do we try to ascribe the cause of this change—to the extent our hypothesis is correct that the change has in fact occurred. Possible reasons abound: a shrinking percentage of our population having served,[209] and thus fewer members of our judiciary;[210] a greater emphasis

206. Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), https://perma.cc/PSZ2-7PMM. For a discussion of the quote's proper context and perversion in today's national security debate, see *Ben Franklin's Famous 'Liberty, Safety' Quote Lost Its Context In 21st Century*, NAT'L PUB. RAD. (Mar. 2, 2015), https://perma.cc/L6U6-3NNB.

207. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 24 (2008) (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

208. Roe v. U.S. Dep't of Def., 947 F.3d 207, 219 (4th Cir. 2020) (quoting *Winter*, 555 U.S. at 26).

209. *See* Katherine Schaeffer, *The Changing Face of America's Veteran Population*, PEW RSCH. CTR. (Apr. 5, 2021), https://perma.cc/A26J-JW7F.

210. For example, "[i]n 1965, all nine of the Supreme Court justices were military veterans." *Landmark 'Firsts' in Supreme Court History*, BRENNAN CTR. (Aug. 1, 2023), https://perma.cc/83PJ-ACN4. Today, only Associate Justice Samuel Alito served in any capacity. *See id.* And Alito's service, while of course honorable, is limited as compared to justices of yesteryear. *See id.* (describing Associate Justice Oliver Wendell Holmes' combat service, having been wounded multiple times, including having been "shot in the chest"). Alito, by contrast, "joined the Army Reserve while in college," deferred his service

on individual religious rights;[211] or something else entirely. The cause, though, is a question more aptly posed to political scientists and lawmakers alike for determination and, if deemed necessary, re-calibration.[212] Whatever its cause, civilians and military personnel should not be surprised to see more judicial intervention in military affairs in the days to come on any number of constitutional claims, meaning operational leaders must be prepared to be flexible in response thereto.

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until after graduating from law school, served for several months in 1975, "receiving training as a signal officer," and ultimately "went on inactive reserve status," having been "promoted to captain before being honorably discharged." *Alito Joined ROTC While at Princeton*, WASH. POST (Nov. 3, 2005, 7:00 PM), https://perma.cc/Y43B-7GNT.

211. *See supra* note 172 and accompanying text.

212. Or, at the very least, those out of uniform.