



1-1-1987

Rendering unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces.

Michael F. Noone Jr.

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Recommended Citation

Michael F. Noone Jr., *Rendering unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces.*, 18 ST. MARY'S L.J. (1987).

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RENDERING UNTO CAESAR: LEGAL RESPONSES TO RELIGIOUS NONCONFORMITY IN THE ARMED FORCES

MICHAEL F. NOONE, JR.*

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I. INTRODUCTION

In the Fall of 1941, Joe L. McCord, an enlisted man in the United States Army Air Corps, sought a writ of habeas corpus from the United States District Court for the Western District of Texas. After McCord had enlisted in the Army, he was subsequently ordained as a minister in the Watch Tower Bible and Tract Society (the Jehovah's Witnesses).¹ Thereafter, McCord sought release from the Army because a tenet of his religion forbade him to salute either the flag or his superior officers.² The court of appeals opinion, in denying McCord's release, relied on an opinion of the United States Supreme Court rendered fifty years earlier which unequivocally gave the right to command to the officer and the duty of obedience to the soldier.³ To date, it is unknown what happened to McCord: whether patriotism or fear of punishment overcame his religious ideals, or whether he persevered in his beliefs and was punished for behavior which constituted offenses under the Articles of War. What is known, however, is that this was the first reported instance in American law in which a member of the armed forces refused to obey lawful orders because of his religious beliefs. Were prior soldiers, sailors and marines simply irreligious, or had the military's disciplinary system somehow adjusted to religious dissidence without intervention by the federal courts?

The only indication that there may have been cases of conscience arising in the military before World War II is found in Colonel Winthrop's 1886 publication, *Military Law and Precedents*, which states that a service member may not defend disobedience by claiming that the order was contrary to his religious scruples.⁴ The fact that such a

1. See *McCord v. Page*, 124 F.2d 68, 68-70 (5th Cir. 1941).

2. Unstated in the opinion, but apparently based on *Exodus* 20:4-5: "You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth; you shall not bow down before them or worship them."

3. See *McCord v. Page*, 124 F.2d 68, 68-70 (5th Cir. 1941); see also *In re Grimley*, 137 U.S. 147, 153 (1890) (court-martial convictions not subject to collateral attack in federal court system, as long as court-martial had jurisdiction over accused); see also *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

4. See W. WINTHROP, *WINTHROP'S MILITARY LAW AND PRECEDENTS* 576-77 (2d. ed. 1920).

statement existed suggests that some cases had arisen. Because Winthrop relied solely on English authorities,⁵ however, one may infer that this "Coke of American military law" knew of no American cases.

The focus of this article is on the role of the legal system⁶ in resolving disputes regarding the accommodation of religious beliefs in the armed forces. Generally, these disputes arise when an individual's religious sensibilities⁷ make claims upon his conscience that cannot be reconciled with the demands imposed by military discipline.⁸ Although the believer may simply refuse to serve,⁹ a more difficult

5. See generally C. CLODE, *MILITARY FORCES OF THE CROWN* (1869); W. HOUGH, *PRECEDENTS IN MILITARY LAW* (1855).

6. "Legal system" as used throughout this paper, refers to H.L.A. Hart's proposition, put forth in *The Concept of Law* (1961), that within the general system of social rules there is a class of obligations differentiated by the fact that they make certain conduct obligatory, and that this obligation is enforceable by official power. The proposition seems self evident, but we will see that the military has defined their legal system in a way which excludes all adjudicatory (and coercive) functions which do not fall within the powers exercised by court-martial. To the extent that disputes arise outside of the legal system they are unreported and unknown, even though they are decided by persons exercising a judicial role. Judicial rule has been defined as:

the role of any person or persons or group of persons or organized group of groups of persons, and any person(s) belonging to such group(s) who for any reason -

- (a) have a duty to pass judgment on any disputed or disputable complaints of wrongdoing made to them, with or without limit as to subject matter;
- (b) have a duty to make their judgement by reference to standards of right and wrong conduct whose existence as standards is not determined by their own present choice or decision, except in so far as they must interpret or extrapolate from existing standards in justifying their decision.
- (c) have a monopoly over the justified use of force in a human society, by the standards prevalent in that society.

N. MACCORMICK, H.L.A. HART 113 (1981) (footnotes omitted).

7. Religious sensibility has been defined as, "The intellectual and affective perception which an individual or community has of the relationship between religious experience and the various dimensions of life." Chinninci, *New Religious Movements and the Structure of Religious Sensibility*, in *UNDERSTANDING THE NEW RELIGIONS* 26, 29 (J. Needleman & G. Baker eds. 1978).

8. "Discipline" in this context has two quite distinct meanings. It may refer to an externalized system of codified rules and regulations demanding obedience to one's superiors (a vertical relationship) and enforced by sanctions including discharge or imprisonment. Discipline may also refer to an informal and internalized system of controls in which one's peers (a horizontal relationship) and ultimately, one's conscience, inhibit infractions. See S. STOUFFER, E. SUCHMAN, L. DEVINNEY, S. STARR & R. M. WILLIAMS, JR., *THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE* 410-11 (1949). The distinction, rarely drawn by the legal system, has an important effect on a court's perception of the religious accommodation problem.

9. See, e.g., McIntosh, *Because Their Conscience Tells Them So (Conscientious Objectors*

problem arises when the military believer does not or cannot claim the status of a conscientious objector,¹⁰ but seeks legal protection for his religiously motivated behavior while remaining in the service. Such a claim of protection may be asserted in either the military or civilian legal system.

Basically, the legal principles upon which these systems rely in adjudicating such claims can be envisaged as forming a double helix. Although both strands of principles are derived from the Constitution, the United States Supreme Court has been unable to formulate a doctrine which links the two by simultaneously accommodating the individual rights of the service member with society's collective need for an armed force whose response to authority must be immediate and unreserved. This dilemma is inherent in any constitutional polity which refuses to abjure civilian judicial control over the military.¹¹ This paper will examine the military and civilian strands separately, comparing their synchronic development and observing that certain trends in military jurisprudence could ameliorate the kind of problems raised by a case similar to McCord's. Research suggests that although instances of conflict between religious sensibility and military discipline are not uncommon, such conflicts are raised and resolved in the military without reference to the constitutional dimensions of the conflict. In conclusion, the paper demonstrates that neither strand of legal principles is responsive to the needs of either the individual or society, and suggests that the federal courts are the least preferred fora for adjudicating such disputes.

in the Service), 103 U.S. NAVAL INST. PROC. 42 (Oct. 1977); Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALF. L. REV. 379 (1968).

10. Since there is no constitutional right to conscientious objector status, Congress may specify the conditions which exempt the objector from military service. See *Gillette v. United States*, 401 U.S. 437, 462 (1971) (Act which conscripted persons who objected to specific war constitutional); *The Selective Draft Cases*, 245 U.S. 366, 390 (1918) (holding Act exempting ministers from service and requiring service members of certain religions to perform non-combat duty not repugnant to constitutional rights).

11. The British legal system has similar doctrinal problems with its treatment of martial law. See Townshend, *Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940*, 25 HIST. J. 167 (1982).

II. ACCOMMODATING RELIGIOUS DISSENT WITHIN THE JUDICIAL SYSTEM

A. *The Military Experience: Courts-Martial Before 1950*

1. The British Tradition

In his statement that religious beliefs were not a defense to a charge of disobedience of orders, Colonel Winthrop relied on English precedent. Since Winthrop's rule remains in effect today¹² through its incorporation in successive editions of the United States *Manual for Courts-Martial*,¹³ it is appropriate to examine the English authorities on which he relied. Hough's *Precedents in Military Law*, refers to two incidents where religious scruples were offered as an excuse for disobeying orders. The first arose on the island of Malta in 1823 when two artillery officers, a lieutenant and a captain, were convicted for disobeying an order to fire salutes as part of a Roman Catholic religious observance.¹⁴ The officers were thereafter dismissed from the military. When the officers sought subsequent Parliamentary relief their case became a *cause celebre*. The commanding officer of the British Army, the Duke of Wellington, who had previously affirmed the sentences, voiced his opinion on the matter before the House of Lords:

The regulation which is here complained of does not require Protestant officers of the British army to attend the Roman Catholic worship. There is no act of *mind* in all this: it is the performance of a mere duty You are told that it is a matter of *conscience*; but I want to know, my lords, whether an officer in the army—and if not an officer, any other member of the army—is to be allowed to get rid of the discharge of a disagreeable duty upon such a plea? If so, my lords, there is an end of all discipline in the army.¹⁵

12. Manual for Courts-Martial, United States, 1984, Exec. Order 12473, pt. IV., ¶ 14c(2)(a) (1984).

13. See, e.g., Manual for Courts-Martial, United States, 1969, Exec. Order 11476, ¶ 169b (rev. ed. 1969); Manual for Courts-Martial, United States, 1951, Exec. Order 10214, ¶ 169b (1951); A Manual for Courts-Martial, U.S. Army, 1928, Exec. Order 4773, ¶ 134b (1936).

14. The Maltese had voluntarily joined the British Empire ten years previously, and their treaty contained an undertaking by the British that they would continue to recognize and support Maltese religious practices. The Maltese were Roman Catholic, and in the 1820's, the British populace were virulently anti-Catholic.

15. W. HOUGH, PRECEDENTS IN MILITARY LAW 117 (1855) (emphasis in original). J.W. Fortescue makes no reference to the incident and speaks only once of any conflict between religious practices and military service. Writing of The Peninsular Wars, and the spread of Methodism, he observes, "Wellington did not think it good for discipline that officers and

Wellington appeared to be drawing a distinction between inward assent and outward obedience. Such a distinction may have Biblical precedent¹⁶ despite the fact that the Judaeo-Christian tradition celebrates the memory of those who refuse to make the distinction.¹⁷

Additionally, Hough relates an instance in which an officer in India refused to go into the trenches on a Sunday.¹⁸ Although Hough does not state whether the officer was cashiered, he makes his own position clear:

Everyone must admit, that if an officer will refuse to obey orders, because they may be contrary to his religious belief regarding the Holy Scriptures, he is unfit to remain in the army. The real Christian is that person who does his duty to his sovereign and to his country without demur. If his conscience be unsettled, he should quit the army at once, and not unsettle the affairs military.¹⁹

In England, officers served at the pleasure of the Crown, not under contract, and could sell their commissions.²⁰ In this regard, Hough's

non-commissioned officers should assemble to listen to the exhortations of privates; nor even that regimental officers should openly rebuke sins to which their superiors might visibly and demonstrably be prone." X J. W. FORTESCUE, *A HISTORY OF THE BRITISH ARMY* 199 (1910). There is evidence of soldiers in 1740 "who hired a room for prayer and preaching". Neuberg, *The British Army in the Eighteenth Century*, 61 *J. SOC. ARMY HIST. RES.* 39, 45 (1983). Common worship and its effect on discipline was to be the subject of two American cases. *See* *Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985); *Bridges v. Davis*, 443 F.2d 970 (9th Cir. 1971), *cert. denied*, 405 U. S. 919 (1972); *see also* *United States v. Johanns*, 20 M.J. 155 (AFCMR 1983), *cert. denied*, — U.S. —, 106 S. Ct. 147, 88 L. Ed. 2d 122 (1985).

16. *See* 2 *Kings* 5. Naaman, a Hebrew, was commander of the army of the King of Aram, who worshiped Rimmon. The prophet Elisha cured Naaman's leprosy. Although Naaman vowed never again to make burnt offerings and sacrifices to another god, he asked forgiveness for one thing: "When my master enters the Temple of Rimmon, and he is leaning on my arm and I bow there also - when I bow down in the Temple of Rimmon, may the Lord forgive your servant for this." *Id.* at 18. *Cf.* *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (concluding that it is constitutionally permissible to regulate religiously motivated behavior, without interfering with religious belief).

17. *See, e.g., Daniel* 3. The Hebrews, Shadrach and his companions, who were royal officials, refused to worship an image set up by their monarch, Nebuchadnezzar.

18. *See* W. HOUGH, *PRECEDENTS IN MILITARY LAW* 117-118 (1855). *But see* *MANUAL OF MILITARY LAW* 12 (HMSO 1914) (officer cannot plead conscientious scruples as justifying refusal to go into trenches on Sunday).

19. W. HOUGH, *PRECEDENTS IN MILITARY LAW* 118 (1855) (footnotes omitted); *see also* Foreman, *Religion, Conscience and Military Discipline*, 52 *MIL. L. REV.* 77, 78 (1971) (misattributing quote to Wellington).

20. *See* *Dickson v. Viscount Combermere*, 176 Eng. Rep. 236 (Q.B. 1863); *In re Poe*, 110 Eng. Rep. 942 (K.B. 1833); A. BRUCE, *THE PURCHASE SYSTEM IN THE BRITISH ARMY, 1660-1871* (1980). *See generally* Nettheim, *Do Members of the Armed Forces Have Any Rights in Their Employment?*, 5 *FED. L. REV.* (Austl.) 200, 218-27 (1973).

advice was both practical and practicable. One wonders, however, if he would have granted scrupulous enlisted men the same right.

The other authority on which Winthrop, and thus all subsequent American military lawyers, relied is Charles M. Clode, a former Solicitor of the War Department, whose *Military Forces of the Crown*²¹ is the single most important source of British military legal history. Clode, in his discussion of the limits of obedience, begins with the premise that every order not obviously improper or against the law must be obeyed. He offers as an example the case of Captain Atchison, where an officer refused to salute in honor of a Saint of the Roman Catholic Church. For this act of disobedience, the Duke of Wellington dismissed the officer from the military.²² Clode too must be describing the incident in Malta, since Hough refers to one of the two officers involved as a "Captain A ____."²³ Clode used the case to illustrate the two views held by members of Parliament of what should have been the officers' response: that the officers should have obeyed the order, and sought redress afterwards, and that the officers' behavior did not warrant court-martial.²⁴ While Parliament was willing to debate the wisdom of the military decision to court-martial Atchison, no thought was given to the possibility that the sovereign would be asked to reinstate him because his religious freedoms had been infringed. Furthermore, the judiciary would not have intervened even if Atchison had sought judicial review of his dismissal. This is due to the fact that in 1792, Lord Loughborough, speaking for the High Court of Justice, refused to issue a writ of prohibition restraining the execution of a court-martial.²⁵ While Loughborough acknowledged that the High Court had jurisdiction, he declined to exercise it for a "mere error in the proceedings."²⁶ From this premise, we will see that the American judiciary, while asserting the right to review disciplinary actions, has given similar deference to military authorities.

21. See generally C. CLODE, *MILITARY FORCES OF THE CROWN* (1869).

22. See *id.* at 66.

23. W. HOUGH, *PRECEDENTS IN MILITARY LAW* 115 (1855).

24. See C. CLODE, *MILITARY FORCES OF THE CROWN* (1869).

25. See *Grant v. Gould*, 126 Eng. Rep. 434 (C. P. 1792).

26. *Id.* at 454. But see *In re Mansergh*, 121 Eng. Rep. 764 (K.B. 1861) (court refused, on discretionary grounds, to issue writ of certiorari to Judge Advocate General in order to quash court-martial); see also *Rex v. Suddis*, 102 Eng. Rep. 119 (K.B. 1801) (court held that return to writ of habeas corpus involving soldier was sufficient if it stated that prisoner was in custody under sentence of court-martial competent to pass the sentence).

2. American Military Justice Before the Uniform Code of Military Justice

Prior to 1951, military appellate decisions were not routinely published.²⁷ Therefore, in order to locate any military decisions, the researcher must rely on the periodic publications of the Army's Judge Advocate General.²⁸ Only one case involving religious scruples was found in this source: that of a Second Lieutenant in the Army Air Corps who became a convert to the Church of the Assembly of God. In 1945, the officer was court-martialed for refusing to continue flight training because his religious convictions prohibited him from risking the possibility of bombing civilians. Relying on the provisions of paragraph 134b of the 1928 *Manual for Courts-Martial*,²⁹ an Army Board of Review confirmed the officer's sentence to discharge and confinement for one year.³⁰ Because this and subsequent courts-mar-

27. "Boards of Review" had been established within the Army in 1918 by General Order and by Congress in 1920. See Act of June 3, 1916, ch. 227, 41 Stat. 799 (1920), *repealed by* Act of June 24, 1948, ch. 625, 62 Stat. 638 (1948). Air Force boards were established in 1947; the Navy did not establish Boards of Review until 1951. See generally Currier & Kent, *The Boards of Review of the Armed Services*, 6 VAND. L. REV. 241 (1953); Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15 (1949). These boards (subsequently renamed Courts of Military Review in 1969) were composed of lawyers, usually judge advocates appointed by their military department, to review for legal sufficiency all convictions of general officers and those cases in which the accused received the death penalty, a dishonorable discharge, or confinement in a penitentiary. Decisions of these boards followed the format of appeals courts decisions and performed generally the same function although they were not self executing. When the court-martial system was revised after World War II, Congress created a Court of Military Appeals over all the services whose members were civilians appointed by the President and subject to senatorial confirmation. See generally Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972). Until Congress provided for certiorari to the Supreme Court from the Court of Military Appeals by passage of the Military Justice Act of 1983, 97 Stat. 1393 (1983), courts established pursuant to article III of the Constitution could not directly review courts-martial judgments. Court-martial jurisdiction was subject to collateral attack, usually by habeas corpus, but also in a suit for damages or equitable relief. See *infra*, Judicial Review of Courts-Martial.

28. *Digests of Opinions of the Judge Advocate General*, 1862-68 and 1912-51; *Bulletin of the Judge Advocate General of the United States Army*, 1942-51; and Board of Review decisions from the various World War II theaters of operations. The Board of Review decisions were not widely distributed and, unless a decision was summarized in the *Digests* or *Bulletin*, it was effectively unpublished. The *Tork* decision falls in this category and has never been cited in subsequent decisions. See CM 283352, *Tork*, 55 JUDGE ADVOCATE GENERAL BOARD OF REVIEW OPINIONS 73 (1945).

29. United States Army, *A Manual for Courts-Martial 1928*, Exec. Order 4773, ¶ 134b (1936 ed.).

30. CM 283352, *Tork*, 55 JUDGE ADVOCATE GENERAL BOARD OF REVIEW OPINIONS 73 (1945). In view of the controversial nature of such cases, it is not surprising the British and

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tial were decided by persons who were fully cognizant of the federal decision interpreting the first amendment's free exercise clause,³¹ it will be useful to first summarize federal judicial interpretations of that clause before evaluating the military's application.

B. *The Civilian Experience: Development of Free Exercise Doctrine*

The first amendment to the United States Constitution was intended to both ensure the free exercise of religion and to separate the state from any established church. In 1878, however, the United States Supreme Court upheld the criminal conviction of a Mormon for polygamy on the ground that the first amendment's protection extended only to religious beliefs, not religious practice.³² This distinction has gradually diminished, most noticeably in the case of *Cantwell v. Connecticut*,³³ in which the Supreme Court ruled that a state's criminal prosecution of a Jehovah's Witness for acting in violation of an ordinance prohibiting door to door solicitation infringed on the believer's free exercise rights. More recently, the focus of judicial activity has shifted from criminal prosecutions, where the first amendment is used as a shield, to civil suits, where individuals claim that the application of a government regulation will impair free exercise rights.

Commonwealth records regarding the separation of air crew members have disappeared so that it is impossible to trace their treatment of flyers with ethical qualms. See McCarthy, *Aircrew and "Lack of Moral Fiber in the Second World War,"* 2 WAR & SOC. 87, 96 n.56 (1984).

31. See U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

32. See *Reynolds v. United States*, 98 U.S. 145 (1878).

33. 310 U.S. 296 (1940). The Court maintained the Wellingtonian body-mind distinction, "the [a]mendment embraces two concepts - freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be." *Id.* at 303-304. The Supreme Court continues to recognize the distinction. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983). See generally Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980). But see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978). Professor Tribe states: "the real distinction must be between laws that aim only at a religious aspect of conduct or seek to achieve a clearly religious end, and laws that aim at a secular dimension of the subject matter either regulated or supported." *Id.* § 14-8, at 838. To the extent the distinction (of secular purpose and secular effect) is useful, it applies in establishment clause cases—those involving state support of religion, while the judicial criterion for free exercise cases—where state action affects religious autonomy, is a determination whether the government has selected the least restrictive means to achieve a compelling end. See *id.* § 14-10, at 846. Tribe assumes that lawyers (judges and law professors) are capable of making the sort of cost benefit analysis required by the criterion, even in cases involving national security. See *id.* § 14-10, at 855-56.

In *Sherbert v. Verner*,³⁴ the Supreme Court ruled that a Seventh Day Adventist had a right to state unemployment benefits even though her employer acted properly in dismissing her for refusing to work on Saturdays. Moreover, in *Thomas v. Review Board*,³⁵ the same reasoning led the Court to conclude that a worker could not be denied unemployment benefits, despite the fact that he voluntarily terminated his employment because of religious ideals which prevented his participation in the fabrication of armaments. The *Sherbert* decision articulated the legal criterion to be used in determining whether an individual could successfully claim exemption from a government regulation on the grounds that its application would interfere with the free exercise of religion. The criterion is one of "strict scrutiny," requiring the government to establish that the application, of an otherwise lawful rule, to the particular individual claiming protection requires a compelling governmental interest that cannot be furthered by other, less restrictive means.³⁶

The "strict scrutiny" test enunciated in *Sherbert* is clearly intended to favor the believer asserting first amendment rights. The Supreme Court and inferior federal courts have, however, applied less rigorous criteria to regulations controlling prisoners,³⁷ the power to tax,³⁸ and instances where Congress has exercised its war powers.³⁹ As a matter of fact, until the 1986 case of *Goldman v. Weinberger*,⁴⁰ no case involving a service member's free exercise claim had been adjudicated by the Supreme Court. Therefore, until 1986, civilian and military courts had some latitude in deciding whether military status called for the application of the strict scrutiny test.

34. 374 U.S. 398 (1963).

35. 450 U.S. 707 (1981).

36. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (application of compulsory education laws to Amish parents).

37. See *Brown v. Johnson*, 743 F.2d 408, 412 (6th Cir. 1984) (upholding prison officials' refusal to allow ministers to worship with homosexual prisoners), *cert. denied*, 469 U.S. 1215 (1985); *Phillips v. Coughlin*, 586 F. Supp. 1281, 1283 (S.D.N.Y. 1984) (initial procedures met compelling interest test); *Furqan v. Georgia State Bd. of Offender Rehabilitation*, 554 F. Supp. 873, 878 (N.D. Ga. 1982) (rational basis test used to review prison regulations).

38. See *United States v. Lee*, 455 U.S. 252, 261 (1982) (upholding social security tax on persons working for Amish employer).

39. See *Johnson v. Robinson*, 415 U.S. 361, 385-86 (1974) (rejecting conscientious objector's free exercise claim to veterans' benefits); *Gillette v. United States*, 401 U.S. 437, 461 (1971) (rejecting conscientious objectors' challenges to statute which granted draft exemptions only to individuals opposed to participation in all wars).

40. ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

1987] *RELIGIOUS NONCONFORMITY IN ARMED FORCES* 1243C. *The Military Experience: Courts-Martial Since 1950*

As we have seen, the *Manual for Courts-Martial* prohibits the use of religious beliefs as a defense to disobeying orders. It is not surprising that such a claim has rarely been asserted before military courts, and that when it has, it has been rejected as contrary to military law. The Board of Review opinions (no Court of Military Appeals decisions exist on this topic) merit our attention as factual reports of the type of free exercise problems that have arisen in the military justice system and how the system handles them.

The first reported case, *United States v. Morgan*,⁴¹ involved an Airman Third Class who was dishonorably discharged and sentenced to two and one-half years confinement after being convicted of refusing to salute the American flag during a military ceremony. Reviewing the conviction, an Air Force Board of Review rejected Morgan's justification that, as a Jehovah's Witness, he had a right to refuse based upon the free exercise clause.⁴² The Board relied on *McCord v. Page*⁴³ and the "military exception" provided by the Supreme Court in *Board of Education v. Barnette*⁴⁴ which states that military personnel have many duties and cannot claim many of the freedoms that are available to civilians.⁴⁵

The second reported military case, *United States v. Cupp*,⁴⁶ also arose in the Air Force. The accused, a Jehovah's Witness, received a sentence identical to Morgan's for failing to report for duty on his Sabbath, (Saturday) and for refusing to salute an officer. Relying on *Morgan* and the provisions of paragraph 169b of the *Manual for Courts-Martial, United States, 1951* which stated that religious scruples were not a defense, an Air Force Board of Review rejected Cupp's free exercise claim. Additionally, the Board rejected Cupp's assertion that military authorities had a duty to initially submit the case to the Department of the Air Force for administrative

41. 17 C.M.R. 584 (A.F.B.R. 1954).

42. *But see* Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (refusal to salute flag in civilian context permitted, overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) which had permitted state to bar from its school system children of Jehovah's Witnesses who refused to salute flag).

43. 124 F.2d 68 (5th Cir. 1941).

44. 319 U.S. 624, 642 n.19 (1943).

45. *See* Board of Educ. v. Barnette, 319 U.S. 624, 642 n.19 (1943).

46. 24 C.M.R. 565 (A.F.B.R. 1956).

disposition.⁴⁷

In the third reported case, *United States v. Burry*,⁴⁸ a Coast Guard Board of Review affirmed the conviction of a seaman who, as a member of the Radio Church of God, refused to work on Saturday, his Sabbath. Previously, Burry's superiors had adjusted his work schedule to accommodate his belief, but revoked his Saturday "liberty" when they became short-handed. The Coast Guard Board, citing *Morgan, Cupp*, and an unreported Navy Board of Review decision⁴⁹ affirmed the conviction.

In the most recent decision, *United States v. Haywood*,⁵⁰ the accused refused to wear an Air Force uniform because she had adopted the Muslim religion which prohibits women from wearing tight-fitting clothes. Haywood pleaded guilty to disobeying an order to wear a uniform and received a Bad Conduct Discharge. The discharge was affirmed by the Court of Military Review; however, the decision was concerned solely with the issue of whether the trial judge erred in describing the offense to the court.

The preceding cases are remarkable for a number of reasons. First, there are only five decisions during a thirty-year period in which the

47. Since 1892, the military has had a system for administratively separating members of the armed forces. The grounds for separation are either unsuitability or unfitness. See generally Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227 (1974). The decision to discharge before expiration of the term of enlistment would satisfy MacCormick's criteria for persons exercising a judicial role. See N. MACCORMICK, H.L.A. HART 113 (1981). Since 1948, there have been five types of military discharges: honorable; general (now a "Discharge Under Honorable Conditions"); undesirable (now a "Discharge Under Other than Honorable Conditions"); bad conduct; and dishonorable. The last two can be given only as part of a court-martial sentence while the first three can only be given administratively. The type of discharge granted is intended to characterize the quality of the individual's service and could affect eligibility for veteran's opportunities for both public and private employment. See Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41, 43-45; Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 3 (1973).

48. 36 C.M.R. 829 (C.G.B.R. 1966).

49. See NCM 66 0804, Minnix (1966). An enlisted man in the Naval Reserves, who failed to meet training requirements and was called to active duty, refused to undergo the induction physical examination or to wear the uniform because of his religious beliefs as a Jehovah's Witness. He was convicted and sentenced to receive a bad conduct discharge and to be confined for three months. The Board of Review rejected his claim that he was exempt from active duty but reduced his sentence, saying: "Even though the accused is of no value to the naval service and his separation from the service is indicated, the circumstances of this case are such that a punitive discharge is not warranted." *Id.* at 4.

50. 19 M.J. 675 (A.F.C.M.R. 1984).

United States military had an overall average annual strength of approximately two and one-half million persons. Second, three of the five cases arose in the Air Force, which during most of the period was the smallest of the three major services and relied solely on volunteers. Likewise, the Air Force is seen to be both the most technological of the services and most devoted to the concept of "management" rather than "leadership". One can only speculate why there were no reported cases from the Army and Marine Corps, which are reputed to have a more rigid and authoritarian system of discipline. There are, however, two possible explanations: there are no other reported cases because there were no other offenses, or there were other offenses which were not reported. The latter explanation is more compelling because only those cases involving a punitive discharge or confinement in excess of one year are subject to review by military appellate tribunals.⁵¹ We can therefore surmise that few disobedience cases involving religious beliefs would be severe enough to require military authorities to conclude that a punitive discharge or extended imprisonment would be appropriate.⁵² Thus, the reported cases were exceptional because military authorities had decided in each instance that severe punishment was warranted. In other cases, the accused would have received minor punishment and, if the behavior continued, as it did in *Burry*,⁵³ administrative discharge would ensue. The

51. See 10 U.S.C. § 869 (1982). It has been estimated that, between 1962 and 1970, Courts of Military Review acted on 6% of all courts-martial, while the Court of Military Appeals acted on 17% of the cases reviewed by the intermediate panels. See Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 76, 189 (1972).

52. See 36 C.M.R. 829 (C.G.B.R. 1966). In *Burry*, the court mentions that the accused had previously received non-judicial punishment under the provisions of article 15 of the Uniform Code of Military Justice, 10 U.S.C. § 815. See *id.* at 830. Punishment under this article and its predecessor, Article of War 104, does not constitute a criminal conviction and is intended to cover only minor offenses. The maximum punishment authorized is a function of the rank of the officer imposing it. The offender may refuse non-judicial punishment and may demand trial by court-martial. It has been estimated that "hundreds of thousands of article 15 proceedings occur each year." D. ADDLESTONE, J. KOLOSKE, L.M. MILFORD, K.D. SNYDER & B. STOCHMAN, *MILITARY DISCHARGE UPGRADING* ¶ 4.3.2.2 n.56 (1982). Summary courts-martial, authorized by 10 U.S.C. §§ 816, 820 (1982) have jurisdiction to try enlisted personnel for any non-capital offense but may not adjudge a punitive discharge or confinement in excess of one month. Both sets of proceedings are administered by non-lawyers, whose actions are subject to internal legal review, but the results are never published. These non-lawyers satisfy MacCormick's criteria for persons exercising a judicial role. See N. MACCORMICK, H.L.A. HART 113 (1981).

53. 36 C.M.R. 829 (C.G.B.R. 1966).

reported military cases do, however, suggest at least two conditions which might give rise to a serviceman's suit in federal court: a court-martial conviction, which may be attacked on the ground that religious beliefs were improperly disregarded; or a decision, of which the serviceman seeks judicial review on the ground that it impairs his free exercise rights.

D. *The Civilian Experience: Judicial Review of Military Decisions Affecting Members of the Armed Forces*

The federal judiciary has traditionally drawn a distinction between its function of reviewing court-martial proceedings and its role in evaluating military administrative decisions. Since free exercise claims can arise in either context, the premises for judicial review in each case must be examined.

1. Judicial Review of Courts-Martial

At the time *McCord v. Page*⁵⁴ was decided, the rules relating to judicial review were simple and straightforward. Generally, a writ of habeas corpus would only be issued if the military had no jurisdiction.⁵⁵ Claims alleging that the accused's constitutional rights had been violated were routinely rejected⁵⁶ because of the rule which stated that a serviceman's constitutional claims could only be asserted before a court-martial.⁵⁷ This rule was applied until 1953 when the Supreme Court decided the case of *Burns v. Wilson*.⁵⁸ In *Burns*, the Court held that constitutional claims could be asserted in habeas corpus proceedings. Furthermore, the Court stated that the appropriate standard for judicial review was whether the military gave fair consideration to the claim.⁵⁹ The doctrine of exhaustion of reme-

54. 124 F.2d 68 (5th Cir. 1941).

55. See Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 43-44 (1961).

56. See *Collins v. McDonald*, 258 U.S. 416 (1922) (allegation that confession had been extracted by duress held to be error in admission of testimony). *But see* *Grant v. Gould*, 126 Eng. Rep. 434 (C.P. 1792).

57. See *Hiatt v. Brown*, 339 U.S. 103 (1950).

58. 346 U.S. 137 (1953).

59. See *id.* at 144 (plurality opinion). *But see* Note, *Military Court-Martial—Scope of Review by Civilian Courts—Violation of Constitutional Rights—Kauffman v. Secretary of the Air Force*, 19 AM. U.L. REV. 84 (1969) (applying "Full and Fair" standard of judicial review to decision of Court of Military Appeals).

dies,⁶⁰ however, requires the accused to postpone his attack until after conviction and completion of military appellate review.

Moreover, the success of an individual's claim depends upon the federal circuit in which the petition has been brought. While the claim must be one of constitutional dimensions,⁶¹ there is a "relative state of anarchy"⁶² among the federal circuits regarding both the scope and standard of review applicable in such cases. Furthermore, we will see that this confusion has had no effect on the military's internal handling of free exercise claims.

Members of the armed forces who have been court-martialed and discharged might also collaterally attack their conviction by bringing suit in the United States Claims Court under the Tucker Act⁶³ for the pay they should have received had they not been improperly convicted. In determining their eligibility for continued pay, the court reviews the legality of the underlying conviction.⁶⁴ In view of the re-

60. The doctrine was first applied to military courts in 1950. *See* *Gusik v. Schilder*, 340 U.S. 128 (1950); *see also* *McLucas v. DeChamplain*, 421 U.S. 21 (1975); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 733 (1974). In this regard, I disagree with Professor Tribe's assertions that *Schlesinger* deviated from the traditional approach of not requiring the individual to exhaust his military remedies. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-5, at 46, 47 (1978). Tribe's conclusion is consistent with the traditional view of military status, *see* Lieber, *The Supreme Court on the Military Status*, 31 *AM. L. REV.* 342 (1897), and is based on his reading of *O'Callahan v. Parker*, 395 U.S. 258 (1969). *O'Callahan*, according to Tribe, is not a "status" case; however, it should be seen as an analogue to *Brooks v. United States*, 337 U.S. 49 (1949). *Cf.* *Relford v. Commandant*, 401 U.S. 355 (1971) (*O'Callahan* distinguished and collateral attack rejected because offense service connected). *But cf.* *Feres v. United States*, 340 U.S. 135 (1950) (*Brooks* distinguished and plaintiff's tort claim rejected because injury service connected). In the author's view, military status is a context, not a condition, and *O'Callahan* can be reconciled with its predecessors.

61. *See* *United States v. Augenblick*, 393 U.S. 348 (1969).

62. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 *MIL. L. REV.* 5, 88 (1985).

63. 28 U.S.C. §§ 1346 (a)(2), 1491 (a)(1) (1982).

64. Until 1964, the court of claims was the only forum available to persons seeking financial benefits from military service. *See* 28 U.S.C. § 1346(d) (1982) (previously amended by 78 Stat. 699 (1964)). The court of claims, however, did not have authority to direct restoration to office or position until 1972. *See generally* Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 *FED. B.J.* 179 (1961); Meador, *Judicial Determinations of Military Status*, 72 *YALE L.J.* 1293 (1963); Philos, *Suits in the Court of Claims Involving Status-A Dilemma*, 16 *FED. B.J.* 103 (1956). It may be that the court of claims was more generous in its treatment of service members' claims where the service member had been treated unfairly by military tribunals. For examples of court-martial convictions, *see* *Juhl v. United States*, 383 F.2d 1009 (Ct. Cl. 1967); *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966); *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947). For examples of administrative separations, *see* *Clackum v. United States*, 296 F.2d 226 (Ct. Cl. 1960). *United States v. Augenblick* casts doubt on the preceden-

cent grant of court-martial review authority to the Supreme Court, however, it is doubtful that the claims court will continue to collaterally review courts-martial convictions.

2. Judicial Review of Military Administrative Decisions

In any review of the federal courts' role in military personnel actions, it is appropriate to start with the most notorious case, *Reid v. United States*.⁶⁵ Reid had been a member of an all black unit stationed near Brownsville, Texas. Some of the members of this unit had been suspected of terrorizing the town. When the soldiers refused to cooperate with military investigators, the President, acting as Commander-in-Chief, ordered their discharge "without honor." Reid's subsequent suit for back pay was dismissed by the federal district court on the grounds that the decision was beyond the scope of judicial investigation.⁶⁶

Three years later, in the 1911 case of *Reaves v. Ainsworth*,⁶⁷ the Supreme Court applied the same principle, by refusing to review the Army's decision to discharge, rather than retire, an officer. The Court stated that military law is due process for military or naval personnel. Therefore, the decision of a military tribunal, acting within its lawful powers, cannot be set aside or reviewed by the courts.⁶⁸ In *Reaves*, the "tribunal" was a medical board of Army officers who concluded that the petitioner was unfit for promotion, thereby subjecting him to discharge. In rejecting the petitioner's claim, the Court explained why the normal standards of judicial review were inappropriate in such a case.

The courts are not the only instrumentalities of government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but

tial value of these cases. *See United States v. Augenblick*, 393 U.S. 348 (1969). Since 1972 the court of claims has been authorized to issue orders directing restoration to office or position. *See* 28 U.S.C. § 1491 (1982). The Court has set extremely strict criteria for exercising that power. *See, e.g., Casey v. United States*, 8 Cl. Ct. 234 (1985); *Guy v. United States*, 608 F.2d 867 (Ct. Cl. 1979); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

65. 161 F. 469 (S.D.N.Y. 1908), *writ dismissed on jurisdictional grounds*, 211 U.S. 529 (1909).

66. *See id.* at 470. Sixty-six years later the Secretary of the Army retroactively granted honorable discharges to the 167 members of the unit, thus reversing the President. *See New York Times*, Oct. 3, 1972, at 48, col. 1; *New York Times*, Sept. 29, 1972, at 1, col. 1.

67. 219 U.S. 296 (1911).

68. *See id.* at 304.

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greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army.⁶⁹

Although agency administrative decisions were, by the mid-1950's, presumptively reviewable by the federal courts,⁷⁰ Justice Jackson, writing for a majority of the Supreme Court in *Orloff v. Willoughby*,⁷¹ maintained *Reaves* "military personnel exception" in strikingly similar language:

[J]udges are not given the task of running the Army The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.⁷²

While the Supreme Court subsequently reaffirmed that members of the armed forces were protected by the Constitution,⁷³ the distinction between the constitutional rights of the soldier and the civilian continues to be made by the Court⁷⁴ when it is called upon to review military judgments relating to "the handling of men."⁷⁵ This distinction is presumably based on the fact that judicial review would interfere with the "habit of immediate compliance with military procedures and orders [which] must be virtually reflex with no time for debate and reflection."⁷⁶ Three factors, however, have limited this principle of noninterference. The first is the Supreme Court's willingness to

69. *Id.* at 306.

70. See 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.07 (1958); see also L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 372 (abr. student ed. 1965).

71. 345 U.S. 83 (1953) (judicial review refused when inducted physician denied officer status).

72. *Id.* at 93-94.

73. See Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962). But see Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1 (1958).

74. See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (rejecting constitutional challenge to Uniform Code of Military Justice articles prohibiting conduct unbecoming an officer and gentleman, and behavior prejudicial to good order and discipline). "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.*; see also *Chappell v. Wallace*, 462 U.S. 296 (1983) (rejecting constitutional tort claims of servicemen against their superiors).

75. *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

76. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). Compare the similar language used by the Supreme Court nearly a century earlier: "An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as the right to command in the officer, or the duty of obedience in the soldier." *In re Grimley*, 137 U.S. 147,

review the constitutionality of the statute on which the military relies for its authority.⁷⁷ The second is the Court's willingness to evaluate the statutory basis for the military department's action.⁷⁸ Finally, the third factor is that the principle of noninterference gives inferior courts the opportunity to apply a competing principle — that persons in the military have constitutional rights, and the federal courts must protect those rights. Thus, it should not be surprising that there are literally hundreds of decisions rendered by inferior federal courts in which the administrative "handling" of a particular "man" in the military has been judicially reviewed.

Although there is no common legal thread to be found among these decisions, some are nonetheless easily explained. Military departments are generally required to follow their own regulations if the regulation is intended to benefit the individual service member⁷⁹ and the individual suffered actual prejudice from non-compliance.⁸⁰ Additionally, there is a growing body of case law applying various provisions of the Administrative Procedure Act⁸¹ to matters involving "the handling of men."⁸² However, when military officials have acted

153 (1890). *Grimley* was cited with approval in the first "case of conscience." See *McCord v. Page*, 124 F.2d 68 (5th Cir. 1941); see also *Parker v. Levy*, 417 U.S. 733, 743-44 (1974).

77. See, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969) (no jurisdiction over current soldier unless offense "service connected"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (no jurisdiction over former soldier). Other statutes affecting the military have received similar review. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (statute which required spouses of female members to be recognized as military dependents only upon proof of actual dependency held violation of due process). But see *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (male officer's due process challenge of statute unsuccessful although statute applicable to female officers set more liberal standard for retention).

78. See Peck, *The Justices and the Generals: The Supreme Court and the Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 66 (1975). Peck distinguishes two classes of cases. See *id.* The first class is, those cases where the action taken was in excess of the statutory authority granted. See, e.g., *Harmon v. Brucker*, 355 U.S. 579 (1958) (characterization of administrative discharges must be limited to service rendered and may not be based on pre-service activities). The second class of cases are those where the service violated a statutory provision. See, e.g., *Bell v. United States*, 366 U.S. 393 (1961) (Army refusal to pay Korean War turncoats must have some statutory basis).

79. See *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

80. See *Bensing v. United States*, 551 F.2d 262, 265 (10th Cir.), *cert. denied*, 434 U.S. 832 (1977).

81. Act of June 11, 1946, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. III)).

82. See *Garrett v. Lehman*, 751 F.2d 997 (9th Cir. 1985); Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135 (1985); Haggerty, *Judicial Review of Military Administrative Decisions*, 3 HASTINGS CONST. L.Q. 171 (1976); Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 42 (1973).

within the scope of their authority, courts had been reluctant to intervene on behalf of an individual service member, regarding constitutional claims such as a lack of procedural due process in actions conducted by a board of officers.⁸³ Similar reluctance on behalf of the courts has been evidenced in cases which involved challenges to assignments or the adequacy of training,⁸⁴ unless the challenge is based on an allegation that the military failed to adhere to the terms of an enlistment agreement.⁸⁵ However, some courts have recently found constitutional grounds for directing the reversal of military decisions involving the separate treatment afforded service members.⁸⁶

In *Mindes v. Seaman*,⁸⁷ the United States Court of Appeals for the Fifth Circuit held that internal military affairs should not be reviewed by a court unless there is either an allegation of constitutional deprivation, or that the military violated applicable statutes or regulations. Further, the *Mindes* standard does not require all such allegations be reviewed. Instead, when faced with allegations of misconduct, courts must consider the policy reasons for nonreview. When considering such policy, the following factors must be weighed: (1) the nature and strength of the challenge to the military determination; (2) the potential injury to the service member if review is refused; (3) the type and degree of military activity interference; and (4) the extent of military expertise or discretion involved.⁸⁸

The *Mindes* test attempts to reconcile the legislative principle that

83. See *Patterson v. Lamb*, 329 U.S. 539 (1947) (declaratory judgment and mandatory injunction); *Denby v. Berry*, 263 U.S. 29 (1923) (involving mandamus actions); *United States ex rel Creary v. Weeks*, 259 U.S. 336 (1922) (no jurisdiction to grant writ of mandamus); *United States ex rel French v. Weeks*, 259 U.S. 326 (1922) (lack of jurisdiction to issue mandamus).

84. See McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administration Decisions*, 108 MIL. L. REV. 89, 126-27 (1985); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 529-33 (1969).

85. See *Peavy v. Warner*, 493 F.2d 748, 750 (5th Cir. 1974) (collecting authorities).

86. See generally Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387 (1984).

87. 453 F.2d 197 (5th Cir. 1971).

88. See *id.* at 201; see also Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 397 n.57, 402-03 (1984). But see *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981) (declining to adopt the *Mindes* test). The Fifth Circuit's opinion in *Calley v. Callaway*, 519 F.2d 184, 199, 203 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976), articulated a similar standard for collateral review of courts-martial. The test employed in *Calley* has not been accepted in the other circuits. See Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 64 (1985).

administrative decisions made within the military do not deserve special consideration simply because they are made within the military⁸⁹ with the contrary principle that military decisions regarding members of the armed forces merit special deference. Deference is given by either defining the controversy as "nonjusticiable"⁹⁰ or by setting a different standard for review.⁹¹ Thus, in examining cases where federal courts have been called on to protect a service member's free exercise rights, one can expect the government to stress that the unique character of the military calls for a special, constitutionally protected regime, while the service member will emphasize the common constitutional protections which all persons enjoy.

E. *Federal Courts and Military Free Exercise Rights*

After *McCord v. Page*,⁹² a quarter century elapsed before another American serviceman appeared in federal court claiming that military practices infringed upon his free exercise rights. In *Geller v. Secretary of Defense*,⁹³ a reserve officer sought to enjoin the Air Force from enforcing a regulation which prohibited beards. Geller, a Jewish chaplain, had served both on active duty and in the reserves from 1950 to 1974. Geller, had been wearing a beard since 1966, but was not disciplined until 1973 when he refused to shave after being di-

89. See S. REP. NO. 752, 79th Cong., 1st Sess. 5 (1945). "[I]t has been the undeviating policy of the committee to deal with the types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their own functions."

90. See *Gilligan v. Morgan*, 413 U.S. 1 (1973). In *Gilligan*, a request for judicial supervision of the Ohio National Guard's training was rejected on the grounds that the relief requested would "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of Government." *Id.* at 7. Writing of *Gilligan*, Professor Redish notes: "Let us assume that the National Guard training manual stated that blacks were to be treated more roughly than whites or that any demonstrator professing a belief in communism should be beaten. Surely, issues of military expertise and flexibility are irrelevant to the constitutionality of such training." Redish, *Judicial Review and the "Political Question"*, 79 N.W. L. REV. 1031, 1056 (1985). While Redish argues for "some meaningful [judicial] review if only to provide a floor of constitutionally acceptable governmental behavior" the extreme "rule making" example he offers avoids the more difficult problem raised by the single soldier claiming an exemption from an otherwise constitutional rule, nor does he suggest what criteria a court might apply to the government's assertion that application of the rule in the individual's case was necessary for good order and discipline.

91. See *Committee for G.I. Rights v. Callaway*, 518 F.2d 466, 476-77 (D.C. Cir. 1975) (permitting warrantless inspections for drugs of servicemen's barrack space).

92. 124 F.2d 68 (5th Cir. 1941).

93. 423 F. Supp. 16 (D.D.C. 1976).

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rectly ordered to do so. Because of his refusal, Geller was reassigned to the inactive reserves. Geller asserted that his decision to wear a beard was religiously motivated and, as such, was constitutionally protected. While acknowledging that the military's concern in displaying a common standard of appearance reflected a responsiveness to discipline, the federal district court concluded that this reason was not sufficient in this case because Geller was *employed* by the military to specifically serve as a Jewish chaplain and he wore a beard for seven years without criticism, adverse action or ill effects. Moreover, in this case the court found no adequate justification for inflexibly applying the Air Force regulations.⁹⁴

The *Geller* opinion is remarkable in that Geller's status was considered to be that of a federal employee and not a military officer.⁹⁵ This may have been due to the fact that, as a chaplain, Geller was thought to be outside the normal military chain of command.⁹⁶ While not constituting estoppel, the fact that immediate superiors had, for seven years, permitted him to serve on active duty without complying with the regulation, presumably evidenced the fact that the chaplain's beard was not a threat to military discipline and efficiency.⁹⁷

As a "free exercise" case, *Geller* was unremarkable; however, when viewed as a decision involving the judicial review of a military administrative decision, it was unique. For the first time a federal judge selectively exempted a member of the armed forces from the application of an otherwise valid regulation.⁹⁸ This result was achieved by treating Geller as an employee,⁹⁹ and balancing his constitutional

94. See *Geller v. Secretary of Defense*, 423 F. Supp. 16, 18 (D.D.C. 1976).

95. Cf. *Reaves v. Ainsworth*, 219 U.S. 296, 306 (1911) ("[t]o be promoted or to be retired may be the right of an officer, . . . but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army").

96. An officer designated as a chaplain has rank without authority to command. See 10 U.S.C. § 8581 (1982).

97. See *Geller v. Secretary of Defense*, 423 F. Supp. 16, 18 (D.D.C. 1976). *But cf.* *Goldman v. Secretary of Defense*, 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginnsburg, C.J., dissenting).

98. See *Geller v. Secretary of Defense*, 423 F. Supp. 16, 18 (D.D.C. 1976).

99. See *id.* In this regard, social science research and theory have been useful to the military in recent free exercise cases. One of the fundamental themes of military sociologists has been the institutional/occupational model of the armed forces. Setting up a dichotomy between the two, researchers then identify biases towards one model or the other. See, e.g., M.L. MARTIN, *FROM WARRIORS TO MANAGERS: THE FRENCH MILITARY ESTABLISHMENT SINCE 1945* (1981); Janowitz, *From Institutional to Occupational: The Need for Conceptual Continuity*, 4 *ARMED FORCES AND SOC.* 51 (1977); Moskos, *From Institution to Occupation*,

right to evidence his religious beliefs, with his employer's interest in uniform appearance.

In 1980 however, the United States Court of Appeals for the Ninth Circuit reached a totally opposite conclusion in a case factually similar to *Geller*. *Sherwood v. Brown*,¹⁰⁰ involved a Navy seaman who had become a member of the Sikh religion which requires its adherents to wear turbans. Soon afterward, the seaman was court-martialed and discharged for failing to comply with the Navy's uniform regulations. In his subsequent suit, the seaman claimed that the regulations were unconstitutional as applied to him. The district court dismissed the suit and the court of appeals affirmed on the grounds that the government had satisfied the "strict scrutiny" test by showing that helmets were required of all naval personnel because of hazards in combat and peacetime operations, and that no less restrictive alternative existed. While the military's authority was affirmed, the court did so on the narrowest possible grounds, the application of the "civilian strict scrutiny test," and not on the principle that military judgments regarding discipline merited judicial deference.

In 1982, two more cases involving the free exercise rights of servicemen were decided in the District of Columbia. The first case to be decided was *Goldman v. Secretary of Defense*,¹⁰¹ in which an ordained rabbi challenged the constitutionality of an Air Force regulation which prohibited his wearing a yarmulke (skullcap). The regulation specifically prohibited both the wearing of any headgear indoors and the wearing of any non-uniform items while in uniform. Initially, Goldman had served for two years as a Navy chaplain, and three and one-half years as an Air Force clinical psychologist during which time his superiors permitted him to cover his head with either a yarmulke or hat while on duty. When he was subsequently ordered to comply with the Air Force regulation, Goldman sought relief claiming that enforcement of the regulation would violate his free exercise rights.

Trends in Military Organization, 4 ARMED FORCES AND SOC. 41 (1977); vanDoorn, *The Officer Corps: A Fusion of Profession and Organization*, 6 EURO. J. SOC. 262 (1965). Clearly the *Geller* opinion comes down firmly on the side of the occupational model. See *Geller v. Secretary of Defense*, 423 F. Supp. 16, 18 (D.D.C. 1976); see also *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (Army enjoined from honorably discharging homosexual reservist).

100. 619 F.2d 47 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980).

101. 530 F. Supp. 12 (D.D.C. 1981), *rev'd*, 734 F.2d 1531, *reh'g denied*, 739 F.2d 657 (D.C. Cir. 1984), *aff'd sub. nom. Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

Prior to trial, the district issued an order temporarily restraining the military from enforcing the regulation and ordering them to withdraw a letter of reprimand which Goldman had received for refusing to comply with the regulation. At the trial's conclusion, the court granted a permanent injunction prohibiting the enforcement of the regulation as to Goldman.¹⁰²

Before considering *Goldman's* subsequent history, it is necessary to examine the case of *Bitterman v. Secretary of Defense*,¹⁰³ also decided in 1982. In *Bitterman*, an Air Force sergeant sought to enjoin the enforcement of a uniform regulation which prevented his wearing a yarmulke while in uniform. The district court held that the enforcement of the uniform regulation was the least restrictive means available to accommodate the compelling government interest—the effective functioning and maintenance of the Air Force. In its analysis, the court relied upon the concept of a separate constitutional regime for members of the armed forces expressed in *Parker v. Levy*¹⁰⁴ and applied to the first amendment in *Brown v. Glines*.¹⁰⁵ Since the regulation was directed in furtherance of “motivation, image, morale, discipline and esprit de corps [which are] essential to the efficient functioning and operation of the Air Force,” the court upheld the regulation.¹⁰⁶

The government appealed the decision in *Goldman* and the trial court holding was reversed by the United States Court of Appeals for the District of Columbia.¹⁰⁷ The court of appeals concluded that:

102. *Goldman v. Secretary of Defense*, 29 EMPL. PRAC. GUIDE(CCH) ¶ 32 (D.D.C. Apr. 26, 1982).

103. 553 F. Supp. 719 (D.D.C. 1982).

104. 417 U.S. 733 (1974).

105. 444 U.S. 348 (1980) (Army regulation requiring commander's authorization before soldier could circulate petition on base, held not unconstitutional prior restraint of free speech).

106. *Bitterman v. Secretary of Defense*, 553 F. Supp. 719, 724 (D.D.C. 1982) (drawing on World War II military history and testimony of Air Force general who emphasized “horizontal” effects of compliance with uniform regulations on other unit members). *But see Goldman v. Secretary of Defense*, 530 F. Supp. 12, 14 (D.D.C. 1981), *rev'd*, 734 F.2d 1531, (D.C. Cir. 1984), *aff'd sub. nom. Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986). The affidavit, submitted by an Air Force general in the *Goldman* trial, emphasized the effect of compliance on civilian perceptions of the military.

107. *See Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C. Cir. 1984), *aff'd sub. nom. Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986). *See generally* Note, *Constitutional Law—The Clash Between the Free Exercise of Religion and the Military's Uniform Regulations—Goldman v. Secretary of Defense*, 58 TEMPLE L.Q. 195 (1985).

[T]he peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible. That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement. Its regulations are necessarily arbitrary. [T]he Air Force argues that it cannot make exceptions . . . without incurring resentment from those who are compelled to adhere to the rules strictly (and whose resentment would be intensified by the arbitrariness of the rules), thereby undermining the goals of teamwork, motivation, discipline, and the like; and that it cannot move the line, so as to avoid the problem of making exceptions, without losing the benefits of uniformity altogether. It therefore concludes that strict enforcement of its regulations is necessary for military purposes. The Air Force's judgment on this issue is entitled to deference because it is within its expertise and outside ours.¹⁰⁸

The view of the three dissenting court of appeals judges, however, illuminates the paradox which military free exercise cases present. The judiciary is obligated to protect constitutional rights and, if necessary, determine when the needs of society must give way to the rights of the individual. Federal judges, however, have no special competence to judge whether the military is handling a particular man properly.¹⁰⁹ Some paradoxes can be resolved by identifying the fallacy on which they are based. The problem posed by requests for judicial intervention in military decisions regarding the handling of men may give rise to an antimony which can only be resolved by restating the premises which led to the paradox.¹¹⁰

The *Goldman* dissenters began their analysis with the premise that Goldman had a constitutional right to display a symbol of his religious belief. Free exercise cases in a civilian context require accom-

108. *Goldman v. Secretary of Defense*, 734 F.2d 1531, 1540 (D.C. Cir. 1984), (distinguishing civilian free exercise cases, on ground that states in civilian cases had no strong interest in uniformity of application), *aff'd sub. nom. Goldman v. Weinberger*, — U.S. —, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

109. *See Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

110. *See generally Fletcher, Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263 (1985). The nature of the conflict is illustrated by an exchange during the oral argument in *Jaffee v. United States*:

The Court: [A]s I read the law, it doesn't matter if they stood up there and said, 'one, two, three, left, right, left,' and marched them over a cliff. . . . You'd be protected under *Feres* . . . ? [Government Lawyers:] Yes, your Honor.
Jaffee v. United States, 468 F. Supp. 632, 635 (D.N.J. 1979), *aff'd*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). Many writers have commented on this dilemma. *See, e.g., Note, Military Dissent and the Law of War: Uneasy Bedfellows*, 58 SO. CAL. L. REV. 871, 872 n.3 (1985) (presenting review of various authorities).

modating those who desire to exercise their religious liberties, unless it would be unduly burdensome.¹¹¹ The fact that Goldman had been permitted to display a symbol without incident was seen as evidence of the fact that accommodation would not be an encumbrance. Further, the dissenters stated that the fact that a military commander declared the display of a religious symbol intolerable suggested a callous indifference to Goldman's religious faith.¹¹² Therefore, because the dissenters' emphasis was on the individual rather than the institution, the Air Force, they had effectively substituted their judgment for that of the military authorities.

The dissenters' approach was consistent with that taken in *Anderson v. Laird*,¹¹³ a case in which the court struck down regulations requiring mandatory chapel attendance for students at the service academies. Furthermore, the *Anderson* decision was consistent with a series of prior Supreme Court cases explicating the first amendment's purpose to build "a wall of separation between Church and State."¹¹⁴ In *Anderson*, the government was unsuccessful in attempting to establish that compulsory chapel attendance for officer candidates had a secular and military purpose by inculcating sensitivity to the spiritual needs of those who would serve under their command. In his concurring opinion, Chief Justice Bazelon applied a "strict scrutiny" test,¹¹⁵ concluding that the government had not established that mandatory chapel attendance was vital to national security, military operations or disciplinary needs.¹¹⁶

111. See *Goldman v. Secretary of Defense*, 739 F.2d 657, 659 (D.C. Cir. 1984) (Starr, C.J., dissenting), *aff'd sub. nom. Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

112. See *id.* at 660 (Ginsburg, C.J., dissenting) (relying on *Zorach v. Clauson*, 343 U.S. 306 (1952)). In *Zorach* the Court sustained a state program for released time for religious education in public schools. "To hold that the state may not [adjust schedules], would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.* at 314.

113. 466 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 409 U.S. 1076 (1972).

114. See *id.* The phrase is drawn from a letter from Thomas Jefferson to a group of Baptists. See XIV *The Writings of Thomas Jefferson* 281-82 (A. Lipscomb ed. 1903).

115. See *Anderson v. Laird*, 466 F.2d 283, 296 (D.C. Cir.) (Bazelon, C.J., concurring) (relying on *Sherbert v. Verner*, 374 U.S. 398 (1963)), *cert. denied*, 409 U.S. 1076 (1972).

116. See *Anderson v. Laird*, 466 F.2d 283, 295-96 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972). Judge Bazelon's view of disciplinary needs can be inferred from his opinion in *Carlson v. Schlesinger*, 511 F.2d 1327, 1335-40 (D.C. Cir. 1975). Judge Bazelon dissented from the majority which denied a serviceman's claim that his first amendment right to free speech had been unconstitutionally abridged when the military arrested him for circulating an anti-war

If the military could not establish that mandatory religious observance was vital to national security or disciplinary needs, could it also prohibit observance on those grounds? That question was raised and answered in two cases in which military officials attempted to interfere with an individual's right to worship. *Bridges v. Davis*,¹¹⁷ focused on worship at two Honolulu, Hawaii churches which had been designated by their pastors as sanctuaries for military deserters. Military police thereafter entered the churches and arrested a number of marines. The pastors who had organized the sanctuaries were initially given permission to visit the men in confinement. After a number of incidents, however, the commanding officer withdrew the pastors' permission to enter the post. The pastors challenged this decision on first amendment grounds but were denied relief by both the district and appellate courts. Both courts concluded that the commanding officer's decision was an appropriate exercise of military judgment relating to good order and discipline.

In *Ogden v. United States*,¹¹⁸ the court again addressed the issue of military interference with a service members off-duty worship. The commanding officer of the Great Lakes Naval Training Center was informed by the Naval Investigative Service that the pastor of the nearby Christian Fellowship Church had encouraged sailors to become absent without leave (AWOL).¹¹⁹ Additionally, the investigation raised allegations that the pastor had solicited sailors to participate in homosexual acts. In response to various newspaper articles, and in light of the fact that the pastor was under criminal investigation for sexual assault, the commanding officer declared the church off-limits.

Members of the church thereafter filed a lawsuit seeking both injunctive relief and money damages for a violation of their first amendment rights. The district court dismissed both the claims for money damages and injunctive relief. The district court's dismissal of the claim for money damages was affirmed by the court of appeals,¹²⁰ but

petition in Vietnam during combat operations. Bazelon's view encompassed only those aspects of discipline which refer to the hierarchical relationship between subordinate and superior.

117. 443 F.2d 970 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

118. *See Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985).

119. *See id.*

120. Two theories of liability were advanced. The plaintiffs' constitutional tort claim for money damages was dismissed on the ground that *Chappell v. Wallace* had concluded that special factors dictated the inappropriateness of any *Biven* type remedy. Their civil rights

the dismissal of the claim for injunctive relief was reviewed in light of the *Goldman* decision then pending before the Supreme Court. The court of appeals reasoned that since the commanding officer's decision involved a "core" liberty interest in worshipping God according to the dictates of conscience,¹²¹ it was judicially reviewable. In reviewing a claim for injunctive relief, the court stated that not only must the service member's claim be one of constitutional dimension¹²² but the commander must be seeking the achievement of a legitimate military end.¹²³ In this regard, a commanding officer's action will be enjoined only if it is irrational, invidious, or exceeds what is necessary to protect the governmental interest involved.¹²⁴

At the time the *Ogden* decision was rendered, the *Goldman* case was pending before the Supreme Court where, it was hoped, definite criteria would be set for evaluating service members' claims involving religious freedom. In affirming the rejection of Goldman's claim, the Court concluded that constitutionally there is no mandate which allows courts to abandon military decisions regarding dress.¹²⁵ Furthermore, Justice Stevens, in a concurring opinion joined by Justices White and Powell, emphasized that any judicial mandate to the military, which would distinguish between permissible and impermissible

claims under 42 U.S.C. § 1983 were dismissed on the grounds that section 1983 applied only to deprivations of rights perpetrated under color of state law. *See, e.g., Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). The appellate court held that their claim under section 1985(3) was waived, thus it was not necessary to decide whether *Chappell* barred the claim. *See Ogden v. United States*, 758 F.2d 1168, 1175 (7th Cir. 1985). The Supreme Court in *Chappell* had expressly refused to decide whether a service member's suit seeking damages flowing from an alleged conspiracy of his military superiors under 42 U.S.C. § 1985(3) could be maintained. *See Chappell v. Wallace*, 462 U.S. 296, 305 n.3 (1983). Since *Chappell* relied on the rationale in *Feres*, and subsequent decisions which turned on the threat to discipline any "incident to service" suit would pose, there is no reason to believe that the Supreme Court would create a conspiracy exception.

121. *See Myer v. Nebraska*, 260 U.S. 390, 399 (1923).

122. *See Ogden v. United States*, 758 F.2d 1168, 1177 (7th Cir. 1985).

123. *See id.* at 1179.

124. *Compare id.* at 1180 with *Mindes v. Seaman*, 453 F. 2d 197, 201 (5th Cir. 1971).

125. *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 1314, 89 L. Ed. 2d. 478, 485 (1986). The Supreme Court's decision in *Goldman* will, in a civilian context, be seen as part of a "new accommodation doctrine [which threatens] to allow governmental, majoritarian interests to override the interests of religious minorities." Teitel, *The Supreme Court's 1984-85 Church-State Decisions: Judicial Paths of Least Resistance*, 21 HARV. C.R.-C.L. L. REV. 651, 655 (1986). *But see Ackerman, Church and State in the Supreme Court: The Non-Revolution of the 80's*, 33 FED. B.N. & J. 285, 289 (1986) (observing that *Goldman* majority abandoned *Sherbert* and *Yoder* without offering explanation).

behavior, would in actuality constitute a directive to discriminate based on religious affiliation.

In his dissent, Justice Brennan reiterated the same arguments that he had made while dissenting in *Brown v. Glines*.¹²⁶ While acknowledging that internal military decisions merited some deference, Justice Brennan would apply an essentially "civilian" criterion to a service member's assertion of first amendment rights. Such criterion would require the government to establish a compelling interest. Moreover, Justice Brennan responded to Justice Stevens' concurring opinion by pointing out that the "neutral" dress regulation effectively discriminated against any orthodox Jew who sought to wear a yarmulke, thereby presenting him with a "cruel choice."¹²⁷

Although the *Goldman* decision is not the focus of this article, insofar as it represents the Supreme Court's only statement regarding the military's duty to accommodate religiously motivated behavior, it will be looked to for the criteria used to adjudicate a service member's constitutional claims. By refusing to accept or reject the standards proposed in *Mindes v. Seaman*¹²⁸ and *Ogden v. United States*,¹²⁹ the Supreme Court has simply restated the principle that courts will (or should) defer to military judgments regarding the handling of members of the armed forces. In their analysis both the majority and the dissenting opinions began with the premise that Goldman had a constitutionally protected right to display a symbol of his religious beliefs. While the majority accepted the military's judgment that the cost of exercising that right exceeded the benefits, the dissent relied on the reasoning implicit in civilian free exercise cases, by insisting that the military justify its judgment. In this regard, the *Goldman* decision illustrates one of the shortcomings of an adjudicatory model for resolving such disputes: "the initial focus on rights is . . . a serious

126. 444 U.S. 348, 367 (1980) (Brennan, J., dissenting).

127. *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 1320-22, 89 L. Ed. 2d 478, 492-93 (1986) (Brennan, J., dissenting). The term is drawn from Justice Stewart's dissenting opinion in *Braunfeld v. Brown*, 366 U.S. 599 (1961) in which the Court upheld Sunday closing laws. "Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand." *Id.* at 616. Former Associate Justice Arthur Goldberg, in an article commenting on the *Goldman* decision, took the same position. See Goldberg, *In Support of the Free Exercise of Religion*, *Christian Science Monitor*, May 12, 1986, at 16.

128. 453 F.2d 197 (5th Cir. 1971).

129. 758 F.2d 1168 (7th Cir. 1985).

impediment to the analysis of costs, for, in principle at least, if rights exist they are not bounded by considerations of cost."¹³⁰ Previously, the Supreme Court in *Thomas v. Review Board*,¹³¹ disregarded the additional monetary costs imposed on the states when it ruled that terminated employees should be eligible for unemployment compensation. The majority in the *Goldman* case, however, was apparently unwilling to disregard the intangible costs to morale and discipline which the government urged would occur if an exception was made.

It may well be that even while the Supreme Court has affirmed service members' constitutional rights in the past, the Court has refused to set general criteria which would encourage federal courts to adjudicate service members' free exercise claims. "Judicial deference" is an epistemological stance, not an analytic technique: it simply discourages judicial intervention. If that was the intent of the Supreme Court in *Goldman*, then the resolution of such claims has been left to the legislature and the executive branch. With this in mind one must now examine if the Court has been successful in setting a workable standard for accommodation.

III. LEGISLATIVE RESPONSES TO THE PROBLEM OF FREE EXERCISE IN THE MILITARY

Captain Goldman's case captured the attention of Congress in much the same way that Captain Atchisons's had gained Parliamentary interest one hundred and fifty years earlier.¹³² For example, one Congressman described the court of appeals' decision as being "offensive to the basic Constitutional right guaranteeing the freedom of religion."¹³³ The Congressman thereafter introduced a bill permitting the wearing of religious headgear in the military for a one-year trial period.¹³⁴ Although the proposal was criticized,¹³⁵ the idea struck a responsive chord in the Senate, which subsequently created a joint study group within the Department of Defense to consider the problem of religious accommodation.¹³⁶ The proposal ultimately became

130. D.L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 34 (1977).

131. 450 U.S. 707 (1981).

132. W. HOUGH, *PRECEDENTS IN MILITARY LAW* 117 (1855).

133. 130 CONG. REC. H3568 (daily ed. May 9, 1984).

134. *See* 130 CONG. REC. H4836 (daily ed. May 24, 1984).

135. *See id.* at H4837-8.

136. *See* 130 CONG. REC. S7420, S7422 (daily ed. June 15, 1984).

part of the Defense Authorization Act of 1985;¹³⁷ requiring the study group to submit its report to the Secretary of Defense who would thereafter report to Congress. The report, however, did not recommend that any changes be made in current military practices.

In 1986, when Captain Goldman's case was adversely decided by the Supreme Court, supporters of Goldman's position sought to include a provision in the Department of Defense Authorization Act of 1987 which would allow military members to wear "neat and conservative" apparel that is "part of the religious observance of the religious faith." The measure, however, was tabled by the Senate in a fifty-one to forty-nine vote.¹³⁸ Similar language was also included in the House Armed Services Committee's version of the current Defense Authorization Act and will, therefore be resolved in the final conference report. Clearly, the proposal suffers from two obvious deficiencies: it neither addresses other kinds of religious observance which may conflict with disciplinary criteria, nor does it establish an objective, easily ascertainable standard for commanding officers to apply.

IV. THE EXECUTIVE RESPONSE TO CLAIMS OF FREE EXERCISE RIGHTS

Donald Horowitz in his evaluation of the adjudicatory model, observes that courts have difficulty in judging how representative of a problem a case actually is; if the case is exceptional rather than repre-

137. Pub. L. No. 98-525, § 554(a), 98 Stat. 2532. "In order to promote the free expression of religion to the greatest extent possible with the requirements of military discipline, the Secretary of Defense shall form a study group to examine ways to minimize the potential conflict between the interests of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline." *Id.*

138. *See* 132 CONG. REC. S10703 (daily ed. August 7, 1986). The legislation had originally been introduced in April, under the sponsorship of Senators D'Amato and Lautenberg. *See id.* at S3785-86 (daily ed. April 8, 1986). Identical legislation, HR4525, 99th Cong. 2d Sess., was introduced in the House of Representatives on the same day. During Senate debate on the bill, one of its sponsors made a heartfelt statement which could have applied to Captain Atchison's case a century and a half earlier: "it is a deep belief of mine that one can be a good, loyal, determined soldier, sailor, or airman without at any time having to make a decision between his belief and loyalty to his country and his belief and loyalty to his religions. They are never, in my view, in conflict." *Id.* at S10703 (daily ed. August 7, 1986) (statement of Sen. Lautenberg). Presumably most, if not all, of his listeners agreed, but we have seen many cases where religious belief and the military definition of the requirements of a disciplined armed force do conflict. His fundamental misunderstanding of the nature of the problem illustrates the legislature's ineptitude in attempting to resolve military free exercise conflicts.

sentative, bureaucrats may not accord much legitimacy to the decision.¹³⁹ So far, we have seen the paucity of reported cases involving the conflict between military members' religious sensibilities and the disciplinary system. If these reported cases represent "the problem," then judicially mandated exceptions should have no apparent adverse affect on the combat capabilities of the armed forces.

In this section the focus will be on unpublished material describing the kinds of free exercise conflicts military decision-makers have been forced to adjudicate. The material is drawn from a variety of sources: a Department of Defense Study Group Report citing a number of unreported federal cases;¹⁴⁰ briefs submitted to the Supreme Court in the *Goldman* case; a student paper, drawing on the files of the Judge Advocate General of the Army;¹⁴¹ and internal records of the various armed services made available to the public by court order.¹⁴² The section will be in two parts, the first describing unreported cases in the federal court system, and the second discussing incidents that were resolved without recourse to the federal judiciary.

A. *Unreported Federal Cases*

In its report, the Department of Defense Study Group categorized four potential areas of conflict and accommodation: rituals, particularly sabbath observances;¹⁴³ dress and appearance practices which allow for visual identification of religious affiliation;¹⁴⁴ dietary practices conflicting with food available in the military;¹⁴⁵ and health-care attitudes, specifically including beliefs in self-care and prohibitions against immunization, blood transfusion, or surgery.¹⁴⁶ The report refers to several unreported cases involving dress and appearance

139. See D.L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 266-67 (1977).

140. OFFICE OF THE SECRETARY OF DEFENSE, *JOINT SERVICE STUDY ON RELIGIOUS MATTERS* (1985).

141. See A. Squire, *The Military and Religion: Concerns, Conflicts, and Accommodations* (Dec. 1985) (unpublished manuscript).

142. See 10 U.S.C. § 1552 (1982 & Supp. II 1984). See generally Kabatchnik & Kabatchnik, *Practice Before the Boards for Correction of Military Records Within the Various Military Departments*, 33 *FED. B.N. & J.* 17 (1986).

143. OFFICE OF THE SECRETARY OF DEFENSE, *JOINT SERVICE STUDY ON RELIGIOUS MATTERS* § II, at 2-3 (1985).

144. *Id.* § III, at 2.

145. *Id.* § IV, at 3-4.

146. *Id.* § V.

practices.¹⁴⁷ For example, one case involved the application of an Air Force regulation prohibiting beards to a Jewish chaplain in the Air

147. *See id.* § I, at 13. One case discussed by the Study Report was *Guru San Singh Khalasa v. Weinberger*. *See id.* *Khalasa* involved a suit by a potential enlistee whose religious practices made him ineligible for enlistment. The federal district court dismissed the suit for lack of subject matter jurisdiction. The Ninth Circuit's opinion affirming the result in *Khalasa* is of especial interest in that it summarizes the Army's various treatments of members of the Sikh religion. *See Khalasa v. Weinberger*, 779 F.2d 1393 (9th Cir. 1985). Conscripted Sikhs were granted exemptions between 1958 and 1974. The draft ceased in 1973 and the exemption was extended to Sikhs who had voluntarily enlisted until 1981, when it was terminated. We could assume that some religious sensibilities of Sikhs serving in the military were offended by this change in policy, but there are no reported Army cases involving active-duty Sikhs affected by the change. The author of an unpublished student paper, relying on Army files, stated that "[t]he 25 Sikhs granted previous exemptions were permitted to stay in the Army subject to assignment restrictions which would not jeopardize their safety." *See Squire, The Military and Religion: Concerns, Conflicts, and Accommodations* 44 (Dec. 1985) (unpublished manuscript). The Army's original decision to exempt conscripted Sikhs may have been based on their reputation as exceptional fighting men. The decision in 1974, after the draft had ended, to grant the same exemption to voluntarily enlisted Sikhs was, however, based on the rationale that the Army would exempt a member of any religious group which set unwaivable appearance requirements. At the time, Army officials thought that Sikhs were the only religious group with such a requirement. *See id.* Subsequently some Christian sects, other Moslems, Hindus, Jews, Rastafarians, and Native Americans sought similar exemptions. Exemptions for members of these groups were denied. When the Army directed that no further Sikh exemptions be granted, it offered a number of rationales: the Soviet's chemical warfare capability had increased to such an extent that members had to be able to wear protective clothing which was air tight, and considerations of uniformity, discipline, and esprit de corps. *See id.* (summarizing an undated memorandum prepared for correspondents at time decision was announced). The Navy's treatment of Sikhs is discussed in *Sherwood v. Brown*, 619 F.2d 47 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980). There is no indication that the *Khalasa* court was aware of the Army's action. Should the Army's decision have affected the court's judgment? When Goldman's prior commanders waived the dress regulation they were acting *ultra vires*; the Sikhs were granted permission by proper authorities. The *Khalasa* decision might well have been unaffected, since courts have held that potential enlistees have no constitutional right to enlistment. *See, e.g., Niezner v. Mark*, 684 F.2d 562 (8th Cir.), *cert. denied*, 460 U.S. 1022 (1982) (applying *Mindes v. Seman* test to constitutional claims of age discrimination and concluding claim was nonreviewable). If a serviceman, who later on active duty became a convert to the Sikh faith, claimed an exemption and was denied, it was because the Army decided that twenty-five Sikhs could be accommodated but that additional converts should be discouraged. In light of such action, would a federal court enjoin enforcement of the regulation? Normally, it would defer to military judgment, but if exemptions had been made by the military, the court might well conclude that the incremental cost to morale and discipline was outweighed by the benefit to the convert. However, the Joint Service Study lists some of the other (potential) religion-based dress and appearance deviations: "swords, ankle length skirts, dreadlocks (long braided hair worn by Rastafarians) and kum kums (red dots worn on the forehead by Hindus). *See OFFICE OF THE SECRETARY OF DEFENSE, JOINT SERVICE STUDY ON RELIGIOUS MATTERS* § I, at 24. It does not list those aspects of dress and appearance associated with Orthodox Judaism which, as we have seen previously, have offered a fertile ground for litigation.

Force Reserves.¹⁴⁸ The chaplain sought an exception to the regulation in order to train and serve with the active force. The suit, however, was subsequently dismissed.

The Department of Defense report also refers to another case, *Shy v. Alexander*¹⁴⁹ which involved a Shiloh-Christian who refused to salute either the flag or female officers. After the Army refused to accommodate his claim, Shy's case was dismissed by the federal district court.¹⁵⁰ In addition to the cases already discussed, the government's brief in *Goldman* refers to three other religious-based cases which were also dismissed by the courts.¹⁵¹ Presumably, these were all the lawsuits known to the Department of Justice. The government's brief, however, also included a poignant letter from the pastor of a United Pentacostal Church near Fort Riley, Kansas, in which he named fifty-one men and women who had been administratively discharged from the Army because of their religious convictions.¹⁵²

Thus one pastor knew of far more incidents of conflict between religious sensibilities and military discipline, than all of the cases contained in legal reporters. The letter clearly suggests that the problem is of far greater magnitude than the official reports indicate. Moreover, the letter reinforces the thesis advanced earlier that most religiously motivated behavior which conflicts with military discipline results in relatively minor unreported punishment followed by administrative discharge.

B. *Unreported Military Cases*

The plausible pattern of dissent and discharge is difficult to demonstrate because the armed forces do not maintain statistical records which show the reasons for administrative discharge. Various Congressional reports have estimated the yearly number of administrative

148. See *Kalinsky v. Secretary of Defense*, Civ. No. 78-17 (D.D.C. June 25th, 1979); see also Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 MIL. L. REV. 53, 84-85 (1982) (quoting from the slip opinion).

149. No. CV-LV-84-141-RDF (D. Nev. May 31, 1984).

150. See Brief for Respondents at 44 n.26, *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

151. See *id.* (citing *Bitterman v. Weinberger*, No. 83-3288 (D.D.C. Apr. 24, 1984) (beard and yarmulke); *Kirschenbaum v. Secretary of Defense*, No. 84-1302 (D.D.C. Apr. 24, 1984) (yarmulke); *Taylor v. Alexander*, No. C-1-80-417 (S.D. Ohio filed Aug. 22, 1980)).

152. Letter from Pastor Leonard Westberg to Senator Aspin and the Honorable Casper Weinberger (Sept. 28, 1984), reprinted in Brief for Respondents at app. 2a-3a, *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

discharges to be in the thousands.¹⁵³ There is, however, one potential source of information. Since 1942, over three million "Less than Honorable Discharges" have been issued by the armed forces.¹⁵⁴ A Discharge Review Board for each service was established in 1944¹⁵⁵ and two years later, in 1946, a Board for the Correction of Military Records was created.¹⁵⁶ In 1977, as the result of a class action suit brought by a group of veterans, the Department of Defense agreed to publish and index these Board decisions.¹⁵⁷ Acting on the hypothesis that some religious believers had been less than honorably discharged,¹⁵⁸ the twenty-one Marine Corps, one hundred twenty Army, and sixteen Navy cases which were indexed as containing an issue relating to religious discrimination were reviewed.

The outcome of the review produced mixed results. Many of the opinions indexed as containing a religious discrimination issue did not contain any such reference; others containing the allegation, often combined it with an allegation of racial discrimination, without containing sufficient facts to enable the reader to determine the exact nature of the discrimination.¹⁵⁹ Only thirty-eight decisions (twenty four

153. See, e.g., H.R. REP. NO. 496, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 388, 86th Cong., 1st Sess. (1959).

154. See D. ADDLESTONE, J. KOLOSKE, L.M. MILFORD, K.D. SNYDER & B. STICHMAN, *MILITARY DISCHARGE UPGRADING* ¶ 1.1 (1982).

155. See 10 U.S.C. § 1553 (1982 & Supp. II 1984).

156. See 10 U.S.C. § 1552 (1982 & Supp. II 1984). See generally Kabatchnik & Kabatchnik, *Practice Before the Boards for Correction of Military Records Within the Various Military Departments*, 33 FED. B.N. & J. 17 (1986).

157. See *Urban Law Inst. of Antioch College, Inc. v. Secretary of Defense*, 4 Mil. L. Rep. (Pub. L. Educ. Inst.) 6012 (D.D.C. Jan. 31, 1977) (stipulation of dismissal). Subsequently, the United States Court of Appeals for the District of Columbia ruled that the Administrative Procedure Act, 5 U.S.C. § 555 (e), required the Boards to provide a full statement of reasons when they denied a request. See *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 600 (D.C. Cir. 1980); see also *Nicholson v. Brown*, 599 F.2d 639 (5th Cir. 1979); *Wood v. Secretary of Defense*, 496 F. Supp. 192 (D.D.C. 1980).

158. Boards for the Correction of Military Records can also recharacterize the reason given for an Honorable Discharge, but it was assumed that most discharge review cases would involve upgrading, that is, an effort to seek a more favorable characterization of the individual's service. That proved to be the case. It has been alleged that these codes have adversely affected some individuals. See D. ADDLESTONE, J. KOLOSKE, L.M. MILFORD, K.D. SNYDER & B. STICHMAN, *MILITARY DISCHARGE UPGRADING* ¶ 7.7.2.1 (1982).

159. Unlike judicial opinions, the board decisions were not intended to have any precedential value. Instead, the opinions were intended to serve solely as an internal record of the board's review of the veteran's allegations and as justification for their decision in order to satisfy the stipulation of dismissal in the *Urban Law Institute* case that "[i]f not otherwise listed in the statement of findings, conclusions, and reasons, a list of contentions and/or issues of fact, law or discretion presented by the applicants will be made public with the decision."

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percent of the total) contained enough information for an analysis. This sample, which involves discharges issued between 1945 and 1983, is far too small to offer anything more than a series of vignettes illustrating some of the ways in which religious sensibilities may create conflict in the military. These unreported incidents, summarized in the appendix, do, however, suggest that the cases reported in the federal and military court-martial systems are not representative of the kinds of problems which arise. The cases were evaluated by considering the kind of remedy which authorities—military, legislative, or judicial—would have been called on to grant in order to accommodate the applicant's religious belief. In evaluating the cases, one may rely on the model of a remedial continuum devised by Peter Schuck,¹⁶⁰ which is based on a scale of judicial intrusiveness ranging from the relatively non-intrusive remedy of a declaratory judgment, to the most intrusive, "structural" injunction where the judge orders change in an institution's behavior.

Nearly one-half of the cases involved some aspect of conscientious objection to the use of military force. Of these fifteen cases, one¹⁶¹ may not have been religiously motivated and falls outside of our study of religious dissent.¹⁶² Since the terms and conditions of enlistment are within the competence of Congress, the remaining fourteen cases were analyzed to determine whether they could have been resolved by a legislative change. In those where the serviceman had not followed the procedure for requesting conscientious objector status,¹⁶³ or became impatient with bureaucratic delays in processing his request¹⁶⁴

Urban Law Inst. of Antioch College, Inc. v. Secretary of Defense, 4 Mil. L. Rep. (Pub. L. Educ. Inst.) 6012, 6013 ¶ 5A (4)(a) (D.D.C. Jan. 31, 1977) (stipulation of dismissal). The Board decision might include a predecision brief, prepared by the Board's staff, intended to familiarize the Board with the applicant's service and health record, and an evaluation of the extent that these confirmed the applicant's allegations. The copies made available to the public have been edited to conform with Privacy Act requirements.

160. See P.H. SHUCK, *SUING THE GOVERNMENT* 14 (1983).

161. See 1958 Army 7. For an explanation of the citation, see the Introduction to the Appendix.

162. It has been suggested that religious criteria for conscientious objector status be eliminated. See *Childress, Conscientious Objection to Military Service*, in *CONSCRIPTS AND VOLUNTEERS* 148, 151 (R.K. Fullinwider ed. 1983). Until 1965, conscientious objector status would be granted to only those inductees whose religion prohibited participation in all wars. However, the Supreme Court in 1965 extended the exemption to those non-believers whose beliefs were sincere and meaningful. See *United States v. Seeger*, 380 U.S. 163, 176 (1965).

163. See 1945 Army 1; 1946 Army 3; 1974 Army 16.

164. See 1975 Marine Corps 2.

and went AWOL without waiting for an answer, no legislative change was necessary. However, in other cases where the applicant was not eligible for classification as a conscientious objector,¹⁶⁵ the outcome presumably would be susceptible to changes in statutes regulating involuntary service. It should be noted that in such conscientious objector cases the remedy sought by the service member was a release from service, and not accommodation within the armed forces. Thus, Congress is confronted with two related, but independent, legislative problems: setting criteria for excusing potential inductees from service; and setting the standards for releasing enlistees whose religious beliefs have either changed during service, or are subsequently discovered to be incompatible with the use of armed force. Because Congress has not been asked to solve either problem the Department of Defense can set its own standard for releasing enlistees.

The judicial rules for considering the claims of those seeking accommodation within the system have not changed since they were articulated in World War II.¹⁶⁶ The only judicial remedy available is release from service by a writ of habeas corpus. As we have seen, such a writ will be issued only when the service has violated the terms of enlistment.¹⁶⁷ It is therefore probable that the criteria for accommodating religiously motivated in-service conscientious objectors will continue to be set by the executive branch.

The remaining cases deal not with conscientious objection but with the previously identified potential areas of conflict. The first, regarding rituals, particularly sabbath observances, is reflected in a number of the Board decisions.¹⁶⁸ Typically, military authorities make some effort to accommodate a service member until such accommodation either conflicts with duty requirements or other members of the unit complain of favoritism.¹⁶⁹ At that point, the commanding officer generally orders the believer to perform duties on the Sabbath. Accommodation of belief, however, still may be possible; other members of the unit could be told that the respect for religious beliefs is more

165. See 1952 Army 5; 1967 Army 10; 1972 Army 13; 1973 Army 15; 1976 Army 17; 1977 Marine Corps 4; 1979 Army 21; 1982 Army 27.

166. See *McCord v. Page*, 124 F.2d 68 (5th Cir. 1941); CM 283352, *Tork*, 55 Judge Advocate General Board of Review Opinions 73 (1945).

167. See *Peavey v. Warner*, 493 F.2d 748 (5th Cir. 1974).

168. See 1956 Army 6; 1959 Navy 2; 1974 Army 16; 1979 Navy 6 and Army 21.

169. Compare 1979 Army 21 with *United States v. Cupp*, 24 C.M.R. 565 (A.F.B.R. 1957) and *United States v. Burry*, 36 C.M.R. 829 (C.G.B.R. 1966).

important than equal treatment,¹⁷⁰ or the believer could be transferred to an assignment where weekends are observed. If accommodation is to be achieved, it cannot be done by either the legislature passing, for example, laws requiring military commanders to honor the sabbath commitments of their subordinates or by the federal judiciary. Thus, the state of the law regarding sabbath observance has not changed since the mid-nineteenth century;¹⁷¹ accommodation is at a commanding officer's discretion and is reviewable only by superiors in the chain of command.

The second potential area of conflict, dress and appearance standards, is more widespread, and therefore more serious than the Department of Defense Study Group report suggests. This is due to the fact that nonconformity relates not only to the rare nonverbal statements of religious affiliation (the yarmulke, etc.) but also to other common beliefs that certain types of dress are forbidden by some believers¹⁷² or that one's faith requires unshorn hair.¹⁷³ To date, Congress has never set dress and appearance standards. Furthermore, it is clear that the proposed "test legislation" in the Defense Authorization Bill¹⁷⁴ which addresses solely "headgear" is not a solution. Since the federal judiciary has proven to be incapable of doing more than ratifying the military's regulations, only the executive branch can make structural accommodation by changing regulations or allowing exceptions.

The third potential area of conflict, problems caused by dietary practices which conflict with the military's requirements for mass feeding and combat readiness, is reflected in the Department of Defense report.¹⁷⁵ To date, however, the military has also been unre-

170. Justice Brennan, speaking on behalf of an exemption of yarmulkes, said that it would serve as "an eloquent reminder [to other members of the Air Force] that the shared and proud identity of United States servicemen embraces and unites religious and ethnic pluralism." *Goldman v. Weinberger*, — U.S. —, 106 S. Ct. 1310, 1319, 89 L. Ed. 2d 478, 491 (1986) (Brennan, J., dissenting).

171. See W. HOUGH, *PRECEDENTS IN MILITARY LAW* 114-15 (1855).

172. See, e.g., NCM 66 0804, Minnix (1966); *United States v. Haywood*, 19 M.J. 675 (A.F.C.M.R. 1984); 1982 Army 25; Letter from Pastor Leonard Westberg to Senator Aspin and the Honorable Casper Weinberger (Sept. 28, 1984), reprinted in Brief for Respondents at app. 2a-3a, *Goldman v. Weinberger*, — U.S. —, 106 S. Ct. 1310, 89 L. Ed. 2d 248 (1986).

173. See, e.g., 1981 Army 24; 1981 Army 26; *Taylor v. Alexander*, No. C-1-80-417 (S.D. Ohio Aug. 22, 1980).

174. See 132 CONG. REC. S10703 (daily ed. August 7, 1986).

175. See 1951 Army 4; 1980 Army 23.

sponsive to standards of accommodation which have been imposed by the judiciary or legislature in this regard.

The fourth and last area of potential conflict, health-care attitudes, is represented by only one case in the report.¹⁷⁶ The case dealt with a service member who refused to be vaccinated. Since civilian compulsory vaccination laws have been upheld by the courts,¹⁷⁷ it is doubtful that any judicial or legislative effort to accommodate those service members claiming first amendment protection from medical treatment would be possible.

As the Study Group's potential areas of conflict are examined, it is noticeable that two important topics were not discussed. First, there is no mention of those cases¹⁷⁸ in which a service members' religious beliefs precluded his participation in military ritual, for example, saluting the flag. Presumably the report's authors concluded that no accommodation was possible. There is no legislative solution for such a case, short of removing the requirement for all service members. Furthermore, a judicial solution would exist in only rare cases where a court would be willing to exempt an individual service member from the application of an otherwise valid regulation. As the system is presently structured, the believer is obliged to make an accommodation because the law will not protect him.

The second area of potential conflict not discussed in the report is religiously motivated behavior which, while not contrary to regulation, diminishes unit cohesion,¹⁷⁹ or horizontal discipline. Unreported

176. See 1967 Army 10.

177. See *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

178. See *McCord v. Page*, 124 F.2d 68 (5th Cir. 1941); *United States v. Cupp*, 24 C.M.R. 565 (A.F.B.R. 1957); *Shy v. Alexander*, No. CV-LV-84-141-RDF (D. Neb. May 31, 1984).

179. See Shils & Janowitz, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 PUB. OP. Q. 280 (1948) (seminal sociological study of intra-group relationships in military). Work on the topic continued in the aftermath of the Korean War. See, e.g., Little, *Buddy Relations and Combat Performance*, in *THE NEW MILITARY: CHANGING PATTERNS OF ORGANIZATION* 195 (M. Janowitz ed. 1964). Cohesion as a measure of unit performance became a major matter of concern during the Vietnam War. See Fowler, *Combat Cohesion in Vietnam*, 59 MIL. REV. 22 (1979). The term has been defined as "the bonding together of members of an organization or unit in such a way as to sustain their will and commitment to each other, their unit, and the mission." NATIONAL DEFENSE UNIVERSITY, DEFENSE MANAGEMENT STUDY GROUP ON MILITARY COHESION, *COHESION IN THE U.S. MILITARY IX* (1984). One author has concluded that "[c]ohesive units drawn from a heterogeneous society are ethnically similar and share other major cultural characteristics or are integrated and socialized to the extent that minorities are able to communicate effectively, share and adhere to dominant secondary and primary group norms, do not form autonomous minority groups with

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cases exemplify numerous such instances. For example: a Catholic mocked by barrack mates because of his evening prayers;¹⁸⁰ a soldier whose religious beliefs made him "a loner";¹⁸¹ and a Seventh Day Adventist whose shipmates said he was "weird."¹⁸² Such religious beliefs are said to interfere with the bonding process which commanders and military sociologists deem necessary for effective unit performance.¹⁸³ No legislative solution to this problem, other than exhortations to "improved understanding" is possible nor are there any articulated standards for an exercise of judicial power by injunction or declaratory judgment. Therefore, if a solution is to be found, it must be found within the executive branch.

separate norms incongruent with army norms; are assigned by sex or by sex and function." W.D. HENDERSON, *COHESION THE HUMAN ELEMENT IN COMBAT* 26 (1985). The military's emphasis on instantaneous response in life-or-death situations, assigns a high value to unit cohesion and "buddy relationships," and draws no distinction between front line and support units. See, e.g., Bonds, *Punishment, Discipline and the Naval Profession*, 104 *NAV. INST. PROCED.* 43, 48 (1978). Army officials might well conclude that religion based characteristics adversely affected unit cohesion and might insist on compliance or discharge. Religious characteristics are constitutionally suspect criteria meriting close judicial scrutiny, particularly "in a setting characterized by institutional rigidity to change . . . [and] when the legislative and administrative processes seem systematically resistant to change." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-31, at 1091, 1092 (1978). Both Professors Reddish and Tribe would presumably expect a federal court to scrutinize closely the military's rationale in such a case but neither offers criteria a court might use in its evaluation. While it must be said that neither scholar has considered the problem of free exercise in the military, it is clear that classic "civilian" tests will not work in a military context. Two church-state scholars were asked by the Joint Service Study Group to comment on the problem. Professor Kurland concluded that while the need for obedience and discipline was not an absolute defense, courts would likely sustain a regulation affecting religious observance even though it conflicted with first amendment claims. See OFFICE OF THE SECRETARY OF DEFENSE, *JOINT SERVICE STUDY ON RELIGIOUS MATTERS* app. at 50 (1985). Professor Pfeiffer warned of any denials of accommodation which might be seen as predicated on hostility to a particular religion, and assumed continued strict scrutiny by the courts. See *id.* app. at 75.

180. See 1946 Army 2.

181. See 1976 Army 18.

182. See 1979 Navy 6; see also 1976 Army 17 (harassment of conscientious objector).

183. See W.D. HENDERSON, *COHESION: THE HUMAN ELEMENT IN COMBAT* 26 (1985); Little, *Buddy Relations and Combat Performance*, in *THE NEW MILITARY: CHANGING PATTERNS OF ORGANIZATION* 195 (M. Janowitz ed. 1964); NATIONAL DEFENSE UNIVERSITY, *DEFENSE MANAGEMENT STUDY GROUP ON MILITARY COHESION, COHESION IN THE U.S. MILITARY* (1984); Fowler, *Combat Cohesion in Vietnam*, 59 *MIL. REV.* 22 (1979); Shils & Janowitz, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 *PUB. OP. Q.* 280 (1948).

V. CONCLUSION

Although our legal system requires public authorities to accommodate religious belief to the greatest possible extent, we have seen that the specialized nature of the military institution discourages legislative or judicial review of the executive's decision regarding accommodation. It is tempting to conclude that so few individuals are represented in the cases reviewed that the military should be permitted to continue their efforts at accommodation¹⁸⁴ without interference by the other two branches of government. However, that temptation should be rejected on two grounds. First, on the basis of simple justice. If we are, as a polity, committed to an ideal of religious freedom, we should ensure that the legal mechanisms we have in place are designed to accommodate that ideal.

Second, the temptation to leave matters as they are should also be rejected on pragmatic grounds. In recent years, leaders of mainstream religious groups have taken positions on public issues which, if accepted by the adherents of their faiths, will create moral dilemmas for believers within the armed forces.¹⁸⁵ Simultaneously, the growth of "new religions"¹⁸⁶ outside the mainstream faiths has been marked by an insistence on externalized behavior inconsistent with military norms. A superficial utilitarian response—that the needs of the few (nonconforming military believers) must give way to those of the many (the citizenry's requirements for a disciplined armed force)—fails to recognize that the pool of military manpower has declined drastically and that the nation may no longer be able to afford the loss of young men and women willing to serve in its defense who "do not use drugs, alcohol, nor tobacco . . . [and are] sincere, dedicated, [and]

184. See DEPARTMENT OF DEFENSE, DIRECTIVE NO. 1300.17 (1985) (dealing with accommodation of religious practices within military services; issued as result of Joint Service Study).

185. See Bernadin, Marty & Adams, *The Role of the Religious Leader in the Development of Public Policy*, 34 DEPAUL L. REV. 1 (1984). Presumably these leaders hope to influence members of the armed forces. If members of the armed forces represent a cross-section of the American population then ninety-two percent identify with Bible-based denominations, eighty-eight percent believe that the Bible is the actual or inspired word of God, and seventy-five percent read the Bible. See Nussbaum, *A Garment for the Naked Public Square: Nurturing American Public Theology*, 16 CUMBERLAND L. REV. 53, 77 (1985).

186. See Anthony & Robbins, *Spiritual Innovation and the Crisis of American Civil Religion*, 111 DAEDALUS 215 (1982); Shepherd, *The New Religions and the Religion of the Republic*, 46 J. AM. ACAD. RELIGION 509 (1978).

hard working.”¹⁸⁷ Therefore, the traditional military solution of defining the limits of accommodation, and removing the believer if those limits are exceeded, may have already become too costly.¹⁸⁸

If a statutory solution is not possible, can the court system arrive at criteria for identifying the exceptional case where judicial deference to the military should give way to intervention to protect the believer? The *Goldman* decisions reveal a bitter disagreement over the proper response to that question, but most judges deem themselves incapable of assessing the intangible costs of an individual exception to the military system of discipline. In effect, the military claims an unchallengeable “knowledge mandate”¹⁸⁹ which precludes a challenge by the

187. Letter from Pastor Leonard Westberg to Senator Aspin and the Honorable Casper Weinberger (Sept. 28, 1984), reprinted in Brief for Respondents at app. 2a-3a, *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

188. The Department of Defense currently enlists about twenty-six percent of qualified males (i.e. those eligible to serve in combat) from the available pool of eighteen year olds; that pool is projected to decline in the 1990's and, if military manpower requirements (in terms of numbers, gender, and test scores) remain constant, nearly a third of the pool will have to enlist in the 1990's. See Rimland & Larson, *The Manpower Quality Decline: An Econological Perspective*, 8 ARMED FORCES & SOC. 21, 22 (1981). Surveys suggest that no more than a third of eligible males (and thirteen percent of eligible females) have shown a propensity to enlist. See Stephens, *Retaining Citizen Soldiers*, 8 ARMED FORCES & SOC. 471, 472 (1982). The services may soon exhaust the pool of eligibles with a propensity to enlist. See generally Horne, *Modeling Army Enlistment Supply for the All-Volunteer Force*, MONTHLY LABOR REV., August 1985, at 35. As Congress considers solutions—increasing incentives to enlist; decreasing entry standards; or curtailing force levels—it should consider the effect of involuntary attrition on requirements for new enlistees. Since 1973, approximately one third of all male recruits have failed to complete their first terms of enlistment. See Faris, *Economic and Noneconomic Factors of Personnel Recruitment and Retention in the AVF*, 10 ARMED FORCES & SOC. 251, 257 (1984). We do not know how many of the enlistments were terminated because of the individual's religious practices. We do know that, at one army post, more than fifty enlistees were separated because of their practices. See Letter from Pastor Leonard Westberg to Senator Aspin and the Honorable Casper Weinberger (Sept. 28, 1984), reprinted in Brief for Respondents at app. 2a-3a, *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986). In 1981, it would have cost between \$13,000 and \$16,000 to enlist each of their replacements. See Baldwin & Daula, *The Cost of High-Quality Recruits*, 11 ARMED FORCES & SOC. 96, 108 (1984). Costs increase dramatically when an enlistee is separated after his first enlistment since six new enlistees have to be brought into the army in order to obtain one careerist with ten years of service. See *D.O.D. Defense Appropriations for F.Y. 1985: Hearings Before the Subcomm. on Defense Appropriations, House Committee on Appropriations*, 99th Cong., 1st Sess. pt. 7, at 425-26 (1985) (testimony of L.H. Korb, Deputy Assistant Secretary of Defense for Manpower & Reserve Affairs). Congressional committees might well ask the Department of Defense for an estimate of the costs of conformity. While concerning itself with the intangible costs to cohesion if dissenting believers were retained, the OFFICE OF THE SECRETARY OF DEFENSE, JOINT SERVICE STUDY ON RELIGIOUS MATTERS vi, viii (1985) does not discuss the tangible manpower costs associated with their replacement.

189. The term is drawn from Halliday, *Knowledge Mandates: Collective Influence by Sci-*

uninformed. Other professions may make similar claims regarding their expertise, but only the military can claim that a challenge to their internal authority can threaten their efficiency and thus the continued existence of the state. For example, in the Goldman trial, an Air Force general submitted an affidavit claiming that exceptions to the uniform regulations would have an adverse effect on civilian perceptions of the military.¹⁹⁰ The general's statement was not based on any specialized epistemological base, but was simply an opinion which the trial judge could accept or reject. When, however, in *Bitterman v. Secretary of Defense*,¹⁹¹ a general testified that an exception to the uniform regulation would have an adverse effect on unit morale,¹⁹² the general claimed a particular expertise which the trial judge could not match. Not surprisingly, the court accepted the general's judgment.¹⁹³ If military judgments regarding religious accommodation are justified by relying on unit cohesion and obedience, most federal judges will refuse to substitute their judgment for that of the military. But this does not necessarily mean that the uniformed believer can never claim civilian judicial review of the military's decision.

While religious nonconformity may expose the believer to court-martial or non-judicial punishment, it must be remembered that religious scruples are no defense to a charge of disobedience of orders. However, the legality of the order may be challenged, and the civilian Court of Military Appeals has set a standard of reasonableness in evaluating military orders.¹⁹⁴ Skeptics may doubt that a uniformed trial court will conclude that an order is unreasonable, but there is no doubt that the Court of Military Appeals has done so even when the

entific, Normative and Syncretic Professions, XXXVI BRIT. J. SOC. 421 (1985). It is used here in the sense that the specialized cognitive base of professional military knowledge relating to "the handling of men" legitimates commanders' professional judgments.

190. See *Goldman v. Secretary of Defense*, 530 F. Supp. 12, 14 (D.D.C. 1981). Justice Blackmun's comments in *Goldman* differ with the general. Blackmun states that the Air Force has not shown that they will suffer an image problem if they allowing exemptions. See *Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 1321, 89 L. Ed. 2d 478, 496 (1986) (Blackmun, J., dissenting).

191. 553 F. Supp. 719 (D.D.C. 1982).

192. See *id.* at 724.

193. *But see Goldman v. Weinberger*, ___ U.S. ___, 106 S. Ct. 1310, 1319, 89 L. Ed. 2d 478, 491 (1986) (Brennan, J., dissenting). Justice Brennan observed in *Goldman* that it was wholly implausible that morale would be affected if yarmulkes were permitted.

194. "If an order imposes a limitation on a personal right, it must appear it is reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command." *United States v. Martin*, 1 USCMA 674, 676, 5 C.M.R. 100, 102 (1952).

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government claims were based on considerations of unit morale and discipline.¹⁹⁵ Similarly, the Military Court of Appeals has involved itself in the discharge process, by deciding that an individual should have been released administratively rather than court-martialed.¹⁹⁶ Moreover, the court has even concluded that a commanding officer may, by his behavior, lose the right to be obeyed even though he has not been relieved of his command.¹⁹⁷ Although this court has not ruled on any free exercise cases, it has expressed its willingness to do so.¹⁹⁸ One may well question the degree of accommodation the Court of Military Appeals might require in first amendment cases, but it is clear that its judges accord far less deference to military decisions than their counterparts in the federal court system.

It could, of course, be argued that in light of the fact that so few free exercise cases proceed to trial and so few trials are reviewed by the Court of Military Appeals,¹⁹⁹ that any "liberality" by the court would not affect disciplinary practices at the unit level. However, an examination of complaints for redress of wrongs submitted under article 138 of the Uniform Code of Military Justice²⁰⁰ shows that military lawyers routinely reviewed these complaints and applied relevant legal criteria in evaluating the commander's effort to accommodate the particular religious practice.²⁰¹ Thus, the military's legal system²⁰² has shown itself more capable than the civilian system in adju-

195. See, e.g., *United States v. Wysong*, 26 C.M.R. 29 (C.M.A. 1958) (rejecting government's rationale that order telling suspect non-commissioned officer not to talk to members of unit regarding investigation was intended to maintain unit's cohesive combat capability).

196. See *United States v. Noyd*, 40 C.M.R. 195 (C.M.A. 1968) (disobedience of orders conviction reversed because accused had been wrongfully denied an administrative discharge as a conscientious objector); cf. *Cole v. Spear*, 747 F.2d 217 (4th Cir. 1984) (applying reasonableness test to military regulations giving precedence to disciplinary action under Uniform Code of Military Justice before processing conscientious objector's application for administrative discharge).

197. See *United States v. Revels*, 41 C.M.R. 475 (A.C.M.R. 1969), *petition for review denied*, 41 C.M.R. 403 (C.M.A. 1970).

198. See *United States v. Johanns*, 20 M.J. 155 (AFCMR 1983), *cert. denied*, ___ U.S. ___, 106 S. Ct. 147, 88 L. Ed. 2d 122 (1985).

199. See Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 76, 189 (1972).

200. 10 U.S.C. § 938 (1982).

201. See Army: DAJA-AL 1983/2556 (holding unreasonable commander's refusal of service member's request for time off to observe religious holidays); JUDGE ADVOCATE GENERAL 1971/4987 (request to reverse commander's refusal to authorize preparation of Muslim food denied as unreasonable).

202. Legal system refers to the proposition that within the general system of social rules

dicating service members' free exercise claims. However, because the military system is, at present, immune from disinterested external scrutiny, its decision may therefore be suspect. The Chief Judge of the Court of Military Appeals has suggested²⁰³ that the court's jurisdiction be expanded to authorize judicial review of adverse personnel actions affecting individual members of the armed forces. If the court's jurisdiction were expanded, the reasonableness of any commanding officer's decision to administratively separate a soldier whose religious beliefs conflicted with established norms would be evaluated by civilians outside the system.²⁰⁴

In this fashion, the antimony alluded to earlier requiring civilian judicial review of matters over which the judiciary disclaims any competence can be resolved by restating the premise that judicial review must take place within the civilian court system. However, as long as men and women believe that their transcendent obligations may conflict with the contingencies of life,²⁰⁵ intractable cases will remain. As a society committed to both the ideal of religious freedom and the demands of a disciplined armed force, we can only admire those heroic men and women who seek to reconcile the demands of two such disparate masters. Chief Justice Stone wrote of those who refused to serve in the armed forces:

[B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which

there is a class of obligations differentiated by the fact that they make certain conduct obligatory, and that this obligation is enforceable by official power. See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

203. See Everett, *Some Observations on Appellate Review of Court-Martial Convictions*, 31 *FED. B.N. & J.* 420, 422 (1984).

204. The military's amenability to internal change, and its fear of external interference, was the Court of Military Appeals' rationale for the *Johanns* decision. See *United States v. Johanns*, 20 M.J. 155 (AFCMR 1983), *cert. denied*, ___ U.S. ___, 106 S. Ct. 147, 88 L. Ed. 2d 122 (1985). "Whether the Air Force abandons the custom [prohibiting fraternization between officers and the enlisted force], tries to retain what now exists, or reclaim some of what has been lost, let us do it consciously and with careful consideration. If we continue to drift we will find that some cause celebre will arise between a firm commander and a determined officer. The decision will then be made for us by someone with no experience in or regard for the institutional values and character of the Air Force. Through ignorance or malice, such a decision maker could do serious injury." Flatten, *Fraternization*, 10 *THE AFJAG REPORTER* 109, 116 (1981).

205. See, e.g., *Jeremiah* 38:1-6, 8-10 (prophet imprisoned for demoralizing soldiers); *Luke* 12:51-53 (Christian message that religious belief may be inconsistent with secular values of cohesion and family affection).

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makes it worthy of preservation at the hands of the state. So deep is its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of conscience of the individual will not in fact ultimately lose it by the process.²⁰⁶

Certainly those who, by joining the armed forces, actively seek to preserve and defend the state need no less consideration. The present system of civilian judicial review has proven to be incapable of adjudicating their claims because of its lack of special expertise in matters relating to "the handling of men." It is therefore proposed that such claims be referred to the civilian judges of the Court of Military Appeals who have shown their willingness and expertise in balancing the demands of military efficiency and conscience.

206. Stone, *The Conscientious Objector*, 21 COL. U.Q. 253, 269 (1919).

APPENDIX: CORRECTION AND DISCHARGE
REVIEW BOARD CASES

INTRODUCTION

Correction and Discharge Board decisions are indexed separately by service and assigned a classification which designates the type of board which considered the request, the year in which the request was decided,²⁰⁷ and the decision's chronological place in that year's sequence of decisions. Thus, AC 80-01597 is the fifteen hundred and ninety-seventh case considered by the Army Correction Board in 1980. The designation "AD" would indicate a case decided by the Army Discharge Review Board. The decisions have been microformed, and the microfiches numbered sequentially. The fiche number and the number of the frame on which the decision begins are listed. For example, the Board's action in case AC 80-1597 begins on fiche 4137, frame F8. Whenever the author has quoted directly from a report, the frame number in which the quotation is found has been cited.

In summarizing the decisions, the following facts concerning the applicants were considered to be relevant: age at enlistment, level of education and mental category,²⁰⁸ years of service, frequency and type of minor punishment imposed as well as offenses charged, and the nature of and basis for discharge. The Board's decision was included to satisfy the reader's curiosity, but the Board's rationale was not summarized unless it was pertinent to the applicant's religious beliefs.

The decisions are referred to by year of discharge, branch of service, and sequence within the year. For example, "1951 Navy 2" indicates the year the serviceman was originally discharged, the branch of

207. "79", for example, denotes cases decided in 1979. A few cases are designated as 7X. These are Army Correction Board cases initially denied between 1971 and 1976 and reconsidered in 1977-78 as part of the settlement in *Heiler v. Williams*, 4 MIL. L. REP. (Pub. L. Educ. Inst.) 3009 (D.D.C. Dec. 16, 1976).

208. See Rimland & Larson, *The Manpower Quality Decline: An Ecological Perspective*, 8 ARMED FORCES & SOC. 21, 67, n.8. "The mental quality of military accessions is measured by scores received on the Armed Services Vocational Aptitude Battery Tests (ASVAB). A portion of the ASVAB scores is then converted to a standardized test score called the Armed Forces Qualification Test (AFQT). Based on AFQT percentile scores, enlistees [and previously, draftees] are classified into one of five mental categories, with Category I being the highest. The average score is 50, which divides Mental Category III. The top 8 %, from 93 to 100, are in Mental Category I; the next 27 %, from 65 to 93, in Mental Category II; the next 33 %, from 31 to 64, in Category III; and the next 20 %, from 10 to 30, in Category IV. Those scoring in Category V are disqualified from [the] military." *Id.*

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service from which he received his discharge, and the fact that his was the second case in that service involving possible religious discrimination which could be found among board records. The cases are summarized below.

1945 ARMY 1 (AC 80-01597) [4137, F1]

A black ex-private sought to have his dishonorable discharge upgraded. He received the discharge as a part of his sentence following a conviction for desertion in war-time. He had been convicted twice before for brief absences without leave. Drafted at age twenty-eight, in mental category IV, he never achieved a grade higher than private. He claimed that he went absent without leave (AWOL) because he had become a Jehovah's Witness and, therefore, was opposed to combat, but felt that he would not be reassigned to a clerical or non-combat position. His claim was not corroborated and the Board concluded that even if his religious beliefs precluded service in a combat unit, appropriate administrative avenues existed by which he could have obtained non-combat status.

1946 ARMY 2 (AD 80-02207) [3094, E9]

A Roman Catholic ex-enlisted man sought to have his "Blue Discharge" upgraded. This discharge category was the functional equivalent of an undesirable discharge and was awarded between 1913 and 1948.²⁰⁹ He was AWOL for approximately two months, and subsequently was convicted by a summary court-martial. He claimed that he went AWOL because his fellow soldiers ridiculed him when he knelt in the evening beside his bed to pray for his deceased father. He attributed a second AWOL period to continuing ridicule by his fellow soldiers. Three of the five members of the Board, in rejecting his request, concluded that his claim was unsubstantiated. However, the relatively minor punishment which he received for each absence suggests that the Army authorities had accepted his contentions and mitigated his punishment accordingly.

209. See Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227, 247 n.73 (1974).

1946 ARMY 3 (AD 80-03102) [3896, A9]

A black twenty-eight-year-old member of the Church of Jesus Christ of the Apostolic Faith was inducted in 1944, although he had been previously classified 4F (ineligible) and was diagnosed by an Army psychiatrist as having an "attitude problem" as well as being a "severe, borderline mental deficiency-religious fanatic." [A11]. He was processed for discharge on the grounds that he exhibited habits and traits of character which rendered him undesirable for Army service. His commander stated that he "[exhibited] many symptoms of religious fanaticism." [B2]. His first sergeant testified that "we did everything possible to make Private — into a good soldier, even to the extent of moving him from barracks to barracks, so that he could be with his religious brothers." [B3]. Another non-commissioned officer stated that "[t]he frustration, hysteria, or phobia that Private — is immersed [in]. . . is not compatible with Army routine. I am of the opinion that his fetishism is beyond [the] point of reasoning." [D2]. He was court-martialed for failure to obey a lawful order, and then convicted by a special court-martial for failure to obey and being AWOL. He claimed that he was a minister of his church, and that he should have been discharged as a conscientious objector. A majority of the Board recommended recharacterization of his "Blue Discharge" to "Under Honorable Conditions" because they felt that his superior should have made a greater effort to transfer him to a non-combat unit, and that his marginal mental qualifications contributed to his behavior.

1951 ARMY 4 (AD 80-03993) [3967, F13]

A nineteen-year-old black Muslim classified as being in mental category IV, went AWOL for twenty-seven days after having been in the Army for two months. He was convicted of that offense by a special court-martial. He claimed that he went AWOL because he had never intended to enlist in the first place, but, rather, meant to work as a civilian. His Muslim teachers persuaded him to return to military control, after which he was placed in pretrial confinement, where he could not eat the food. He was subsequently returned to his unit where he lived on peanuts and water for two to three months. There was evidence that military authorities attempted to help him with his diet problems, but, after six months of service, a board of officers found that the applicant evidenced traits of character which rendered his retention in the Army undesirable. An undesirable discharge was

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issued after he had been AWOL a second time. The Discharge Review Board unanimously voted to grant him partial relief in the form of a general discharge on the grounds that he had a reduced capacity to serve due to his religious beliefs.

1952 ARMY 5 (AD 80-04828) [3380, B12]

A twenty-year-old, placed in mental category IV, was inducted into the Army and went AWOL shortly thereafter. He was convicted of that offense by a special court-martial, but the sentence of two months confinement was suspended. A month later, he went AWOL for six weeks, returned for two weeks, and then went AWOL again for two months. He was court-martialed and received six months confinement. An Army psychiatrist recommended an administrative discharge because of his anti-social personality. He subsequently received an undesirable discharge which he sought to have recharacterized on two grounds: 1) military duty and the possibility that he would have to kill a human being were contrary to his religious beliefs; and 2) he had a medical problem, present at the time of induction into the service, which made him physically unable to serve in the military. The Board rejected both contentions as being unsubstantiated.

1952 NAVY 1 (ND 81-05667) [2971, A1]

A nineteen-year-old Jewish sailor with a tenth-grade education was given an undesirable discharge for numerous petty offenses including being AWOL for eleven days. He sought to have his discharge upgraded on the ground that he was discriminated against because of his religious beliefs. The Board rejected the contention as being unsubstantiated.

1956 ARMY 6 (AD 81-0988) [7755, C1]

An eighteen-year-old Seventh Day Adventist with a tenth-grade education enlisted in 1954. After basic training and approximately a year in Germany, he returned to the United States where he received two non-judicial punishments under the provisions of article 15 of the UCMJ, and a conviction by a special court-martial for being AWOL. He received an undesirable discharge for unfitness, which he subsequently sought to have upgraded on the grounds that his offenses were due to conflicts with his platoon sergeant. He alleged that the

sergeant did not want him to go to church on Saturday, harassed him, and placed him on KP and guard duty. His contentions were rejected on the grounds that they were unsubstantiated and that he had failed to bring the alleged harassment to the attention of the board which originally considered his discharge.

1958 ARMY 7 (AD 81-09525) [6430, F14]

The applicant, who had a ninth-grade education, was inducted into the Army. He subsequently claimed conscientious objector status and asserted that he could not handle weapons. While his claim was being processed, he was transferred to a medical unit. He received an undesirable discharge for frequent misconduct of a discreditable character evidenced by three instances of non-judicial punishment imposed for a three day AWOL and missed "bed checks" and two summary court-martial convictions resulting from a day long AWOL and breaching a restriction on his movements. The Discharge Review Board, although finding no evidence of religious or racial discrimination, granted partial relief in the form of a general discharge on the ground that the characterization of his service was too harsh.

1959 NAVY 2 (ND 80-02696) [694, B1]

After enlisting at the age of seventeen, a Jewish seaman, claiming one year of college, received an undesirable discharge for repeated petty offenses three years and eight months later. Most of the offenses were not religiously motivated: five episodes of disobedience; one instance of using profanity; two instances of possessing other seamen's clothing; two unauthorized absences; and theft for which he was convicted by a special court-martial. Another special court-martial conviction for disobedience had been disapproved on review. In addition, he missed the sailing of his vessel after he was denied leave to attend services celebrating the Jewish high holy days. He was convicted of being AWOL and "missing movement of his ship," and his military obligation was extended to accommodate the days lost during confinement and while AWOL. He subsequently received two additional convictions by summary courts-martial for sleeping on duty and a two-day unauthorized absence. The Board concluded that it was within his commander's prerogative to deny him leave and that there was no evidence he had sought counsel or advice from his chaplain.

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1964 ARMY 8 (AD 79-05964/005964B) [764, E9]

In a personal appearance before the Board, the applicant, classified as being in mental category III, with one semester of college, stated that he enlisted at age nineteen to avoid the draft. After training, he was sent to Germany where he alleged he was subjected to verbal, physical and emotional abuse by various supervisors because he was Jewish. He claimed that evidence of frequent misconduct of a discreditable nature were the products of anti-semitism. The misconduct charged included failure to report, wearing an improper uniform, absences from bed checks and his unit, dereliction of duty, and being AWOL. In addition, he had two summary court-martial convictions for disrespect and dereliction of duty and two special court-martial convictions for disobedience. The Board examined the record and concluded that the charge of religious discrimination was being used to divert attention from his inadequacies as a soldier. The Board also noted that the complaint had been investigated by a chaplain and found to be groundless. Relief was denied.

1967 ARMY 9 (AD 81-00321) [3610, A11]

A twenty-four-year-old college graduate in mental category II was drafted and given an undesirable discharge three months later after having received two article 15 punishments for failure to report and disobedience. He sought recharacterization of his discharge, claiming that his "educational, and by implication, [his] religious and regional background was seen discriminatorily." [B1] He further asserted that his performance in the service was a result of this discrimination and, thus, his discharge should be upgraded to honorable. The Board rejected his request and the particular contentions made, noting that the applicant was referred to the Jewish chaplain for counselling, indicating that the applicant had not been dealt with in a discriminatory manner.

1967 ARMY 10 (AC 82-10743) [8903, A14]

A nineteen-year-old inductee, placed in mental category II, was classified in the Selective Service System as a conscientious objector. He was sent for modified basic training as a non-combatant medical corpsman. He refused to train, and his claim that he should be discharged on hardship grounds was rejected. He was court-martialed after being AWOL, and was confined for two and one-half months. A

month later his request that he be reassigned to non-medical training because he was a member of the Pentecostal Church of God in Christ, and, thus, believed only in divine healing and did not believe in giving or receiving medication, was granted. He subsequently failed an administrative training course, went AWOL for two days, and was transferred to cooking school from which he went AWOL again. He received an undesirable discharge for unfitness. His request that the discharge be upgraded because he was assigned duties incompatible with his conscientious objector status was rejected.

1967 MARINE CORPS 1 (MD 78-03695) [755, E13]

An eighteen-year-old, with ten and one-half years of civilian education, enlisted and completed basic training with marginal ratings. Sometime after his enlistment, he became converted to the Nation of Islam. He went AWOL for two months and was court-martialed. The special court sentenced him to confinement for four months, but post-trial clemency curtailed his confinement to one month. Subsequently, he was assigned as a driver and permitted to drill without a rifle, apparently because of religious convictions. He then was convicted by a special court-martial of willful disobedience of an order, and sentenced to six months confinement and a bad conduct discharge. His confinement was subsequently curtailed to four months and the discharge suspended on the condition that he perform satisfactorily. A week after the trial he sought discharge as a conscientious objector. The request was rejected and he went AWOL again, this time for approximately nine months. He was convicted of that offense by another special court-martial, and sentenced to a bad conduct discharge and confinement for six months. He sought to have his discharge upgraded on the grounds that his first amendment rights had been violated because his religious convictions were the basis of his court-martial for disobedience and his superiors were prejudiced against his religion. Both contentions were rejected as unsubstantiated.

1968 ARMY 11 (AD 7X-001773) [2158, C6]

A twenty-year-old Seventh Day Adventist high school graduate in mental category IV went AWOL after completing advanced infantry training and received article 15 punishment. He later was convicted of disobedience by a special court-martial and confined. The day he was released from confinement, he went AWOL. He was court-mar-

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tialed for that absence and was given an undesirable discharge while serving his sentence. He sought to have the discharge upgraded on the grounds that he had requested transfer from his unit but was only offered combat, which was against his religion. The Board rejected his argument on the grounds that "the applicant's training and assignment was in accordance with regulations concerning his religious status." [C10].

1971 NAVY 3 (NC 81-7192) [2447, A7]

A nineteen-year-old high school graduate, classified as mental category I, enlisted in the Navy. He was a member of the World Wide Church of God. He received a bad conduct discharge after a general court-martial found him guilty of being AWOL for fifteen months. The applicant had previously been convicted twice by special courts-martial for unauthorized absences totalling eighty-one days. He sought upgrading of the discharge on the grounds that his absences were due to his superiors' refusal to recognize his claim of conscientious objection and that his church had directed him to go AWOL. The Board rejected his request, noting that there was nothing in his record concerning his religious beliefs until after he had returned from his third absence, and that a letter which he submitted from the World Wide Church of God had advised him not to go AWOL, but rather to seek separation under Navy regulations.

1971 ARMY 12 (AD 81-07020) [6877, C3]

In this case, the applicant was classified as being in mental category IV, but was described as "highly intelligent" by the colonel who interviewed him before his undesirable discharge. The discharge was given in lieu of trial by court-martial for seven absences without leave which the applicant attributed to family and financial problems. He blamed his prior disciplinary record in Vietnam, consisting of two article 15 punishments for disobedience and a special court-martial conviction for pointing his rifle at a fellow soldier, to racism and religious prejudice. Although the Board rejected the contentions of racial and religious prejudice, they granted him a general discharge in view of his service in Vietnam, where he had been wounded and received a Purple Heart medal.

1972 ARMY 13 (AD 82-07148) [7964, C6]

The twenty-one-year-old applicant in this proceeding had sixteen years of education, was placed in mental category IV, and was a member of the Apostolic Faith of Jesus Christ. He went AWOL immediately following his induction into the Army. After his return to military control and pending his court-martial, he sought discharge as a conscientious objector. His commander and chaplain supported his application as being sincere, but it was rejected because, contrary to what he had told them, he had never sought conscientious objector status from his draft board, a prerequisite for release from active duty. Before he was told of the decision on his discharge application, he went AWOL again and was apprehended thirteen months later. He applied for, and was granted, an undesirable discharge in lieu of trial. He subsequently applied for upgrading of his discharge on the grounds that “[a]t the time of my draft I had recently given my life to Jesus Christ . . . [M]y pastor at the time . . . convinced me that AWOL was the only way out” [C8]. The Board rejected his request, concluding that he had been treated properly by the military system.

1972 ARMY 14 (AC 84-01462) [9392, B14]

A twenty-year-old with eleven years of education and classified as mental category III was sent to Korea. He subsequently was convicted by a summary court-martial of a number of offenses, including impeding the military police, disrespect and disobedience, and being AWOL for four days. The following month he was punished under article 15 of the UCMJ for being AWOL again. When his commander initiated action to administratively discharge him for frequent incidents of misconduct and a negative and resentful attitude, he waived his right to a hearing and was given a general discharge. He sought to have his discharge upgraded to honorable on a number of grounds, including the fact that he had to travel twenty to thirty miles to see a chaplain and attend church services. His request was rejected, and the Board concluded that the lack of religious support did not excuse his acts of misconduct.

1973 ARMY 15 (AD 80-06770) [3756, G1]

A twenty-year-old Black Muslim high school graduate, placed in mental category III, was inducted into the Army after his application to the Selective Service System for conscientious objector status had

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been denied. He stated that he was unaware of his right to appeal that decision. After induction, he again applied for conscientious objector status. His commander and chaplain were convinced that he was sincere and had held his beliefs prior to induction. After extensive investigation, his request was denied in accordance with Army regulations, which directed disapproval when a request was based solely on information presented to and rejected by the Selective Service. He immediately went AWOL for thirty-two days. When he returned, he waived trial by court-martial and was given an undesirable discharge. Although two of the five Board members thought the discharge should be upgraded, the majority concluded that the discharge was proper and equitable.

1973 NAVY 4 (ND 79-01500) [628, E13]

No personal data was included in this file. The applicant had received a general discharge for apathy and a defective attitude. He requested that his discharge be upgraded, claiming that he should not have been allowed to enlist in light of his low test scores. He also asserted that he had been subjected to discrimination because he was black and had converted to Judaism. This request was rejected.

1974 ARMY 16 (AD 81-06201) [3000, B12]

In this case, the applicant was an eighteen-year-old, classified as being in mental category III, who served uneventfully for two years. He then received an undesirable discharge in lieu of trial by court-martial for two unauthorized absences from duty. He previously had received non-judicial punishment for stealing from a vending machine. He offered a number of reasons in support of his request that the discharge be upgraded, of which two were related to his religious beliefs. He claimed that as a Seventh Day Adventist he had not been allowed to observe his Sabbath and that he had been discouraged from applying for conscientious objector status. The Board concluded that none of his contentions were supported by evidence in the record and rejected his request.

1975 MARINE CORPS 2 (MD 78-01227) [663, E8]

The applicant in this proceeding was eighteen years old and had eleven years of civilian education. He received an undesirable discharge for unfitness based on frequent misconduct of a discreditable

nature. After receiving non-judicial punishment for disobedience of orders to clean up a bathroom, disrespect, and possession of marijuana, he sought conscientious objector status. Shortly after his request was returned for additional information, he received non-judicial punishment for an unauthorized absence. A week later, he went AWOL and was convicted of that offense by a special court-martial. Three days after his conviction, he was given non-judicial punishment for yet another unauthorized absence. The same day, his commander initiated action to discharge him. He testified at the hearing in which he sought to have his discharge upgraded that he was a member of the Seventh Day Adventist faith. He claimed he enlisted believing that he would fit in. While he performed satisfactorily initially, he began to experience problems after being assigned to perform duties which required the wearing of a weapon. He asserted that, while he was able to discuss his religion in depth with his commanding officer, they didn't get along. He also alleged that he had been harassed and pressured by his commanding officer with references to the Bible. The Board rejected his testimony on the grounds that it lacked specificity and failed to establish either harassment or unfair stigmatization.

1976 ARMY 17 (AD 77-01977) [2514, A9]

Converting to Islam at nineteen, this applicant with eight years of education and classified as being in mental category II was inducted into the Army. After completing training with excellent ratings, he went AWOL. He claimed in his request for discharge upgrading that his absence was due to harassment he received from his peers in the barracks because he did not wish to fire his weapon during training. He further claimed that his request for exemption from service as a conscientious objector had been rejected. He was not punished and served for two months before going AWOL again. He was convicted of the offense by a special court-martial. After yet another unauthorized absence, he requested a discharge in lieu of trial by court-martial. When he subsequently sought to have his undesirable discharge upgraded, the Board rejected the contention that his religious background affected his ability to serve, noting that no evidence was produced which demonstrated that the applicant held religious convictions incompatible with military service.

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1976 MARINE CORPS 3 (MD 19-01640) [901, A140]

A nineteen-year-old Black enlistee with twelve years of civilian education listed his religious preference at induction as Baptist, although he later claimed he was a follower of Islam. After completing training, he soon went AWOL. He received article 15 punishment for the absence and was transferred to another post. He then received three article 15 punishments for damaging government property and for failing to check in as required. After counselling by a chaplain, who described the applicant as a black militant, he was apparently charged with other offenses unspecified in the Board report. Following two further unauthorized absences from duty, he was discharged in lieu of trial. His request for upgrading of his undesirable discharge on the grounds that his behavior was motivated by his religious beliefs was denied.

1976 ARMY 18 (AD 79-00324) [4707, E14]

The applicant in this case, who felt his religious beliefs made him a longer, was seventeen years old with eleven years of education and a mental category IV classification. He was given an undesirable discharge for unfitness after receiving four non-judicial punishments for failure to report for duty, failure to obey a lawful order, and absence from duty. His religious affiliation was not given in the file. His request for an honorable discharge was rejected because there was no evidence to support his contention that his ability to serve was impaired by discriminatory attitudes toward his religious views.

1977 NAVY 5 (ND 78-02074) [493, C11]

The applicant in this case enlisted at age eighteen and had twelve years of education. After completing training, he was assigned to a destroyer escort. He sought to be discharged because he was not able to fulfill the responsibilities of his Jewish faith aboard ship. His request was disapproved "in the interests of fairness and equitable treatment for all." [D12]. During 1976, he received a substandard performance report and non-judicial punishments for failure to obey a lawful order, using provoking words and gestures combined with a racial slur, and being drunk in a public place. Subsequently, he was given a non-judicial punishment for being AWOL. He was given a general discharge, however, for medical reasons. When he sought to have the discharge upgraded to honorable, the Board rejected his re-

quest, stating that “[t]he religious belief and physical disability of the applicant does not excuse his misbehavior or poor performance.” [C14].

1977 MARINE CORPS 4 (MD 78-00993) [649, C12]

This applicant, a twenty-year-old with twelve years of civilian education, received non-judicial punishment for undescribed offenses fifteen days following his enlistment. He was convicted by a special court-martial after going AWOL, but his sentence was not reported. He subsequently received an undesirable discharge in lieu of trial after going AWOL again. When he sought to have his discharge recharacterized, one of the contentions he advanced was that the discharge was inequitable because “his capability to serve was affected by deep religious convictions, which prevented him from serving in a combat unit, even though he did not qualify for classification or discharge as a conscientious objector.” [C12]. His religion was not given, nor were his religious convictions described. The Board rejected his request because he had never applied to be classified as a conscientious objector.

1978 ARMY 19 (AD 80-08149) [3145, E4]

This applicant with ten years of education had first enlisted at age seventeen. He served two years and received an honorable discharge. He reenlisted two years later, waiving a veteran's disability pension to do so. He was honorably discharged after one year so that he could reenlist for six years. He went AWOL after his second reenlistment and remained in that status for over two years. He received an undesirable discharge in lieu of court-martial. He offered a number of reasons for his absence, including heavy drug use and lack of respect in his unit. He further asserted that his being a servant of Christ Jesus and studying to be a minister of the gospel was not compatible with Army life. The Board rejected his request that his discharge under other than honorable conditions be upgraded because there was no evidence he had ever sought to discuss his personal problems with his superiors.

1979 NAVY 6 (ND 83-02553) [3443, D13]

This eighteen-year-old immigrant alien enlistee with twelve years of education was assigned to a ship after completing training. After be-

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ing cautioned regarding his performance, he went AWOL, remaining absent for sixteen days. He was given non-judicial punishment upon his return to military control. Soon thereafter, he went AWOL again and missed a sailing. When he returned, he was convicted of the absence by a summary court-martial. While he later achieved a promotion, he went AWOL yet again and was charged with desertion following his apprehension by civilian authorities. He pleaded guilty before a special court-martial and was awarded a bad conduct discharge, which he subsequently sought to have upgraded. The applicant testified that he experienced problems with his shipmates because he was a Seventh Day Adventist; he perceived that his religious practiced rendered him weird in the view of his peers. He further testified that he was forced to work on his Sabbath and was told his only recourse was to apply for conscientious objector status. No relief was granted.

1979 ARMY 21 (AD 80-13087) [3181, E14]

This proceeding concerned a seventeen-year-old enlistee with eleven years of education who was placed in mental category III. He received an undesirable discharge for frequent misconduct evidenced by four article 15 punishments given for twice disobeying lawful orders, eating without permission, failing to go to his appointed place of duty, wrongfully accepting collect telephone calls, and twice failing to go to his appointed place of duty. He also had received a summary court-martial conviction for two failures to appear at duty assignments and for disobeying a standing order by entering female sleeping quarters. As part of his sentence, he was sent to a rehabilitation program. When he sought to have his discharge upgraded, he explained that he was a member of the World Wide Church of God which recognizes Saturday as the Sabbath, but only began to take his religion seriously after basic and airborne training where military authorities considered his religion "a joke." [F3]. He was then transferred to Fort Dix, New Jersey where

he worked out a deal with his unit leadership at Ft. Dix [not to work on Saturday] however things did not work out He was transferred from Ft. Dix to Ft. Riley and was able to work out something with the unit leadership to facilitate not working on Saturday. However, it became a problem due to complaints from unit personnel.

[*Id.*]. The Board concluded that many of the episodes of misconduct were unrelated to his religious beliefs and denied relief.

1980 ARMY 22 (AD 81-09222) [6784, A1]

An eighteen-year-old enlisted man with eleven years of education went AWOL and was given a discharge under other than honorable conditions in lieu of court-martial. When he sought to have his discharge upgraded, he said that his drill instructor was prejudiced against his race and religion and, although he was transferred to another unit, he felt he "would simply meet further prejudice elsewhere" and, therefore, went AWOL. [A5]. The Board did not find his statement sufficiently compelling to warrant recharacterization of the discharge.

1980 ARMY 23 (AD 81-09822) [6355, E12]

This applicant originally enlisted at age eighteen with twelve years of education, and was honorably discharged two years later. He immediately reenlisted. While stationed in Germany, he converted to the Islamic faith and sought a monetary allowance to take his meals in the community, rather than the dining hall, because of the dietary requirements of his religion. The request was denied. Subsequently, he received non-judicial punishment for failure to go to his appointed place of duty. The Board report referred to statements in the applicant's file which showed he had been counselled for a disrespectful manner and attitude as well as disobedience. The file also contained evidence of misconduct resulting in article 15 punishment and court-martial action. The serviceman had requested a discharge in lieu of trial, which was granted under other than honorable conditions. The Board concluded that there was no evidence that his misconduct had been provoked by prejudice or his religion and denied relief.

1981 ARMY 24 (AD 82-00662) [7677, A1]

A twenty-three-year-old high school graduate in mental category III had an unblemished record following his enlistment until he received a general discharge in lieu of court-martial. The discharge was a result of the applicant's failure to adhere to service policy regarding hair and beard length. While his entry records listed him as a Baptist, the applicant professed to belong to the Rastafarian faith. There was evidence that his adherence to Rastafarian tenets was selective and that uncut hair was not absolutely required by that religion. The Board rejected the applicant's contention that he was discriminated

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against and should have gotten an honorable discharge, noting that the Army had followed established and proper procedures.

1982 ARMY 25 (AD 84-05789) [9790, E4]

This applicant was an enlistee and a nineteen-year-old high school graduate in mental category IV. The only woman among the applicants, she served in Korea for one year and then went AWOL for three months. She was discharged under other than honorable conditions in lieu of court-martial. She offered two reasons for her absence: her religion forbade her to wear trousers; and she was separated from her husband because they had been stationed at separate posts and the Army failed to help them get a joint domicile. The Board rejected her request, noting that there was no record of her having sought assistance because of her religious beliefs, and that her military record did not indicate that she was married and had sought a joint domicile with her husband.

1981 ARMY 26 (AD 82-02060) [7812, D1]

A twenty-year-old high school graduate placed in mental category III, this enlistee was promoted to private soon after completing training. He was offered non-judicial punishment shortly thereafter for three offenses, two for disobeying a non-commissioned officer and one for disobeying an officer. He refused non-judicial punishment, was tried by a summary court-martial, and convicted. The following month, a special court-martial convicted him of threatening a female private. He was transferred to another post, where he received two non-judicial punishments for participating in a breach of the peace and disobeying an officer. When he appeared before a board of officers considering him for administrative discharge, he explained that he was a Rastafarian when he enlisted, that his religion forbade him from cutting his hair or shaving, and that his offenses related to his religious beliefs. He was given a discharge under other than honorable conditions because of misconduct. The Board refused to upgrade the discharge, saying that he failed to follow Army regulations regarding accommodation for religious practices.

1981 ARMY 27 (AD 83-01580) [559, G2]

This high school graduate in mental category II had originally enlisted in the Army when he was twenty-two, and had been honorably

discharged three years later. He reenlisted when he was twenty-seven, and served a year before going AWOL for ten days, for which he received non-judicial punishment. He was subsequently notified that he was being considered for discharge due to unsuitability. He submitted a statement saying that, due to his religious beliefs, he could no longer participate in an organization that promoted violence or the use of weapons of destruction. He was given a general discharge. Although he claimed that the characterization of his discharge was inequitable because he had a diminished capability to serve based on his conscience and religious discrimination, the Board rejected both contentions.

1983 ARMY 28 (AD 83-03002) [9172, B11]

An eighteen-year-old with ten years of education, the applicant in this case was discharged four months after his enlistment for substandard entry-level performance and conduct. He sought to have his discharge, which was uncharacterized, changed to honorable on the grounds that he had been punished for his personal values and religious beliefs, which prevented him from fitting in. The Board rejected the contention that an uncharacterized discharge was punishment. Relying on a report of six counselling sessions prepared by the unit chaplain who had detected no deeply held religious beliefs that would conflict with military service, the Board agreed with his commander's assessment that he should be discharged for "lack of motivation, negative attitude and steadfast disregard for physical conditioning." [B13].