

**FRAMERS' INTENT AND MILITARY POWER:
HAS SUPREME COURT DEFERENCE TO THE
MILITARY GONE TOO FAR?**

Kalyani Robbins [FN1]

Copyright © 1999 University of Oregon; Kalyani Robbins

The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world.

Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smaller scale, it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one, which may be inauspicious to its liberties. [FN1]

The goal of this Article is to bring back this level of caution and concern which has been gradually eroded by the great *768 deference the Supreme Court has granted the military in balancing the rights of citizens with asserted military expediency. As the United States continues to grow as a nation and a world power, we must take care not to lose sight of the principles upon which this country was founded, and which have been the basis for its success. While we protect ourselves and our allies through the indispensable aid of our military, and this inevitably entails some individual sacrifice, we must nonetheless insist that the military keep its need to infringe upon our liberties to a minimum.

The first ten amendments to the United States Constitution, ratified in 1791 and known as the Bill of Rights, create the core of what people today consider their most basic freedoms. Without these rights, and consistent judicial adherence to them, most Americans would not feel secure. There are two major sources of danger to these basic rights: internal and external. Internally, we must protect ourselves from our own infringement of these rights through the firm restrictions that the Constitution places on the government in its treatment of the people. Externally, we must protect our system of maintaining these freedoms from foreign parties who may wish to take over and change our government. Both safeguards are extremely important, but either is worthless without the other. In other words, these goals are entirely dependant on one another. When we spend our resources on the national defense, we must ask ourselves just what it is that we are protecting. At the same time, we must also accept that occasionally it will be necessary to ask that individuals make personal sacrifices in order to protect the entire set of freedoms for the whole.

It is the role of the Supreme Court to balance these interests and determine the extent to which the military may limit certain liberties in order to protect the nation. More specifically, it is the Court's duty to limit the military's unconstitutional acts to those in which it simply must engage. Certainly no one would argue that the military should be completely unbound by the Constitution. The disputed issue merely goes to how it is to be kept in check, by whom, and to what extent. In Part I of this Article, I will discuss the Court's practice of deferring to the military's judgment regarding this balance, which prevents it from being properly struck.

The Framers clearly thought about this balance when authoring the Bill of Rights. Indeed, while the focus of these amendments *769 was on individual freedoms, the need for urgent exceptions for the military was addressed where necessary. The ultimate question this Article seeks to address is to what extent the Framers intended the Court to bend the rules for the military above and beyond the leeway already provided. I will investigate this in Part II through a combination of textual, historical, and structural analysis. This investigation and analysis will demonstrate that the Court has granted the military a degree of power well beyond that contemplated by the

Framers.

This analysis is important because original intent has not been taken into consideration sufficiently with regard to the level of autonomy the military is allowed. There have been many arguments based on policy, necessity, and even justiciability, but it seems that judges and scholars have forgotten about the Framers altogether. If we are to continue to live in a government that they structured, there must be some limitation on the extent to which we deviate from their carefully thought-out plan. Every word in the Constitution had a purpose, and in other areas of inquiry we treat that as an important factor to this day. This Article could include many long sections on modern issues and advisable policy, and it does marginally address these issues, but its focus is on the Framers, the way they structured our government, and their placement of the military within that scheme.

One of the sources of the Court's inability to conduct proper constitutional analysis in military cases is its lack of access to complete and unbiased information upon which to base that analysis. In Part III, I will make an effort to suggest methods for addressing this problem alternative to simply letting the military use its special knowledge as a source of power over the Court. Part IV will demonstrate a modern example of where the problem of excessive deference can lead, and present the Court with a suggestion to use this as a context for change. Finally, the Article will conclude by summarizing the need for change and urging the Court to reconsider its policy of deference.

I The Supreme Court's Tradition Of Excessive Deference to the Military

When dealing with those cases in which individuals assert that the military has violated their constitutional rights, the Supreme Court has regularly and almost exclusively held in favor of the *770 military. This is the case regardless of what right is involved, or of what military interest is at stake. The Court claims to look to the importance of the interests at stake, [FN2] but the actual analysis is no stricter than a typical non- military rational basis inquiry. [FN3] Why give such blind deference? If the military's interests are so important, why not let them be held to a brighter light so that they can prove their justification? To do so would lend greater credibility to, and provide stronger justification for, the military's true needs, while screening out those abridgements of individual rights that it does not need to make. This Part will examine some of the Supreme Court precedent concerning military deference and will discuss the need to reconsider this methodology.

Although *Korematsu v. United States* [FN4] has never been overruled, it has been met with heavy criticism. For many, it represents the Court's deference to the military at its blindest and most dangerous moment. While the more recent and subtle cases may be the ones that should raise greater concern, *Korematsu* is still the paradigmatic case of military deference. In that case, Fred Korematsu, a Japanese-American man, was convicted of violating an order requiring all people of Japanese ancestry to report to detention camps. In appealing that conviction, he challenged the constitutionality of the order. The Court upheld the conviction by a vote of 6 to 3, despite purporting to apply strict scrutiny. Justice Black's opinion began:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; *771 racial antagonism never can. [FN5]

Nevertheless, the Court did not follow its own prescription to carefully scrutinize the true purposes of the order, which could have been motivated by racial animus. Even assuming that the order was issued in good faith, the Court still did not make an effort to assess whether it was indeed necessary.

The Court offered as justification for upholding the order that "military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion." [FN6] This reasoning does not address the issue of the military's relationship to constitutional analysis, which is implicated by such a severe case: should the Court accept the military's assertions of necessity without further analysis, or should it use a more standard means/end analysis? And, assuming the former, as the Court seems to have done, how should the military then be kept in constitutional check if there is no entity genuinely analyzing the constitutionality of its actions?

It was in *Korematsu* that the Court set the stage for its perpetual deference to military authority:

[H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform,

feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. [FN7]

This rhetoric attempts to make the Court's conclusions psychologically palatable, but does nothing more than say that sometimes it is necessary to sacrifice the needs and rights of an individual in order to protect the state. This point, however, is the basic backdrop of all rights-based constitutional analysis, or the Court would never engage in it at all. If this were not the case, the Court would just automatically strike down every abridgement of individual rights without further inquiry. Implicit *772 even in those cases which do invalidate a law as unconstitutional is that had the law been justifiable as the only way to protect a strong government interest, it would have survived the inquiry. The Court has consistently used a reminder of this backdrop in lieu of real constitutional analysis in military cases, suggesting that the inquiry itself had been done at the military level. This allocation of power does not do justice to the Constitution, however, as the military is in no position to interpret the Constitution in this context, nor was it ever intended that it should do so. Indeed, the level of deference the Court has granted to the military for the interpretation of the extent of certain constitutional provisions may amount to a violation of the separation of powers. The Court has a duty to enter into some degree of constitutional analysis itself.

Justice Jackson, dissenting in *Korematsu*, described with great foresight the frightening implications of the decision in that case:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. [FN8]

Although the military has not attempted to use this case to again racially discriminate in criminal procedure or to transplant citizens, and the Court has not cited to it when justifying its deference to the military in modern contexts, Justice Jackson's fears have been realized through a pattern of analysis much like that of *Korematsu*.

Since *Korematsu*, the Court has continued to accept the military's assertions of expedience. As Justice Jackson points out, however, "even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court *773 holds, it does follow, then we may as well say that any military order will be constitutional and have done with it." [FN9] This is essentially what the Court must do in military cases where it does not have sufficient information before it to determine the necessity of the action at issue. This poses a very serious problem for conducting any sort of traditional constitutional analysis, and something must be done to rectify it. So far, the Court has neither made an effort to develop a method for accurately investigating necessity, nor has it been in the practice of finding a nexus between the asserted necessity and the means employed before upholding them.

One of the more recent examples of this is *Goldman v. Weinberger*. [FN10] In that case, the Court upheld the application of a military regulation involving uniformity of dress to a rabbi serviceman, forbidding him to wear a yarmulke when in uniform despite the fact that it was usually hidden by his service cap. [FN11] The government's interest could not fairly be found compelling, as evidenced by the fact that Dr. Goldman had worn the yarmulke for years before it was even noticed. Moreover, there was insufficient evidence that the interest was compelling in the aggregate, as the only evidence of the need for complete uniformity of appearance was the military's own assertion of that need. The regulation was overinclusive and not narrowly tailored, as it only allowed for completely invisible religious apparel, and even that only at the (standardless) discretion of the commanders. [FN12] Still, the Court upheld the regulation and its application to Dr. Goldman, relying exclusively on the "considered professional judgment of the Air Force." [FN13] In doing so, it all but stated that the First Amendment does not exist in the military: "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." [FN14] While it may be true that

some of the benefits society derives from the First Amendment are not applicable to military settings, such as encouraging *774 robust debate and promoting democracy, the Amendment contemplates certain individual rights as well, and the military is comprised of individuals.

A few years earlier, in another landmark case of military deference, *Chappell v. Wallace*, [FN15] several enlisted men brought a suit against their superior officers for race discrimination, and the Court held that the doctrines that would apply in a civilian context did not apply to this case because of the special circumstances surrounding military governance. [FN16] The Court called allegations "that because of [respondent servicemembers'] minority race petitioners failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity" [FN17] a "nonreviewable military decision [[]." [FN18] The Court held that such cases should be kept within the internal administrative grievance process, subject to judicial review only through the Court of Military Appeals. [FN19] The Court went so far as to state that "[t]he special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel." [FN20] This is at best a circular argument, in that it rests justification for the military's judicial power on the fact that it exists.

When the Court found that "the Constitution contemplated" a military judiciary, it did not rely on language anywhere in the legislative document setting up the military judiciary, for there is none. The Court found support for its notion that the Framers envisioned "plenary" legislative control over the rights of servicemembers, including the option of giving constitutional question jurisdiction to military judges, in Article I, Section 8, Clauses 12- 14, which grant Congress the authority "To raise and support Armies"; "To provide and maintain a Navy"; and "To make Rules for the Government and Regulation of the land and naval Forces." [FN21] This assertion is certainly fodder for legal realists, as there have been few occasions on which such a leap of imagination *775 as this was necessary to interpret a text. Would it then follow that the power "To establish Post Offices" [FN22] includes the power to redefine the application of constitutional rights to postal workers? There is nothing at all in the Constitution itself, nor the records of the convention, to suggest that at the will of Congress, the military need not be subject to constitutional requirements.

Over the years the Court's deference to the military has been the basis for numerous rejections of challenges to military action or other government action involving the military. Asserting this deference, the Supreme Court has: allowed Congress to delegate the authority to define the factors leading to the death penalty in military capital cases to the President; [FN23] allowed Congress to require only males to register for the draft; [FN24] diminished the constitutional rights of criminal defendants in cases before military tribunals; [FN25] allowed the Air Force to require its members to obtain approval before circulating petitions; [FN26] limited the free exercise of religion to allow Congress to determine whether and when to accommodate those who invoke that clause of the First Amendment; [FN27] and allowed the government to ban political speeches and the distribution of leaflets on military reservations, [FN28] to list but a handful of the cases. It is highly unlikely that any of these regulations would have survived scrutiny in a civilian context.

A common justification for the Court's deference to the military is the necessity which comes from the Court's lack of expertise. This is frequently mentioned in cases of deference, and is also the apparent basis for those cases, to be discussed in Part II, that call military decisions non-justiciable political questions. [FN29] This, however, avoids what amounts to a practical problem by applying a theoretical, rather than a practical, solution. Rather than consider the practical alternatives to the Court's dearth of *776 information regarding military culture and strategy, the Court has developed doctrine to obviate that need.

II Framers' Intent, As Evidenced by Text, History, and Structure

The goal of this Part is to find an answer to the central question of this article: how much deference, if any, did the Framers expect the Court to grant the military in cases involving constitutional rights? The Framers took great care in selecting the language they used in every clause throughout the Constitution and its first set of amendments. Indeed, they engaged in numerous and lengthy discussions, often over the inclusion of a single word or two. In addition to carefully wording the text to make proper interpretation more feasible, the Framers carefully considered the array of issues that might be impacted by the substance of that text. By looking at the text itself, the Framers' discussions while drafting it, and the events from that time of which they were doubtless cognizant, as well as some of their own comments and clues with regard to interpretive method, a better understanding of what the Framers intended may be gained. It also makes sense to take into account the structural integrity of the document as a whole. It is important to remember that the Constitution is a single document, and that all of its provisions must

work together.

This Part utilizes these methods of constitutional analysis in order to uncover the role that the military, and its interests, should play in our constitutional system according to the Framers' own design. First, this Article will provide a careful textual analysis, bringing together various clauses in the Constitution and its amendments, as well as discussions surrounding its drafting, to demonstrate that significantly more attention was given this issue than existing scholarship/case-law would suggest. Second, I will survey and analyze the Framers' attitudes toward, and concerns regarding, the military and its power vis-a-vis the civil government. Third, I will make a structural argument, based primarily on the doctrines of separation of powers and the non-justiciable political question, that supports my central thesis.

A. Analysis of the Text

The Framers did not explicitly draft a clause to guide the Court *777 in its application of constitutional principles to military situations. Perhaps they deemed this unnecessary because the military was to be controlled by the civilian government, and therefore the entire Constitution clearly applied to it. However, where they did wish to limit rights in order to accommodate military necessity, they did so explicitly, which suggests that we go too far by exempting the military from the enforcement of other rights not so limited. The Framers certainly did not, at any point in the Constitution or in other records, set up the military as its own legal society, separated from our constitutional structure. Neither did they overlook the military entirely, leaving its concerns to be addressed by future generations. Rather, the Framers spoke often and with great insight about the military's needs and excesses, and affirmatively addressed them at several points in the Constitution. This portion of the Article will analyze the Constitutional text that speaks to the question of deference to the military, utilizing the same time-honored interpretive maxims that the Framers used themselves.

1. The Doctrine of *Inclusio Unius est Exclusio Alterius* Applies

If we apply the doctrine of *inclusio unius est exclusio alterius* to the Constitution's treatment of the military, we find that while military exemptions from the strict adherence to certain requirements of the Bill of Rights were included, others were just as consciously excluded. If there were serious doubt that the doctrine should apply to such a unique document as the Constitution, and we were to treat the area of military adherence to the Bill of Rights as though it had not been addressed, perhaps it would make sense to establish common law doctrine on the matter. However, the Framers did contemplate that the *inclusio unius est exclusio alterius* doctrine would apply to the Bill of Rights, and authored it based on that understanding. For this reason, it behooves the Court to follow the letter and spirit of the resulting document and not to establish common law doctrine that conflicts with its purpose.

Those who were opposed to the idea of adding a bill of rights to the Constitution were concerned about the difficulty of thinking up every worthwhile liberty, and feared that any bill of rights would necessarily be incomplete, which would be dangerous to *778 those rights left unenumerated. In the 1789 House debates on this issue, Mr. Jackson said:

There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government. [FN30]

This concern was primarily expressed by opponents of the amendments, but even those who supported them did not refute the argument. Indeed, no effort was made to allay these fears, as they were based on the most basic of all interpretive traditions. Instead, great weight was granted to this concern by addressing it with its own amendment. The Ninth Amendment [FN31] was written to prevent the application of this maxim to individual rights, and it thereby lends powerful credibility to the notion that the maxim does apply to the rest of the document. [FN32] Madison drafted the amendment, and explicitly stated this purpose:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it,

as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]. [FN33]

Because the Bill of Rights is a finite set of exceptions to the powers the Constitution grants to the government, [FN34] the function of this interpretive tradition would be to prevent the people from asserting rights that the Framers had forgotten to include. This *779 same maxim, that could so easily have been applied to individual rights without the Ninth Amendment, certainly must apply to other categories of exceptions specifically included in the Constitution and its amendments. It makes particular sense that it would apply to those exceptions that were created on behalf of the feared government and against the rights otherwise fundamentally belonging to the people.

The Framers, while clearly demonstrating their awareness of this interpretive maxim, chose to write explicit exceptions for the military to certain enumerated rights, but not to others. Implicit in such an exception is that without it, the military would be required to protect that privilege, just like the civilian government, or the clause would be superfluous. Further, if the exceptions listed were just the more important ones, but the military was to be treated differently over-all, a more catch-all exception would have been written as well, much like what was done for exceptions to government power through the Ninth Amendment.

There are several clauses and amendments in the Constitution through which the Framers demonstrate an awareness of the issue of military necessity, and create leeway for it, thereby eliminating the need for special judicial deference beyond that prescribed. First, Article I, Section 9, Clause 2, reads, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." [FN35] This exception was described as applicable only "upon the most urgent and pressing occasions," without which the privilege "shall be enjoyed . . . in the most expeditious and ample manner." [FN36] This clause most closely mirrors the modern judicial application of the entire set of constitutional requirements to the military (though the clause is less deferential) and yet it is the only place where the Framers used this language. This allowance for the military is not based on deference or prioritizing, but on a logical link between the specific right in question and the feasibility for the military to protect it in all circumstances. Clearly, there are times in active war when this right would be impossible to uphold.

Next, the Third Amendment states that, "No Soldier shall, in time of peace be quartered in any house, without the consent of *780 the Owner, nor in time of war, but in a manner to be prescribed by law." [FN37] This wording explicitly made allowances for situations of urgency, while still creating a right to be protected at other times. Again, this exception is based primarily on the extent to which the right in question directly burdens the military to such a degree that might, under the certain circumstances to which the exception solely applies, completely incapacitate it. It does not suggest any level of deference to the military beyond that necessary to keep it alive during battle.

Finally, the first clause of the Fifth Amendment sets up the right to a Grand Jury indictment for capital crimes, "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." [FN38] Again, this is an individual right that the Framers specifically made inapplicable to the military, and even then only in cases of urgency.

Again, what the rights enumerated in these clauses all have in common is that they are particularly tough to apply during times of extreme danger without crippling the military. The Framers did not express these concerns, however, with regard to the more typical personal freedoms, such as those involving speech, religion, due process, or personal security. This is probably due to the fact that it is unlikely such liberties would impose a hardship on the military approaching the magnitude of their necessity to freedom. If and when these rights impose on the military, the current civilian constitutional law jurisprudence is more than sufficient to deal with the problem. If the military regulation cannot survive the standard levels of scrutiny, there is nothing in the Constitution or its legislative history to suggest that it should be upheld anyway. Indeed, there is ample evidence to the contrary. [FN39]

Non-application of the *inclusio unius est exclusio alterius* maxim could result in an erroneous reading of the spirit of these clauses. Because the clauses suggest a desire to protect the military from the crippling effect of overzealous preservation of individual rights, one might infer that the Framers would support deference to the military, but this would be careless. To suggest *781 that the clauses addressing military urgency were randomly placed to demonstrate the Framers' concern for military expediency, and that that spirit should apply to all interpretation, is to insult them by turning a blind eye to the care they took in the selection and placement of each and every word.

The Framers thought about the military's needs, and rather than creating a catch-all system of deference to those needs, they attempted to address them individually, as necessary. This was most likely done, not only to address those military needs, but to prevent the Court from being forced to grant general deference to the military, which would be necessary in the absence of the Framers' efforts to deal with major concerns. Indeed, Madison himself stated that the federal powers, which are essentially exceptions to the liberties retained by the people and to the powers of the states, are "few and defined." [FN40] It follows from this that the federal government may not reach beyond those which are written.

Finally, implicit in any set of exceptions is that there is a rule to which the exceptions exist in the first place. Regardless of the application of the above maxim, there must be some general application that the Framers had in mind when making certain exceptions for military circumstances. If that general application were anything but to enforce the Constitution against the military, there would be no exceptions at all. Indeed, these exceptions are evidence of the rule from which they withdraw.

2. The Second and Third (Military) Amendments

"At heart, the [Second Amendment] reflects a deep anxiety about a potentially abusive federal military, an anxiety also reflected in the Third Amendment." [FN41]

***782** The Framers were particularly wary of the threat of tyranny from military powers. This was the impetus for the Second [FN42] and Third Amendments. [FN43] By looking at the text itself, and especially the text the Framers discussed and rejected, one finds meaningful clues that the entire Bill of Rights applies to the military and that deference to the military was never expected or intended. The Framers wished to allow the people to protect themselves from potential infringements of their rights by a standing army, which was often described as the "bane of liberty." [FN44]

Elbridge Gerry described the Second Amendment as "intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed." [FN45] The purpose of the Third Amendment, now putatively a basic privacy right, was more likely to prevent the military from taking over civilian society. [FN46] While the realities we face today are significantly different from those that existed over two centuries ago, it would be wrong to forget the spirit behind this text, which could continue to protect our liberties in other contexts.

a. The Second Amendment

In the originally proposed clause that would become the Second Amendment, there was an additional portion that said, "but no person religiously scrupulous shall be compelled to bear arms." [FN47] Both the fact that the clause was written, and the fact that it was removed, lend support to the notion that the Framers feared military power and did not wish to feed it to the detriment of individual rights.

The text itself demonstrates this by forbidding the military ***783** from imposing moral hardships on citizens whose religious convictions are in the minority. Not only would this clearly apply even if the military needed such people, but that appears to be its primary application, as it is unlikely it would be necessary under any other circumstances. The only time that people are traditionally compelled to bear arms is during battle. By drafting this portion of the Amendment, struck out for other reasons as discussed below, the Framers prioritized religious freedom over military necessity. By its obvious application to times of necessity, the Framers demonstrated an expectation that the Constitution would apply as strictly to the military as to the civilian government.

Even more compelling is that the Framers chose not to keep this language despite their concerns for this religious minority. There were two reasons for their decision to strike the clause: to prevent discrimination on the basis of religion, and to leave some room for the legislature (making it another example of the Framers' efforts to make allowances for those military needs they deemed most serious). As Elbridge Gerry stated quite clearly in the discussion which led to striking out the clause, this was to be done not only for the sake of the military, but for the people that it would be prone to mistreating. [FN48] He expressed a fear that its inclusion could lead to discrimination by, for example, preventing such 'religiously scrupulous' people from bearing arms if they wished (like if the need to protect themselves from standing armies should arise so seriously that they were forced to set aside their non-violent convictions). [FN49] This discrimination in the application of the right, he suggested, would "destroy the constitution itself." [FN50] The struggle that took place over how to deal with this issue was a display of powerful convictions regarding the relative importance in the new government of individual freedom over

military power, which was really only there to protect liberty. Indeed, much of the colonial population was opposed to having any military at all. [FN51]

***784** In ultimately striking out the clause, the Framers of the Bill of Rights nonetheless emphasized the importance of its spirit. One of them, Elias Boudinot, argued without opposition on the point that we should practically never compel religious objectors to bear arms, primarily because we must make a conscious effort to depart from the history of oppression during war. [FN52] Still, they deliberately left the matter of conscientious objection to the discretion of the legislature with the admonition that it treat the issue sensitively. Egbert Benson urged: "I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion." [FN53]

The upshot is that the Legislature should make allowances to the extent possible, but not be bound when it would create a hardship. It is key that the Framers thought the only way to achieve this avoidance of military hardship was by leaving the clause out of the final text, because it suggests that had it been left in, the legislature would have been completely bound by it. They had to strike a rights-granting clause in order to leave room for legislative/military discretion with regard to situations of necessity. This is essentially the same arrangement the Supreme Court has created for those clauses which were not struck, but rather were ratified. Why were the Framers so concerned that this clause would excessively tie the Legislature's hands that they struck it out even though they supported it in spirit (with the exception of their fears regarding the potential for discrimination--they discussed both issues in making their decision)? Most likely, they did so because they did not expect rights-based constitutional clauses to be interpreted deferentially solely according to military expediency. As it turns out, they could have left the clause in and gotten the same result.

b. The Third Amendment

If the Framers had expected the level of deference the Supreme Court now grants the military in determining when it is appropriate to infringe upon constitutional rights to further its own interests, the Third Amendment would have been much ***785** shorter and more simple; it would have said "no soldier shall be quartered in any house without the consent of the owner." [FN54] Reflected in the Third Amendment is a greater appreciation for individual rights than for military convenience. Nonetheless, the Framers were once again mindful of the risk of binding the military at times of great emergency. Thus, they rejected a motion to apply the amendment to times of war and peace, pointing out the danger of trapping the military outside in inclement weather during a battle. [FN55] Out of concern for extreme military urgency, they explicitly left some room for leniency at a "time of war." [FN56] As discussed in Part II.A.1, *supra*, this deliberate inclusion suggests that where such room was necessary in the amendments, it was created. It also indicates a general view that rights are superior all the way up to the point of extreme military need.

Suppose for a moment that the motion had passed, and that the amendment simply stated that "no soldier shall be quartered in any house without the consent of the owner." [FN57] Is there any doubt that, under the Court's precedent, allowances would still be made in cases of military emergency? Indeed, under the present deferential standard, the military would not even need to prove the necessity or demonstrate any lack of alternatives. If the Court is properly adhering to the Framers' expectations, why was it so important to them to write the now superfluous exception for times of war and necessity? The decision to change the clause supports the argument that the amendments were intended to operate as strictly for the military as they do for the rest of the government.

B. History: The Framers' Attitudes Toward the Military and The Implications of Those Attitudes

The Framers were more suspicious of military government than of government generally. Elbridge Gerry commented that the most common way for any government to invade the rights and liberties of its people was by raising an army. [FN58] While drafting ***786** the Constitution, the Framers expressed concern both about the military acting against the people, as later happened in *Korematsu*, and the military government acting against its own soldiers. [FN59] James Madison articulated a goal for the amendments to "raise barriers against power in all forms and departments of Government." [FN60] He also specifically urged against forgetting the tyranny of military power, or the importance of liberty to citizens. [FN61] He asserted:

The same causes which have rendered the old world the Theatre of incessant [[sic] wars, & have banished liberty from the face of it, wd. soon produce the same effects here. . . . The means of defence agst. foreign danger, have been always the instruments of tyranny at home. . . . Throughout all Europe, the armies kept up under the pretext

of defending, have enslaved the people. [FN62]

Just because the Framers expressed concern for the military's needs through their various attempts to address them as discussed in Part II.A, supra, it does not follow that they wished to give it any more power and autonomy than any other part of the government. Rather, they recognized the obvious need for a military, despite its risks to liberty, and while they hoped to minimize those risks, they did not want to write anything into the Constitution that would destroy the military entirely, lest the country return to the mercy of the King. As constitutional scholar Akhil Amar stated: "[I]n war, with the very survival of the nation at stake, an army was the lesser of two evils—a nominally American army might be marginally less threatening to domestic liberty than the enemy's army." [FN63]

Samuel Adams wrote that to allow military leaders different legal standards is to set them up for tyranny. [FN64] He argued that to govern the military by different laws will teach it that it is the ***787** "lord [] and not the servant [] of the people." [FN65] He urged the people, while it is in their hands to construct a constitution, to be certain that they did not relinquish too much power to military forces, which he felt were predisposed to taking advantage:

It behoves the publick then to be aware of the danger, and like sober men to avail themselves of the remedy of the law, while it is in their power. It is always safe to adhere to the law, and to keep every man of every denomination and character within its bounds--Not to do this would be in the highest degree imprudent: Whenever it becomes a question in prudence, whether we shall make use of legal and constitutional methods to prevent the incroachments of any kind of power, what will it be but to depart from the straight line, to give up the law and the Constitution, which is fixed and stable, and is the collected and long digested sentiment of the whole, and to substitute in its room the opinion of individuals [referring to military leaders, as was the context of this entire piece], than which nothing can be more uncertain: The sentiments of men in such a case would in all likelihood be as various as their sentiments in religion or anything else; and as there would then be no settled rule for the publick to advert to, the safety of the people would probably be at an end. [FN66]

This fear was common at the time the Constitution was drafted, as the people had fled from tyranny, both civil and military. While modern scholars agree that the Framers feared excessive government powers, the fact that the military was one of the most dangerous of these powers seems to have disappeared from the dialogue. This is a complete reversal in the debate which, in the Eighteenth Century, focused much more heavily on military tyranny.

Even the Declaration of Independence explicitly criticized King George for granting deference to the military (through phony/fixed trials analogous to our current system of great deference without real scrutiny), and for allowing it to be independent from and superior to the civil power. [FN67] Further, shortly before the Framers drafted the amendments, there were numerous problems with the military disobeying the laws and not being ***788** held accountable. John Jay complained of this circumstance, arguing that the military should be reigned in from its practice of simply taking things it needed from the people. [FN68] The Framers were aware of these circumstances, and concerned about them, [FN69] so it is unlikely that they drafted the amendments with any expectation of deference to the military. Indeed, part of the impetus for writing a Bill of Rights at all was to address this sort of behavior.

The modern shift in dealing with military power certainly cannot be explained away by saying that times have changed, and the military is now better at walking the line between its urgent needs and the rights of its soldiers and civilians. One need only look at the events of the last half-century, from the Japanese internment camps through the present-day "don't ask, don't tell" policy to see that this is not the case. Further, the military is now bigger and stronger than ever, and is kept up at all times, regardless of whether the country is at war. Indeed, the circumstances that were so greatly feared, and which the Framers attempted to prevent by drafting the amendments to the Constitution, are as real today as they were when Samuel Adams expressed his concern.

C. Arguments Based on Governmental Structure: Separation of Powers and Non-Justiciable Political Questions

1. The Military's Place in the Separated Powers Framework

The military has an almost purely executive function. It is an entity of action, and not of lawmaking or judicial review. Congress makes the laws under which it must function. It, much like an administrative agency, makes its own rules for operation. The federal judiciary is required to keep it in constitutional check. The military, like some administrative agencies, has its own set of judges to review controversies arising under its own set of laws and rules. Certainly, its jurisdiction is broader than that of other agencies, extending to criminal prosecutions against

its own members, but that jurisdiction does not extend to the last-resort *789 interpretation of the Constitution. To the extent that constitutional interpretation is sometimes necessary in any government decisionmaking process, judicial or otherwise, it is always reviewable by the Supreme Court. [FN70]

The military is a unique society which, to a certain extent, is only properly understood by its own members. At the same time, it is a part of the United States, and must therefore function within our constitutional structure that divides power and responsibility three ways. While it would indisputably be easier to allow the military to function more autonomously, governing itself according to its own special understanding of its needs, "[t]he doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power." [FN71] Indeed, the various powers were not randomly handed out, nor were they organized purely by general category, though this is obviously a factor. Rather, they were carefully arranged to create a system of checks and balances, simultaneously authorizing each branch to police the others, and preventing any branch from either usurping the power of another or delegating away its own.

The military is no exception to this structure. The Framers chose to divide control over the military similarly to everything else. They gave Congress the power to make rules to govern it, [FN72] the states the power to appoint officers, [FN73] the President the power of Commander in Chief, [FN74] and the Court, broadly, the power of jurisdiction over cases arising under the Constitution. [FN75] It was at least as important to the Framers to spread out power over the military as over the civilian government, because they so greatly feared the dangers of excessively centralized military control. [FN76]

The Court's role in the broader military scheme is to keep it in *790 constitutional check. Justice Douglas described this role in *Winters v. United States*:

Historically, one of the most important roles of civil courts has been to protect people from military discipline or punishment who have been placed beyond its reach by the Constitution and the laws enacted by Congress. . . . There are those who in tumultuous times turn their faces the other way saying that it is not the function of the courts to tell the Armed Forces how to run a war. Of course that is true. But it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. As stated in *Ex parte Milligan*, supra, civil liberty and unfettered military control are irreconcilably antagonistic. A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws. [FN77]

Simply because the Court's role is limited with regard to cases involving the military, and it must not overstep its bounds by providing strategic or operational instruction, does not mean that it has no role at all. Indeed, it has a duty.

In *Parisi v. Davidson*, [FN78] the Court was asked to follow principles of comity with respect to the military tribunal, and not to review a habeas corpus case until the military tribunal had concluded its court-martial. This it refused to do, though the reasoning was based primarily on the difference between the matters involved in each pending case, such that principles of comity would not apply even if it were a state court at issue. Justice Douglas, however, in his concurrence, suggested that the concept of comity could not apply at all to military tribunals, as they are essentially analogous to administrative law judges:

Comity is 'a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' But the Pentagon is not yet sovereign. The military is simply another administrative agency, insofar as judicial review is concerned. While we have stated in the past that special deference is due the military decisionmaking process, this is so neither because of 'comity,' nor the sanctity *791 of the Executive Branch, but because of a concern for the effect of judicial intervention on morale and military discipline, and because of the civilian judiciary's general unfamiliarity with 'extremely technical provisions of the Uniform Code (of Military Justice) which have no analogs in civilian jurisprudence.' [FN79]

This is the logical role that the military should play in our governmental structure. While it is an extremely important and highly specialized "agency," it is not and cannot be its own judicial check.

The military's focus is on the execution of war and preparedness to respond to it and to other national and

international emergencies, and not on individual rights. This is probably one of the reasons why it was not granted the power to determine which of its actions are constitutionally acceptable. Instead, it is expected to make a good faith effort to abide by constitutional principles, which includes submission to the determinations of our federal judicial branch when there is a controversy. Any lack of such submission, or any refusal on the part of the judiciary to enforce constitutional requirements against the military, can result in a gradual process through which the military becomes more and more autonomous. Such autonomy is exactly what the Framers feared most, and sought to avoid by spreading out the power as they did. The Court has, to a great extent, endorsed this structural view through its consistent review of habeas corpus requests by servicemembers. It has stated that the federal judiciary has exclusive jurisdiction over claims for discharge as a conscientious objector, and that the Court of Military Appeals is limited to hearing appeals from court-martial convictions. [FN80] Justice Douglas further explains the role of habeas corpus in keeping the military in check:

A person who appropriately shows that he is exempt from military duty may not be punished for failure to submit. The question is not one of comity between military and civilian tribunals. One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds. The Court properly does just that in the opinion announced *792 today. [FN81]

In *Parisi*, the Court granted the writ to a conscientious objector, stating that "the writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces." [FN82] In fact, in habeas corpus cases where plaintiffs assert unlawful induction, they are not even required to exhaust all administrative remedies before bringing their cases to federal court. [FN83]

In sum, the military fits best into our separation of powers scheme as an executive function, and should not be given judicial power to interpret the Constitution. As Justice Douglas stated:

The Army has a separate discipline of its own and obviously it fills a special need. But matters of the mind and spirit, rooted in the First Amendment, are not in the keeping of the military. Civil liberty and the military regime have an 'antagonism' that is 'irreconcilable.' When the military steps over those bounds, it leaves the area of its expertise and forsakes its domain. The matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution. [FN84]

2. Non-Justiciable Political Questions

In recent decades the Court's deference to the military has sometimes taken the more palatable form of the non-justiciable political question. [FN85] In *Gilligan*, the Court found it "difficult to conceive of an area of governmental activity in which the courts have less competence," urging that the "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." [FN86] The argument is not that deference is justified by the military's expertise, but that the military's decisions are entirely political ones, which, through executive and *793 legislative control, are accountable to the electorate. This doctrine most certainly applies to the daily decisions involving military operation, strategy, and for the most part, policy. These are rightfully a part of the political process. It does not follow, however, that the doctrine may be applied to military decisions that violate individual constitutional rights. The doctrine does not generally apply that way in the civilian context, and there is no reason why it should in the military context.

These political question holdings do not, however, entail any judicial restraint from protecting constitutional rights from government infringement, so the military still must not be excepted. The Court itself has clearly limited the doctrine of political question in this way as well, so I do not argue against its case-law on this point; my only point is that scholarly discussion of this issue must observe the same limitation. The Court in *Gilligan* made this point clear:

In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief. We hold only that no such questions are presented in this case. [FN87]

In that case, the plaintiffs were asking the district court to "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard." [FN88] In addition, the plaintiffs

wanted continued judicial supervision of the training and operations of the Guard to ensure compliance with the court-approved procedures. [FN89] The separation of powers problem inherent in such a request is clear, even to those who advocate the strictest judicial review of the military that the Constitution will allow.

In Orloff, the Court was willing to go so far as to hold that the military was required to place professional inductees in positions which utilize their professional skills, but not so far as to take control over specific duty orders within that field. [FN90] In other *794 words, the issue of whether the rationale behind induction was lawful is justiciable, but whether each and every professional servicemember is entitled to perform those duties for which he or she is best educated is not.

3. The Greater Separation of Powers Problem Suggests Less Deference to Military Decisions

The separation of powers doctrine, as discussed earlier, has as its primary purpose and function the prevention of power concentration. It is not enough to prevent one branch from usurping the power of another; it is also important to forbid delegation of the power and duty invested in any branch. While all three branches are bound by an oath to support the Constitution, the judicial duty to interpret the Constitution is vested in the judiciary, and it may not shirk that duty or allow others to share it. The military is not a part of the judicial branch, and has no authority to engage in constitutional judicial review. When the Supreme Court asserts as its primary justification for holding a military act constitutional that the military itself has already calculated its action to be sufficiently necessary to survive constitutional inquiry, it delegates its most basic constitutional duty to the military. This is especially egregious when the military act challenged would, absent narrow tailoring to a compelling government interest in the civilian context, be deemed an unconstitutional infringement on someone's liberty.

Justice Brennan persuasively described this problem in his dissent in *Goldman v. Weinberger*:

Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational- basis standard--absolute, uncritical "deference to the professional judgment of military authorities." If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be. [FN91]

The source of Brennan's frustration with the majority was not his disagreement with the result, but the fact that the process which *795 led to that result was not constitutionally proper. There is more than mere deference in play here. This case in particular is an example of one that, due to the years that Dr. Goldman wore his yarmulke without incident, and to the over-inclusiveness of the regulation, would probably have failed even an intermediate level of constitutional scrutiny.

This is not to suggest that every case in which the Court has explicitly deferred to the military's judgment as to the constitutionality of its actions would have failed standard constitutional analysis. There will certainly be circumstances, perhaps with even greater frequency than in the civilian government, when the military's needs are so great, and alternative options so lacking, that it must violate an individual's rights and the Court must allow it to do so. The problem lies in the frequent, if not consistent, lack of any constitutional analysis at all. By stating that the relevant analysis has been done at the military level, the Court is not only shirking its constitutional duty to police the other branches, it is delegating its interpretive function to them.

III Some Suggestions

Because necessity is one of the justifications for the judicial behavior criticized, it is fair to ask what alternative approaches would make it possible to strike a proper balance between individual rights and military imperatives. Not only does the Court often complain of its inability to determine the military's needs without simply accepting the military's own assertions, but even when it offers other justifications for its deference, at the core the problem is nearly always the Court's lack of expertise. This is a difficult problem, but that does not excuse the legal community from its problem-solving responsibility. Rather than attempting creative arrangements to aid in the proper constitutional analysis of military cases, the Court has thrown up its hands and handed over its jurisdiction.

When criticizing the "'special expertise' argument [which] is often employed by the defenders of the military court system," [FN92] Justice Douglas pointed out that "civilian courts must deal with equally arcane matters in such

areas as patent, admiralty, tax, antitrust, *796 and bankruptcy law, on a daily basis." [FN93] It is worthwhile, then, to take a moment to consider how this is achieved. In cases such as Justice Douglas describes, the parties generally call disinterested third-party experts to testify to relevant understandings of the field, as well as to the reasonability, within that field, of a particular act. The attorneys will take the time to locate such witnesses for cases dealing with areas in which precedent has taught them that this is important to do. This better enables the courts to fulfill their responsibility to engage in the legal analysis that those field experts cannot do on their own. The judicial holdings of such cases are thus a result of the combined wisdom of the experts and the judges. For this reason alone, the importance of ensuring that the experts are disinterested should be evident.

Not only is the military like its own specialized field, but it is also somewhat more removed from society than are other specialized fields. For this reason, the need for such disinterested experts in the military field is both exceptionally great and more difficult to fulfill. Most experts on the military are either in the military, so clearly not disinterested, or were formerly in the military, which increases the likelihood of bias. This is not to say that all people in the military, or even all those who are or were officers in the military, are the same, or are hostile to upholding constitutional rights. The argument against using experts with direct ties to the military leaves plenty of room for diversity of thought, politics, and opinion among military personnel. When the courts allow expert testimony in other fields, they do not select those that either work or have worked at a company that is one of the litigants in the case. This is the most basic of precautions we take in the selection of disinterested experts. [FN94]

*797 Diversity of military personnel notwithstanding, the risk of bias is probably at least slightly higher with members and former members of the military than it is with former corporate employees. This is precisely because of the specialized military society to which the Court so often refers. The very system of subordination that the Court does not wish to tamper with has a psychological impact on those who participate in it, either as commander or as subordinate. The likelihood of bias is quite great, though it might as easily be a bias against the military as one in its favor. [FN95] Still, either bias should disqualify an individual from testifying as an expert in a case where the military is one of the parties. This basic common sense is the norm in nonmilitary cases, and yet time and again the Court (exclusively) allows military leaders to provide it with all of the evidence of military necessity through their own assessments of the demands of the military's "special society."

The upshot is that we need experts on military culture, strategy, daily operation, regulation, etc. who are not, and never have been, members of the armed forces themselves. How to arrange for the existence of such experts is not the focus here, and there are probably many avenues. The important thing is that we acknowledge the need for disinterested military experts and respond to it creatively. The nature of the situation suggests that both Congress and the Court would need to support such an effort in order for it to succeed.

Essentially, it would significantly aid the process of constitutional inquiry into military behavior to have people who are trained in the functions of the military be available on an on-call basis, but not necessarily full-time. One possible way of achieving this could be through the creation of a new government fellowship through which such training would be provided to a select group of civilians. In addition to a rigorous selection process controlled by a diverse panel, applicants would be subject to a security background check prior to admission. Upon the completion of the program, much of which would include immersion in (but not subjection to) the military environment, fellows *798 would return to their academic institutions or other places of employment. The alumni of this program would agree to be, for a certain number of years, the pool of experts available to testify honestly and without bias in cases where the military is brought before the civilian judiciary. For this purpose they would be granted security clearance and have access to all information relevant to the particular controversy.

Another option would be to create a small military oversight agency. While this would be government, it would still be civilian, and therefore in tune with the Framers' mandate that the military "always be subordinate to the civil power." [FN96] The agency would be expert on the military's needs, and could even take over some of the administrative complaint procedures that are presently conducted within the military. Much like the EEOC with regard to employment discrimination, the agency would not possess the judicial power, but the results of its factual investigations would be available to federal courts.

Regardless of what is ultimately done about the Court's informational problems in dealing with military cases, something must be done. Looking the other way while the military gains more strength and autonomous power every year, [FN97] and with every new Supreme Court opinion, is not an acceptable option.

IV An Opportunity for Change: Don't Ask, Don't Tell

On July 19, 1993, Secretary of Defense Les Aspin announced the new Department of Defense policy regarding gays in the military. [*799 FN98] This policy, which has become popularly known as the "don't ask, don't tell" policy, suggests that a lesbian/gay/bisexual person may serve in the military, so long as they are not discovered. It purports to shift the ban on homosexuality in the military from one against status to one against conduct, in an effort to protect it from constitutional challenge. [FN99] In practice, however, status is far more often the source of trouble for gay and lesbian servicemembers than any actual act. [FN100] Aspin's memorandum even defines "homosexual conduct" as "a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." [FN101] The term "propensity" seems to refer more closely to one's status than to conduct.

For a number of reasons, the "don't ask, don't tell" policy is the perfect place for the Supreme Court to begin to treat the military with less deference. First, it is an example of a situation where policy was knowingly made constitutionally weak in reliance on the Court's usual deference. Second, it is a case in which there is merit to the assertions of constitutional violation. Third, the lower courts have specifically stated that they are bound by the Court's precedent of deference to the military in deciding this case, so there is opportunity to correct the problem. Finally, there is already civilian academic research and data on the effect of having homosexual individuals present in the military, so the fact that the suggestions made in Part III have not been implemented will pose less of a burden than in other contexts.

A. Other Branches' Reliance On Expected Deference Affects Decision-Making

The "don't ask, don't tell" policy is a good example of what *800 can result from the Court's pattern of deference, beyond the results of any particular case it decides by according deference, or even the precedential value of that holding. Just as Justice Jackson feared at the time *Korematsu* was decided, the principle of deference can be a "loaded weapon" for military authorities to use in making decisions. [FN102] Attorney General Janet Reno prepared a memorandum for the President in order to instruct him as to the likelihood that Aspin's new policy would survive a constitutional challenge. The purpose of the memo was to aid the President in making a decision regarding whether to accept the policy, as such determinations are based in part on whether a challenge can be defeated. The memorandum pointed to the history of deference as evidence that the policy would survive, thus discouraging any effort to improve upon it:

The Supreme Court has repeatedly stated that the courts must review decisions by the President and by military commanders deferentially, taking into account the separate nature and special needs of military society. As a consequence, it is possible to justify in the military setting constraints on individual liberty and choice that might be invalid in civilian society. Because of the extraordinary deference paid by the courts to military service, we are confident that the new policy proposed by the Secretary of Defense will be upheld against constitutional challenge. [FN103]

This reliance on expected deference, resulting in a consciously reduced effort to protect the constitutional rights of servicemembers, is the most compelling reason for a change in judicial policy in this regard. If members of the other two branches of government could always be relied upon to wholeheartedly abide by their oaths to be bound by the Constitution, there would be no need for a third branch to keep them in check.

B. The Constitutional Challenge to the "Don't Ask, Don't Tell" Policy Has Merit

If it were litigated in a civilian context, the "don't ask, don't tell" policy would probably be held unconstitutional for a variety of reasons. First, it could be held to violate due process requirements by punishing status. Second, it could be held to violate the First Amendment by punishing speech rather than conduct. *801 Finally, it could be held to violate equal protection by treating homosexuals differently under the law than heterosexuals. Although homosexuals are neither a suspect class entitled to strict scrutiny, nor a quasi-suspect class entitled to intermediate scrutiny, they are still a definable class and are thus entitled to at least rational basis scrutiny, which still places a burden on the government that it may not be able to meet here.

The "propensity" clause of the "don't ask, don't tell" policy may violate the Due Process requirement of the Fourteenth Amendment. In *Robinson v. California*, [FN104] a case involving the criminalization of narcotics addiction, the Supreme Court held that punishing people because of their status violates due process. [FN105] Under the "don't ask, don't tell" policy, no evidence of conduct is required in order to discharge a servicemember for

being gay. The conduct is inferred from the status, and the burden is on the servicemember to prove the absence of that conduct. Because of the difficulties inherent in trying to prove a negative, the policy essentially punishes status.

The "don't tell" requirement is a potential violation of the First Amendment. "When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, to regulate election campaigns, or to prevent littering) [courts] insist that it meet the high, First Amendment standard of justification." [FN106] This is the case regardless of how controversial [FN107] or offensive [FN108] that speech may be deemed. The restriction on speech that the "don't ask, don't tell" policy entails needs to be analyzed to determine its necessity. Moreover, the policy does not merely proscribe speech that takes place in the employment context, but applies anywhere and with anyone. If it is discovered that a servicemember told a friend or relative that he or she was gay, the policy applies. Finally, the speech proscription is content-based because not everyone who states their sexual orientation risks punishment--only *802 those who state a particular one. Content-based speech restrictions are generally forbidden by the First Amendment. [FN109]

Finally, because the policy discriminates against an entire class of people, it could be held to violate the Equal Protection clause of the Fourteenth Amendment. The Supreme Court has set up three standards of review for cases in which the government has disadvantaged a particular class of persons: where the classification is based on race or national origin, the courts are to apply a "strict scrutiny" standard of review, which requires the government to show that the classification is necessary to achieve a compelling interest; where the classification is based on gender or age, the courts are to apply "intermediate scrutiny," which requires that the classification be substantially related to an important government interest; and in most other cases, courts apply a "rational basis" standard, under which the government need only demonstrate a rational relationship between the classification and a permissible government interest. [FN110] Despite the difference in these methods, there is one common thread: the burden is on the government to meet the standard, however low it might be. If this burden were placed on the military with regard to its discrimination against gay and lesbian servicemembers, it may have trouble meeting even the rational basis standard, especially in light of the RAND study, if consulted.

The Court's own ruling in *Romer v. Evans* [FN111] provides the strongest support for an equal protection challenge to the "don't ask, don't tell" policy. In that case, the Court held unconstitutional an amendment to the Colorado constitution that prohibited laws designed to prevent discrimination against homosexual persons, calling it "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." [FN112] The Court held that the amendment lacked a rational relationship to a legitimate interest because it was "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." [FN113] This is precisely what the "don't ask, don't tell" policy does: it identifies *803 persons by the very same trait, and then denies all of them, across the board, the opportunity to serve in the military openly. Not only is *Romer* somewhat analogous to a "don't ask, don't tell" challenge, but at a minimum it stands for the proposition that even a rational basis inquiry into legislation that targets gays and lesbians will involve an expectation of some degree of narrow tailoring. [FN114] Although such an inquiry will not require the legislation to be as narrowly tailored as possible, if it is sufficiently overbroad, it will fail to appear rationally related. [FN115] Absent the complete deference granted military regulations, it is reasonable to believe that the Court might find that banning openly gay individuals entirely from service is too excessively broad to bear a clear relationship to the need for unit cohesion.

C. Lower Courts Have Used the Mandated Deference to the Military as the Primary Justification for Upholding the Policy

The Supreme Court has yet to rule on the constitutionality of this policy, though it has been challenged in the lower courts and is on its way up for review. The *Able v. United States* [FN116] case presents the best example of why this situation may be an excellent opportunity for the Court to begin a new era of reduced military deference. In that case, which upheld the constitutionality of the "don't ask, don't tell" policy, the central issue was deference to the military, and whether, in striking down the policy, the district court had granted it properly under Supreme Court precedent. The United States District Court for the Eastern District of New York held that the policy violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. [FN117] In its appeal to the Second Circuit, "[t]he government argue[d] that the district court failed to accord the judgments of Congress and the military the proper deference in deciding the eligibility requirements for military service and *804 that, under the correct standard, [the policy] is constitutional." [FN118] The Second Circuit agreed. After conceding that the policy would likely fail a civilian-level analysis, the court stated that the long line

of Supreme Court precedent mandating deference to the military required it to reverse the holding below. [FN119] Indeed, the court went so far as to say that, under Supreme Court precedent, courts are not to scrutinize the underlying purposes behind military actions, though they would do so even in cases requiring only "rational basis review" arising in a civilian context. [FN120] Because this level of deference is so extreme, it presents a good opportunity for the Court to scale back its degree in an opinion that reverses this holding.

D. Civilian-Gathered Data Are Already Available

There is conflicting evidence regarding the effect allowing gays to openly serve in the military would have on unit cohesion and morale. [FN121] Therefore, this issue is especially convenient for the Court to use to begin a new era of analyzing the constitutionality of military policies on a factual basis. There are already civilian data suggesting that the current policy is unnecessary, so the Court could remand for analysis and consideration of all the data. Then, if Congress were to implement something along the lines of what I described in Part III, [FN122] the courts would be in a better position in the future to base their rulings in military cases on facts rather than blind deference.

Conclusion

More than two centuries after the Framers presented the country with their vision of limited and diffuse powers, it is drifting in the area of military regulation. It is not too late, however, to reconsider what the Framers intended with regard to military power, and to act accordingly. Military leaders are all too aware of the history of Supreme Court deference to their decisions, and have not always chosen the best response to that grant of constitutional authority. Instead of treating it as a grave responsibility, *805 they have taken advantage of it by cutting corners when it comes to individual rights. The Framers did not contemplate that the military would have this opportunity in the first place, and it is time for the Court to take back the role of determining whether a particular military action violates the Constitution. Although it is key to strike a balance between our national security on the one hand, and the rights asserted by an individual on the other, we must take care to remember that on the latter side of that balance, the integrity of our system of liberties weighs in along with that individual.

[FN1]. J.D., Stanford Law School, 1999; B.A., University of California at Berkeley, 1995. Associate, McCutchen, Doyle, Brown & Enersen, San Francisco, California. Instructor, First Amendment Law for Journalists, Media Alliance, San Francisco, California. Law Clerk to the Honorable Norman H. Stahl, United States Court of Appeals for the First Circuit, Boston, Massachusetts, 2000- 2001. Law Clerk to the Honorable Faith S. Hochberg, United States District Court for the District of New Jersey, Newark, New Jersey, 2001-2002. I wish to thank Stanford Law School Dean Kathleen M. Sullivan for her generous contribution of time spent mentoring me throughout this project--without her guidance, encouragement, and comments on several drafts, this Article would not have been possible. I also wish to thank Stanford Law School Professors Gerald Gunther and Janet E. Halley for their frequent insights and research guidance. Finally, I would like to express my appreciation to Professors Steven G. Calabresi and Leonard S. Rubinowitz of Northwestern University School of Law for (when I was a 1L there) helping me to shape my ideas and encouraging me to pursue this endeavor in the first place. The great support I have enjoyed has strengthened the piece; any remaining weaknesses are mine alone.

[FN1]. The Federalist No. 41, at 262 (James Madison) (Bicentennial Ed., 1976).

[FN2]. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (granting the military its usual deference when considering the "relative importance of a particular military interest").

[FN3]. See *id.* at 512 (Stevens, J., concurring) (recognizing the military interest at stake in that case as "legitimate" and "rational," and therefore sufficient); see also *Rostker v. Goldberg*, 453 U.S. 57 (1981) (rejecting a Due Process challenge to the male-only draft registration requirement on the basis of the male-only combat requirement, without analyzing the constitutionality of the latter); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (upholding against First Amendment challenge the application of a regulation allowing a military commander to suppress speech that "he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command," without any actual analysis of whether such a danger existed in that case); *Korematsu v. United States*, 323 U.S. 214 (1944) (accepting the military's assertion of necessity without engaging in additional analysis of the circumstances).

[FN4]. 323 U.S. 214 (1944).

[FN5]. *Id.* at 216.

[FN6]. *Id.* at 218.

[FN7]. *Id.* at 219-20.

[FN8]. *Id.* at 245-46 (Jackson, J., dissenting).

[FN9]. *Id.* at 245 (Jackson, J., dissenting) (emphasis added).

[FN10]. 475 U.S. 503 (1986).

[FN11]. See *id.*

[FN12]. See *id.* at 509 ("[M]ilitary commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally." (emphasis added)).

[FN13]. *Id.* at 508.

[FN14]. *Id.* at 507.

[FN15]. 462 U.S. 296 (1983).

[FN16]. *Id.* at 304.

[FN17]. *Id.* at 297 (emphases added).

[FN18]. *Id.* at 298.

[FN19]. See *id.* at 302-03.

[FN20]. *Id.* at 303-04 (emphasis added).

[FN21]. U.S. Const. art. I, § 8, cl. 12-14.

[FN22]. *Id.* at § 8, cl. 7.

[FN23]. See *Loving v. United States*, 517 U.S. 748, 768 (1996).

[FN24]. See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

[FN25]. See *Kahn v. Anderson*, 255 U.S. 1, 8-9 (1921).

[FN26]. See *Brown v. Glines*, 444 U.S. 348, 357-58 (1980).

[FN27]. See, e.g., *Gillette v. United States*, 401 U.S. 437, 462 (1971).

[FN28]. See *Greer v. Spock*, 424 U.S. 828 (1976).

[FN29]. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1 (1973) (appropriateness of National Guard's training and orders non-justiciable); *Orloff v. Willoughby*, 345 U.S. 83 (1953) (challenge to assignment of duties non-justiciable).

[FN30]. 1 *Annals of Cong.* 442 (Joseph Gales ed., 1789).

[FN31]. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

[FN32]. Interestingly, this argument is itself an application of that doctrine. Because the Framers included one

exception to the maxim itself (for unenumerated rights), it is unlikely that they envisioned other exceptions to it, or they would have written a broader catch-all here (such as one simply stating that the maxim does not apply to the Constitution).

[FN33]. 1 Annals of Cong. 439.

[FN34]. For example, the power to try alleged criminals does not include the power to make them testify against themselves, but absent the Fifth Amendment it would.

[FN35]. U.S. Const. art. I, § 9, cl. 2.

[FN36]. 2 The Records of the Federal Convention of 1787, at 334 (Max Farrand ed., 1937).

[FN37]. U.S. Const. amend. III.

[FN38]. U.S. Const. amend. V.

[FN39]. "The inclusion of one is the exclusion of another." This doctrine decrees that where law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded. Black's Law Dictionary 687 (5th ed. 1979).

[FN40]. The Federalist No. 45 (James Madison).

[FN41]. Akhil R. Amar, *The Bill of Rights* 46 (1998); see also 1 Annals of Cong. 749 (Joseph Gales ed., 1789) (Elbridge Gerry describing the purpose of a militia as "to prevent the establishment of a standing army, the bane of liberty"); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 185 (1962) (the Second and Third Amendments were drafted to provide further assurances to a population "still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had 'effected to render the military independent and superior to the civil power.' "). But see Michael A. Bellesiles, *Gun Laws In Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 Law & Hist. Rev. 567 (1998) (arguing that the impetus for the Second Amendment was to allow property owners to protect themselves from rebellious indentured servants, slaves, and Indians).

[FN42]. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[FN43]. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

[FN44]. 1 Annals of Cong. 749.

[FN45]. *Id.*

[FN46]. See Amar, *supra* note 41, at 59-63 (arguing that the Bill of Rights is structural as well as rights-based, and that the Third Amendment fits together with the Second, rather than the Fourth, as part of an effort to limit military power in the overall government scheme).

[FN47]. 1 Annals of Cong. 749.

[FN48]. See *id.*

[FN49]. See *id.*

[FN50]. *Id.*

[FN51]. See Benjamin Franklin, *Papers* 12:119, *The Gazetteer and New Daily Advertiser*, May 2, 1765 ("Conceiving themselves the only representatives of America, they most cheerfully acquiesce in his last proposition, and hereby declare their choice to defend themselves without any military aid. They dread no enemy but the mother

country, and wish to preserve America as an asylum for the wrecks of liberty." (emphases in the original) (reprinted in *The Founder's Constitution* 215 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *The Founder's Constitution*]).

[FN52]. See 1 *Annals of Cong.* 767.

[FN53]. *Id.* at 751.

[FN54]. *Id.* at 752 (Sumpter's motion).

[FN55]. See *id.* (comments of Mr. Sherman and Mr. Hartley, and vote defeating Sumpter's motion).

[FN56]. U.S. Const. amend. III.

[FN57]. 1 *Annals of Cong.* 752.

[FN58]. See *id.* at 749. ("Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.").

[FN59]. See, e.g., 3 *The Records of the Federal Convention of 1787* 420-21 (Max Farrand ed., 1937) (Gouverneur Morris to Moss Kent, Jan. 12, 1815) ("We knew that when militia were of necessity called out, and nothing but necessity can justify the call, mercy as well as policy requires, that they be led immediately to attack their foe.").

[FN60]. 1 *Annals of Cong.* 436.

[FN61]. See 1 *Records of the Federal Convention of 1787* 464-65.

[FN62]. *Id.*

[FN63]. Amar, *supra* note 41, at 54.

[FN64]. Samuel Adams, *Writings* 1:251, *Boston Gazette*, Oct. 17, 1768 (quoting Locke: "Where the law ends, tyranny begins") (reprinted in *The Founder's Constitution*, *supra* note 51, at 215).

[FN65]. *Id.* (emphases in original).

[FN66]. *Id.* (emphases in original).

[FN67]. See the Declaration of Independence, para. 13, 14, 16, & 17 (U.S. 1776) (Rossiter ed. 1961) ("He has kept among us, in times of peace, standing armies, without the consent of our legislatures. He has affected to render the military independent of and superior to the civil power For quartering large bodies of armed troops among us: For protecting them, by mock trial, from punishment ..." (emphasis added)).

[FN68]. See John Jay, *Unpublished Papers* 1:461-63, *A Freeholder, A Hint to the Legislature of the State of New York*, in *The Founder's Constitution*, *supra* note 51, at 312-13.

[FN69]. As evidenced by the conviction that "[t]he military [should] always be subordinate to the civil power." 2 *The Records of the Federal Convention of 1787*, *supra* note 37, at 334.

[FN70]. See *Marbury v. Madison*, 5 U.S. 137 (1803).

[FN71]. *Myers v. United States*, 272 U.S. 52 (1926) (Brandeis, J., dissenting).

[FN72]. U.S. Const. art. I, § 8, cl. 14.

[FN73]. *Id.* at § 8, cl. 16.

[FN74]. *Id.* at § 2, cl. 1.

[FN75]. *Id.*; see also *Marbury*, 5 U.S. at 137.

[FN76]. See *Amar*, *supra* note 41, at 54 (arguing that the Framers viewed diffuse control over the military as an "indispensable bulwark[] against any congressional attempt to misuse its power over citizen militiamen"); *Warren*, *supra* note 41, at 184 (The Framers' "apprehensions [regarding the danger to liberty of excess military power] found expression in the diffusion of the war powers granted the Government by the Constitution.").

[FN77]. *Winters v. United States*, 89 S. Ct. 57, 59-60 (1968) (citations omitted) (granting a stay from an order to go to Vietnam, pending a resolution of the legality of that order).

[FN78]. 405 U.S. 34 (1972).

[FN79]. *Id.* at 51 (Douglas, J., concurring) (citations omitted).

[FN80]. See *id.* at 44 ("[T]he jurisdiction of the Court of Military Appeals is limited by the Uniform Code of Military Justice to considering appeals from court-martial convictions. That court has been given no 'jurisdiction' to consider a serviceman's claim for discharge from the military as a conscientious objector." (citations omitted)).

[FN81]. *Id.* at 49 (Douglas, J., concurring).

[FN82]. *Id.* at 39.

[FN83]. See *Billings v. Truesdell*, 321 U.S. 542 (1994).

[FN84]. *Parisi*, 405 U.S. at 54-55 (Douglas, J., concurring) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) for the irreconcilable antagonism between "civil liberty and the military regime") (emphasis added).

[FN85]. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1 (1973) (appropriateness of National Guard's training and orders non-justiciable); *Orloff v. Willoughby*, 345 U.S. 83 (1953) (challenge to assignment of duties non-justiciable).

[FN86]. *Gilligan*, 413 U.S. at 10; see also *Orloff*, 345 U.S. at 94 ("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.").

[FN87]. *Gilligan*, 413 U.S. at 11-12.

[FN88]. *Id.* at 6.

[FN89]. See *id.* ("Respondents contend that thereafter the District Court must assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court.").

[FN90]. *Orloff*, 345 U.S. at 88 ("We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction. It is not conceded, however, that particular duty orders within the general field are subject to judicial review by habeas corpus.").

[FN91]. *Goldman v. Weinberger*, 475 U.S. 503, 515 (Brennan, J., dissenting).

[FN92]. *Parisi*, 405 U.S. 34, 52 (1972) (Douglas, J., concurring).

[FN93]. *Id.* at 53.

[FN94]. An excellent example of military bias can be demonstrated through a comparison between two reports Secretary of Defense Les Aspin commissioned to aid him in determining the appropriate policy to apply to gays in the military. He asked both the RAND Corporation, a private nonprofit research institute, and a Military Working Group (MWG) to do a study on the effects of allowing homosexuals to serve in the military. The two reports

reached quite different conclusions. The RAND Report, based on the research of numerous sociologists, anthropologists, psychologists, historians, doctors, economists, and attorneys, determined that gay men and lesbians could openly serve in the military without damaging unit cohesion, so long as the message behind that policy is "clear and ... consistently communicated from the top." The MWG Report, on the other hand, concluded that homosexuality in the military could only be tolerated if kept a secret. This report, of course, is the one Aspin used in the DOD policy. For further discussion of the differences between these reports, and their relation to Aspin's policymaking, see Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology*, 3 *GLQ* 159, 227-30, n.28 & 34 (1996). See also Janet E. Halley, *A Guide to the Military's Anti-Gay Policy* (1999).

[FN95]. An environment as rigorous and subordinating as that of the military surely must return more than a few disgruntled soldiers from its service.

[FN96]. 2 *The Records of the Federal Convention of 1787*, *supra* note 36, at 334.

[FN97]. See Warren, *supra* note 41, at 187-88:

A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

[FN98]. See Memorandum of Department of Defense, *Re: Policy on Homosexual Conduct in the Armed Forces* (July, 1993) [hereinafter *DOD Memo*].

[FN99]. For a discussion of the distinction between status and conduct in this policy, see generally Halley, *supra* note 94.

[FN100]. See Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 *U.S.F. L. Rev.* 919, 927 (1994):

[T]he new policy ... punishes status and speech while permitting conduct to be excused, if the military so desires, upon exercising its discretion. A service member who simply announces that he or she is gay, lesbian or bisexual is much more likely to be discharged than someone who has actually engaged in homosexual conduct, as long as the conduct is not publicly acknowledged.

[FN101]. *DOD Memo*, *supra* note 98 (emphasis added).

[FN102]. See *supra* text accompanying note 8.

[FN103]. Memorandum of the Office of the Attorney General, *Re: Defensibility of the New Policy on Homosexual Conduct in the Armed Forces* (July, 1993).

[FN104]. 370 U.S. 660 (1962).

[FN105]. See also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (homelessness may not be criminalized).

[FN106]. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring) (citing *Saia v. New York*, 334 U.S. 558, 561 (1948) (noise reduction); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (campaign regulation); and *Schneider v. New Jersey*, 308 U.S. 147, 162-63 (1939) (litter prevention)).

[FN107]. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[FN108]. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

[FN109]. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (holding that limitations on speech, even where justifiable if made general, may not be based on the content of that speech).

[FN110]. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440- 46 (1985).

[FN111]. 517 U.S. 620 (1996).

[FN112]. *Id.* at 635.

[FN113]. *Id.* at 633.

[FN114]. See *id.* at 632-33 (pointing out that cases in which the Court had found a law to advance a legitimate government interest dealt with laws "narrow enough in scope" to "ascertain some relation between the classification and the purpose it served.").

[FN115]. See *id.* at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.").

[FN116]. 155 F.3d 628 (2d Cir. 1998).

[FN117]. See *Able v. United States*, 968 F. Supp. 850 (E.D.N.Y. 1997); *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995).

[FN118]. *Able*, 155 F.3d at 630.

[FN119]. See *id.* at 633-36.

[FN120]. See *id.* at 634.

[FN121]. See comparison of RAND and MWG reports on this matter, *supra* note 94.

[FN122]. Members of all three branches of government have a duty to support the Constitution, U.S. Const. art. VI, cl. 3, so Congress should endeavor to aid the Court in its present constitutional dilemma with the military through such implementation.