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## Military Personnel Policy: Who's in Charge? The Courts, Congress, or the Commander in Chief?

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# Military Personnel Policy: Who's in Charge? The courts, congress or the commander in chief?

By William A. Woodruff

## I. Introduction

The ongoing debate over the military's homosexual policy has produced conflicting signals from the three branches of government over establishing and administering military policy. President Clinton declared that a policy that discriminated on the basis of sexual orientation was wrong and vowed to lift the ban. At the same time, senior uniformed leaders of the military, who are also part of the executive branch, defended the ban. Members of Congress have come down strongly on both sides of the issue. Judicial decisions in recent years both affirmed and condemned the policy.<sup>1</sup>

The homosexual policy that triggered the debate is embodied in a Department of Defense directive promulgated by the Secretary of Defense. As commander in chief, the President certainly has a constitutional role in military policy.

The Constitution also gives Congress significant power and responsibility over military matters. Indeed, article I, section 8 of the Constitution contains an impressive list of military powers and responsibilities vested specifically in the Congress. In fact, the Department of Defense directive at the center of the current debate was promulgated pursuant to a Congressional grant of authority to the Secretary of Defense to establish enlistment criteria.

While article III of the Constitution does not specifically mention the military or give any military powers directly to the judiciary, the principle



of judicial review does bring the judiciary into the mix. Recent decisions by district courts in California overturning discharges of homosexual sailors<sup>2</sup> indicates the willingness of at least some judges to become involved in military policy.

But who is really in charge? Which branch of government, after resolving internal disagreements, gets to make the final decision? When the courts, the commander in chief, and the Congress all claim a role in running the military, who gets the last word? This article will briefly explore these

questions in the context of the debate over the homosexual exclusion policy.

## II. The Role of the Courts

Despite some ambiguity early in our nation's history, it is now well-settled that the courts have the power to review military policies, programs, and activities. In one sense, therefore, the answer to the question posed above is that the courts will have the last word. Merely acknowledging the fact that courts can review military decisions, however, does not determine the degree to which a court may substitute its judgment for that of

the political branches in matters involving the military. Both Congress and the courts have developed restraining<sup>3</sup> devices to preclude judges from becoming too deeply involved in military affairs.<sup>3</sup> Ultimately, the question is to what extent may a judge second-guess policy decisions of the executive and legislative branches in reviewing challenges to military policies.

The Supreme Court has compiled a long and consistent record of granting considerable deference to the political branches in military policy disputes. Over 100 years ago, the Court recognized the unique nature of the military:

An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.<sup>4</sup>

More recently, the Court noted that "judges are not given the task of running the Army . . . ; [o]rderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters . . . ."<sup>5</sup> Furthermore, the Court has acknowledged that federal judges are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."<sup>6</sup>

*Goldman v. Weinberger*,<sup>7</sup> a case pitting military uniform regulations against an Orthodox Jewish rabbi's First Amendment free exercise rights, illustrates the degree of deference the Court has determined must be granted to military policy makers. Simcha Goldman was an Air Force clinical psychologist and an ordained Jewish rabbi. In observance of his religious faith, he routinely wore an unobtrusive yarmulke while indoors in uniform. Air Force regulations,

however, precluded the wear of any headgear except as authorized by the Air Force regulations. The regulations did not permit the routine wear of a yarmulke. Goldman challenged the regulations as violating the Free Exercise Clause of the First Amendment. Goldman argued that wearing the unobtrusive yarmulke did not present a danger to military discipline or esprit de corps. He claimed the Air Force's assertion to the contrary had no support in actual experience or scientific study. In fact, he offered expert testimony that accommodating religious practices such as his would actually improve morale within the military and further the goals underlying the uniform regulations.

In rejecting Goldman's challenge, the Court noted that soldiers do not leave their Constitutional rights at home when they join the military, but the unique nature of military service and the requirement for discipline and obedience necessitates a review that is "far more deferential than constitutional review of similar laws or regulations designed for civilian society."<sup>8</sup> Even if the policies are based upon "professional military judgment," as opposed to scientific studies, this deferential review applies:

But whether or not expert witnesses may feel that . . . exceptions to . . . [the military policy] are desirable is quite beside the point. The desirability of . . . regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.<sup>9</sup>

Though criticized,<sup>10</sup> *Goldman* clearly teaches that courts must grant considerable deference to military policy makers, even when the policy at issue impinges upon rights specifically protected by the Constitution. Applying this principle to challenges to the homosexual policy leads to the conclusion that courts called upon to review the

policy must be prepared to defer to "considered professional judgment" even when plaintiffs argue that expert studies do not support the policy. If the military's interest in having everyone wear the same clothes is sufficient to overcome the long-cherished and specifically enshrined right to the free exercise of religion, certainly the military's interest in unit cohesion and combat effectiveness is sufficient to overcome any particular group's desire to serve, whether they be single parents, high school drop outs, those who do not meet height, weight, or other physical standards, or homosexuals.



### III. The Role of the Political Branches

Taken as a whole, the Supreme Court's jurisprudence concerning the review of military policies reveals that the courts are not charged with determining military policy. While a federal court is a particularly inappropriate forum to decide questions of force composition and service qualifications, the Legislative and Executive branches are specifically charged with responsibility for the military and national defense.<sup>11</sup> The political branches, unlike the courts, are susceptible to lobbying efforts, political pressure from interests groups and constituents, and worries over reelection. But such is the nature of the democratic process.

Unlike the judiciary, the political branches are not required to give



deference to the decisions of military commanders. Both the President and the Congress may choose to accept the advice and recommendations of military leaders on matters effecting the Armed Forces, but they are under no constitutional command to defer to the judgment of uniformed military leaders. This principle of civilian control changes the nature of the debate when the forum is the political arena rather than the courtroom.

Instead of arguing over the standard of review that a court should employ or debating the degree of deference that a judge should give to a commander's military decision, the debate in the political arena can center on the underlying merits of the policy at issue.

Recognizing that the political branches have the authority and responsibility to decide the issue is only part of the analysis. Considering the allocation of authority and responsibility between the Executive and Legislative branches is another question.

#### A. The Executive

As "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual service of the United States,"<sup>12</sup> the Constitution certainly gives the President some authority over the military. The delegates to the Constitutional Convention, who wrestled with the difficult issues of allocation of military

power in a central government, were familiar with the role of a commander in chief. They fully understood that it was the senior position in the military chain of command and carried with it significant power. Their recent experience with the British and European systems, however, made them wary of placing too much military power in one office. While the British king was also the commander in chief of the British forces, the office created by the Constitution was "nominally the same," . . . [but] 'in substance much inferior,' amounting 'to nothing more than supreme command and direction of the military and naval forces, as first general and admiral . . .'<sup>13</sup>

While possessing the "supreme command and direction" of the armed forces is an impressive phrase, it does little to delineate the precise military powers vested in the President. Clearly, however, the President does not have the relatively unchecked military powers of an 18th century

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European monarch. In reality, the extent of the President's military authority is determined by the political process.

Justice Jackson's concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*<sup>14</sup> has become the classic statement concerning the scope of executive authority. In reversing President Truman's exercise of his commander in chief powers to direct the Secretary of Commerce to seize the nation's steel mills in an effort to prevent a labor dispute from disrupting production needed to support the war effort in Korea, Justice Jackson set forth a three-tiered paradigm of presidential power:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress have current authority, or in which its distribution is uncertain. . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .<sup>15</sup>

Under Jackson's formulation, determining the scope of presidential power requires considering what authority Congress has in the area and how it has been implemented, if at all. While the President certainly has authority to establish military personnel policies, the real question is whether Congress agrees or acquiesces in the policy. If so, and subject to a very deferential standard of judicial review, there is no question as to authority. If not, the struggle

then becomes one of the political will of the President on one hand and the Congress on the other.

#### B. The Legislature

The military powers specifically granted by the Constitution to the Congress far exceed those specifically granted to the President. Article I, section 8, of the Constitution vests in Congress the power, among others, to "provide for the common defense," to "declare war," to "raise and support armies," to "provide and maintain a navy," to "make rules for the government and regulation of the land and naval forces," and the power to "make all laws . . . necessary and proper for carrying into execution the foregoing powers."<sup>16</sup>

In exercising its constitutional authority, Congress has granted the President and the Secretaries of the military departments statutory authority to promulgate regulations governing various aspects of military life and operations. While the President's title of commander in chief carries with it the inherent power to establish rules and policies governing the military, as commander in chief he is, in effect, part of the "land and naval forces" over which Congress is authorized to govern and regulate. As the chief executive, of course, the President can veto any rule that Congress passes. If he has the votes to sustain the veto, then his power as chief executive prevails over the congressional power to make the rules and regulations governing the armed forces. If Congress overrides the veto, then the President, both as the chief executive with the obligation to faithfully execute the law and as the senior commander in the armed forces, has the duty to comply with the valid exercise of congressional authority.

In the context of the debate over the homosexual policy, it is clear that the President can, by executive order or through departmental directives, rescind the homosexual policy and establish a different policy. It is

equally clear that any statutory provision passed by Congress and signed into law by the President or enacted over his veto will trump any executive order or departmental directive.

#### IV. Resolving the Debate

On July 19, 1993, the President announced a new homosexual policy that purported to end discrimination on the basis of sexual orientation. While less than what homosexual activists had hoped for, the new policy declared that sexual orientation was not a bar to service, but continued the practice of discharging those who engage in homosexual acts, who enter into homosexual marriages, or who claim to be homosexual. Because the previous policy did not define, mention, or consider sexual orientation apart from sexual conduct, the new policy actually creates an orientation-conduct dichotomy and declares that orientation is not a bar to service. Essentially, the President's July 19, 1993, policy is based upon the

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notion that sexual orientation is unrelated to sexual behavior. The President's policy also placed certain restrictions on a commander's authority to investigate allegations of homosexuality among members of the unit and contemplated the issuance of detailed investigatory guidance.

In hearings before the Senate Armed Services Committee and a subcommittee of the House Armed Services Committee, senior Department of Defense officials explained that the new policy was basically the same as the previous policy with only minor exceptions. The creation of the orientation-conduct dichotomy and the investigatory restrictions in the President's policy, however, caused some concern. Despite assurances from administration officials that the new policy was essentially the same as the previous policy, both the House and Senate Armed Services Committees approved amendments to the Defense Authorization Act for Fiscal Year 1994 that will, in effect, codify the policy that has been in place since 1981. The statutory language retains the discharge criteria as it existed under the previous policy, does not place limits on a commander's discretion to investigate matters that may effect unit morale, cohesion, and discipline, and does not contain the notion that sexual orientation is not linked to sexual conduct.<sup>16</sup> Attempts during floor debate to amend the Senate bill and specifically defer to the discretion of the President were defeated. Assuming that the pending legislation is passed and signed by the President, the homosexual exclusion policy will become a statutory condition on service, enacted pursuant to Congress' power under article I, section 8, of the Constitution.

Obviously, enacting the homosexual exclusion policy into law, rather than leaving it to the discretion of the President or the Secretary of Defense, reduces the authority of the

Executive to alter or amend the policy in the future. Once Congress has exercised its constitutional authority to make the "rules for the government and regulation of the land and naval forces," the President's discretion is limited. He must faithfully execute the law. The codification of the homosexual exclusion policy also effects the scope of judicial review. The extensive hearings before both the Senate Armed Services Committee and the House Armed Services Committee produced an impressive body of evidence to support the legislative findings contained in the statute. When signed into law, the statute will contain the congressional finding, based upon extensive hearings, that the "presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion, that are the essence of military capability."<sup>17</sup>

This exercise of congressional authority places the homosexual exclusion policy in essentially the same posture as the male-only draft registration law that was upheld in

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*Royster v. Goldberg*.<sup>18</sup> In 1973, after establishing an all-volunteer armed forces, President Nixon ended the requirement for 18-year-old males to register for the draft. After the Soviet invasion of Afghanistan, however, President Carter determined that reactivation of the registration process was necessary. Accordingly, he asked Congress to transfer funds from the Department of Defense budget to the Selective Service System. The President also asked Congress to amend the Military Selective Service Act to register women for the draft as well as men.

Congress agreed that reactivating the registration process was appropriate. After extensive hearings, debate, and deliberation, however, Congress declined to provide for the registration of women and transferred only enough funds to provide for the registration of men.

Several male plaintiffs challenged the constitutionality of the all-male draft. The Supreme Court held that the male-only draft did not violate equal protection principles. Central to its conclusion was the fact that Congress was exercising its constitutional authority over the Armed Forces and that its decision was reached after careful consideration of the alternatives. The Court noted that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."<sup>19</sup>

No doubt there will be judicial challenges to any statutory limitation on service by homosexuals. But the combination of executive and legislative authority that a statutory provision requires creates a formidable barrier that will not be easily breached. The very text of the Constitution commits this matter to Congress. In an exercise of this constitutional responsibility, Congress carefully and deliberately considered the issue. Committees in both houses conducted extensive hearings and

heard testimony from differing viewpoints. In the final analysis, the body charged with the power to raise armies and given the duty to make the rules to govern the military decided that the presence in the armed forces of individuals who engage in or who have the propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability. *Goldman, Royster*, and a long line of Supreme Court decisions teach that courts must defer to such judgments.

While the courts must defer to Congress on such issue, there is no requirement that those with opposing views do so. The exercise of congressional authority over the military on this or other matters does not carry with it the finality principles that apply to judicial decisions. Congress has taken action to preserve a policy that military judgment and experience holds is necessary to maintain the effectiveness of our armed forces. In this regard, the debate is over and the question has been decided. Congress had the last word. It would be naive, however, to think that the issue will go away. In some respects, the battle is just beginning.

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#### ENDNOTES

1. Compare *Ben Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (discharge of an admitted homosexual did not violate free speech or equal protection principles) with *Meinhold v. Department of Defense*, 808 F. Supp. 1455 (C.D. Calif. 1993) (discharge of sailor who announced his homosexuality on national television violates equal protection), appeal docketed, No. 93-55242 (9th Cir. 1993).



2. *Meinhold v. Department of Defense*, 808 F. Supp. 1455 (C.D. Calif. 1993); *Dahl v. Secretary of the Navy*, No. S-89-0351 MLS, 1993 U.S. Dist. LEXIS 12102 (E.D. Calif. Aug. 30, 1993).

3. See e.g., 5 U.S.C. §701(b)(1)(F)&(G) excepting from the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701-706, military courts-martials, commissions, and military authority exercised in the field in time of war or in occupied territory; *Gilligan v. Morgan*, 413 U.S. 1 (1973) (political question doctrines preclude judicial review and supervision of the training, equipping, and use of the National Guard); *Mindes v. Seaman* 453 F.2d 197 (5th Cir. 1971) (judicial review of military decisions limited to those cases where plaintiff alleges military has violated the Constitution, a statute, or its own regulations and plaintiff has exhausted administrative remedies. If plaintiff satisfies these threshold requirements, court must then balance the nature and strength of the plaintiff's claim, the potential injury to the plaintiff if review is denied, the degree of interference with the military function judicial review would have, and the extent to which military expertise and discretion are involved in determining whether to actually review the claim on the merits.).

4. *In re Grimley*, 137 U.S. 147, 153 (1890).

5. *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

6. *Chappel v. Wallace*, 462 U.S. 296, 305 (1983), quoting *Warren, The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962).

7. 475 U.S. 503 (1986).

8. 475 U.S. at 507.

9. 475 U.S. at 509 (emphasis added).

10. See, e.g., Felice Wechsler, Comment, *Constitutional Law Goldman v. Weinberger: Circumscribing the First Amendment Rights of Military Personnel*, 30 Ariz. L. Rev. 349 (1988); Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. Rev. 855 (1987); Mary Jo Donahue, Comment, *First Amendment Rights in the Military Context: What Deference is Due? — Goldman v. Weinberger*, 20 Creighton L. Rev. 85 (1986-87).

11. U.S. Const. art. I, §8; art. II, § 2. See also *Gilligan v. Morgan*, 413 U.S. 1 (1973). In response to the Supreme Court's decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Congress and the President exercised their constitutional authority and enacted a statutory provision that permits the wearing of religious apparel like that at issue in *Goldman*. See, 10 U.S.C. § 774.

12. U.S. Const. art II, § 2.

13. Richard Kohn, *The Constitution and National Security: The Intent of the Framers*, in *The United States Military under the Constitution of the United States 1789 - 1989* 61, 80 (Richard Kohn, ed., 1991), quoting *The Federalist* No. 69 (Alexander Hamilton).

14. 343 U.S. 579 (1952).

15. 343 U.S. at 635 - 638.

16. S. 1298, 103d Cong., 1st Sess., § 546 (1993); S. Rep. No. 103112, 103d Cong., 1st Sess., 278-297 (1993).

17. Id.

18. 453 U.S. 57 (1981).

19. 453 U.S. at 70.