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Unequal Law, Unequal Burden: The All-Male Selective Service Act, Civilian Rights, and the Limits of Military Deference in Modern Supreme Court Jurisprudence

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UNEQUAL LAW, UNEQUAL BURDEN: THE ALL-MALE SELECTIVE SERVICE ACT, CIVILIAN RIGHTS, AND THE LIMITS OF MILITARY DEFERENCE IN MODERN SUPREME COURT JURISPRUDENCE

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I. INTRODUCTION

In 2016, the Senate passed its annual defense funding bill, the National Defense Authorization Act, with a provision that would require women to register with the Selective Service.[1] Senator John McCain (R-AZ), Chairman of the Armed Services Committee, strongly supported the measure.[2] Although the amendment was defeated in the House of Representatives, it received backing from the House Armed Services Committee.[3] At the same time, lawsuits filed in Cali-

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1. S. 2943, 114th Cong. § 591 (as passed by Senate, June 14, 2016); *see* Jennifer Steinhauer, *Senate Votes to Require Women to Register for the Draft*, N.Y. TIMES (June 14, 2016), http://www.nytimes.com/2016/06/15/us/politics/congress-women-military-draft.html?_r=0.

2. Senator John McCain stated, "The fact is . . . every single leader in this country, both men and women, members of the military leadership, believe that it's fair since we opened up all aspects of the military to women that they would also be registering for [the] Selective Service." Steinhauer, *supra* note 1.

3. Nicholas Clairmont, *The Unseemly Death of an Amendment to Draft Women*, ATLANTIC (May 20, 2016), http://www.theatlantic.com/politics/archive/2016/05/the-unlikely-birth-and-unseemly-death-of-an-amendment-to-draft-americas-women/483599/ [https://perma.cc/TKJ9-PWWF]. California Republican Duncan Hunter, a strong opponent of women serving in combat roles, originally proposed the amendment. He then voted against his own proposal. *Id.*

fornia and New Jersey challenged the continued constitutionality of the all-male Selective Service law as it currently stands.[4]

From an equal rights perspective, the exclusion of women from Selective Service registration places an undue burden on men, who not only face forcible conscription but a myriad of criminal and civil penalties for failing to register.[5] From a feminist viewpoint, the current law may be seen as a government-endorsed affirmation that women must be shielded from the obligations of full participation in civic life, justifying unequal treatment in American society.[6] The renewed wave of interest in the Selective Service system, both in the political and legal arenas, largely springs from the implementation of the new Pentagon policy to allow women to fill combat roles, ending the so-called combat exclusion rule.[7]

Undoubtedly, the lifting of the combat exclusion policy will have significant ramifications on a Fifth Amendment Due Process Clause[8] analysis of the male-only Military Selective Service Act (MSSA or the Act).[9] Ultimately, however, the Pentagon's decision to open combat roles to women will not be totally dispositive in a legal challenge to the Act. As this Article explores, the degree of judicial deference granted to Congress and the military on the question of women's exclusion from the draft will play an essential role in future judicial review of the Act.

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4. *See* Kristina Davis, *Suit Over Women in the Draft Back in Action*, SAN DIEGO UNION-TRIB. (Feb. 19, 2016, 5:09 PM), http://www.sandiegouniontribune.com/military/sdut-women-register-draft-9th-circuit-opinion-2016feb19-story.html [http://perma.cc/8CGP-FHHL]; Ilya Somin, *Lawsuit Challenges Constitutionality of Male-Only Draft Registration*, WASH. POST: VOLOKH CONSPIRACY (July 15, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/15/lawsuit-challenges-constitutionality-of-male-only-draft-registration/?utm_term=.3c88c81b23e4 [https://perma.cc/689M-7HPH]. The first lawsuit was filed by the National Coalition for Men; the second by a teenage girl and her mother—both claiming that the Military Selective Service Act unconstitutionally discriminates based on sex.

5. *See infra* notes 231-35 and accompanying text.

6. *See* Linda K. Kerber, *"A Constitutional Right to be Treated Like . . . Ladies": Women, Civic Obligation and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 119-23; Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 293-94 (1984).

7. Memorandum from Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, and Leon E. Panetta, Sec'y of Def., on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule (Jan. 24, 2013) [hereinafter Dempsey Memorandum], https://www.defense.gov/news/WISRJointMemo.pdf [https://perma.cc/9M9N-X6WY]. The decision was announced in 2013 by then Defense Secretary Leon Panetta and fully implemented within the armed services on January 1, 2016.

8. The Supreme Court has interpreted the Fifth Amendment's Due Process Clause to preclude the federal government from denying persons equal protection under the law, effectively incorporating the Fourteenth Amendment's Equal Protection Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

9. Military Selective Service Act, 50 U.S.C. §§ 3801-3820 (2012).

This Article begins with a brief historical overview of the MSSA and the 1981 Supreme Court case *Rostker v. Goldberg*,[10] in which the Court upheld the Act against a due process challenge. The *Rostker* decision has faced widespread criticism for its constitutional analysis.[11] Indeed, the level of deference granted to Congress regarding the exclusion of women was remarkable, and many scholars agree that this degree of deference ultimately overcame a probing and meaningful due process analysis by the Court.[12] Next, this Article briefly examines the Supreme Court's history of using judicial deference in military-related cases. Most important for a future legal challenge, however, is the recent trend in the Court's jurisprudence. This Article then explores recent cases in which the government argued for military deference and the Court's evolving approach to these cases. Finally, focusing on precedent in the last fifteen years, beginning with the Global War on Terror (GWOT) cases and going through First Amendment challenges from recent terms, this Article attempts to set a framework of deference for a modern-day challenge to the MSSA.

II. HISTORY OF THE MILITARY SELECTIVE SERVICE ACT

During the Civil War, President Lincoln signed the Enrollment Act,[13] marking the first time the federal government required compulsory military service of able-bodied males.[14] Congress has enacted multiple draft laws since that time, resulting in the conscripted service of over 16 million American men during twentieth-century conflicts alone.[15] The current draft registration law, the MSSA, was passed by Congress in 1967.[16] Conscription for the Vietnam conflict ended in 1973, however, and mandatory registration ended in 1975, effectively putting the Selective Service Registration System into standby mode.[17]

Prompted by the Soviet Union's invasion of Afghanistan in 1979, President Carter called for the reactivation of the draft registration

10. 453 U.S. 57 (1981). As the *Rostker* Court inexorably linked the requirement to register with the actual requirement for conscripted service, this Article does the same.

11. *See infra* notes 43-44 and accompanying text.

12. *See infra* note 44 and accompanying text.

13. Ch. 75, 12 Stat. 731 (1863).

14. KRISTY N. KAMARCK, CONG. RES. SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS 2 (2016).

15. *Induction Statistics*, SELECTIVE SERV. SYS., https://www.sss.gov/About/History-And-Records/Induction-Statistics [https://perma.cc/MAA6-UYCY] (last visited Jan. 6, 2018) (providing total induction numbers for each conflict when the United States used the draft). The estimated numbers include 2.8 million servicemen in World War I, 10.1 million in World War II, 1.5 million in Korea, and 1.8 million in Vietnam. *Id.*

16. Military Selective Service Act of 1967, Pub. L. No. 90-400, 81 Stat. 100 (1967).

17. KAMARCK, *supra* note 14, at 11.

process.[18] He asked Congress to fund the reactivation of the Selective Service System and also recommended that Congress amend the MSSA to allow the registration and conscription of women.[19] After holding lengthy hearings that included testimony from multiple Pentagon officials, Congress agreed that it was appropriate to reactivate the draft registration process.[20] The funding amount allocated by Congress was significantly less than requested by President Carter, however, as Congress determined that only males should be included in registration.[21] The MSSA has been amended several times since its inception, but its essential requirement, that males between the ages of eighteen and twenty-six register for the draft, remains.[22]

A. Rostker v. Goldberg *(1981)*

Shortly after the renewal of the registration process, the Supreme Court granted certiorari in *Rostker*, which presented a Fifth Amendment Due Process Clause challenge to the MSSA. The district court struck down the law, finding that contrary to Congress's official findings and the arguments proffered by the government, the bulk of military congressional testimony showed that women's inclusion in draft registration would further the military's interest, not detract from it.[23] In that way, the lower court found that the government failed to

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18. President Jimmy Carter, State of the Union Address (Jan. 23, 1980), https://www.jimmycarterlibrary.gov/assets/documents/speeches/su80jec.phtml [https://perma.cc/85JL-3V8E].

19. Rostker v. Goldberg, 453 U.S. 57, 60 (1981).

20. *Id.* at 61 (citing H.R.J. Res. 521, 96th Cong., 94 Stat. 552 (1980)).

21. *Id.* (first citing S. REP. NO. 96-789, at 1-2 (1980); then citing 126 CONG. REC. 13,895 (1980) (statement of Sen. Nunn)).

22. 50 U.S.C. § 3802(a) (2012). The law states, in relevant part:

> Except as otherwise provided in this chapter, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Id. It goes on to state that:

> The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this chapter (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

Id. § 3083(a).

23. Goldberg v. Rostker, 509 F. Supp. 586, 603 (E.D. Pa. 1980). The district court also found it problematic that Congress displayed conflicting positions on women's usefulness in the military. At the same time as it continued to increase funding to recruit more women

show an important government interest in the all-male law, as required by an intermediate scrutiny gender discrimination analysis.[24] In doing so, the district court plainly rejected a deferential treatment of Congress's contrary factual findings.

The Supreme Court explicitly rejected the district court's approach and noted that particular deference was due to the determinations of Congress in the area of military affairs.[25] Relying heavily on the legislative reports, the Court concluded that Congress reasonably and constitutionally excluded women from draft registration plans. Explaining the correct standard of review to apply to the case, the Court stated that Congress's determination in regard to the single-sex draft registration decision deserved dual layers of deference—in addition to the deference normally accorded congressional determinations, issues concerning national defense and military affairs deserved the highest level of deference from the Court.[26] Tracing Congress's powers to Article 1, Section 8 of the Constitution—including the authority to raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the armed forces[27]—the Court categorized such powers as "broad and sweeping."[28] Moreover, the Court emphasized that the judiciary itself largely lacked competence in the area of military affairs.[29]

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into the armed forces, Congress simultaneously passed legislation to exclude them from conscripted service. *Id.* Following the district court decision, the Director of the Selective Service, Bernard Rostker, filed a notice of appeal with the Third Circuit Court of Appeals. Justice Brennan, acting as Circuit Justice for the Third Circuit, stayed the order. *See* Rostker v. Goldberg, 448 U.S. 1306, 1311 (1980). Soon after, the Supreme Court noted probable jurisdiction. *See* Rostker v. Goldberg, 449 U.S. 1009 (1980).

24. *Goldberg*, 509 F. Supp. at 605 (citing the "important interest" standard from *Craig v. Boren*, 429 U.S. 190 (1976)). In *Craig,* the challenged state law prohibited men aged 18-20, but not women, from purchasing low-alcohol beer. *Craig*, 429 U.S. at 191-92. The Court, applying intermediate scrutiny, determined that the law violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 208-09. Although the state showed an important interest in lowering alcohol-related traffic incidents, that purpose was not sufficiently related to the discriminatory law, despite an arguable numeric correlation showing a greater likelihood of men being involved in traffic incidents. *Id.* at 215 (Stewart, J., concurring).

25. In describing the framework of deference to Congress's findings, and the resulting rejection of the district court's analysis, Justice Rehnquist stated, "[W]e must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." Rostker v. Goldberg, 453 U.S. 57, 68 (1981).

26. *Id.* at 64-65 ("The case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

27. U.S. CONST. art. I, § 8, cl. 12.

28. *Rostker*, 453 U.S. at 65 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

29. *Id.* at 65-66 ("[It] is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially pro-

The Court's reasoning in upholding the law was ultimately rooted in the long-standing prohibition against women serving in combat roles. Congressional testimony established that in a draft-time scenario, the military's greatest personnel need would be combat troops.[30] Noting the statutory restrictions and executive policy preventing women from filling such roles, Justice Rehnquist, therefore concluded that women and men were not similarly situated for purposes of a draft or draft registration.[31] For this reason, Congress's registration plans were sufficiently related to the stated purpose in authorizing registration.[32] Under this line of reasoning, an analysis of the underlying policy of excluding women generally from combat was unnecessary. The policy of excluding women from combat roles thus became a proxy for the Court and allowed it to avoid examining the MSSA on the fundamental basis of gender exclusion.

There were significant differences in how the Supreme Court and the district court evaluated the legislative findings. In overturning the MSSA as unconstitutional, the district court was persuaded by military testimony before Congress which revealed that in an anticipated draft of 650,000 personnel, the military could absorb 80,000 females to fill noncombat roles.[33] Conversely, the Supreme Court noted that even assuming women could be drafted to fill some noncombat roles, Congress had found that including women in registration and the draft was not "worth the added burdens."[34] Citing congressional findings that military training would be unnecessarily hampered, the Court also did not find merit in the proposition that all women could be registered, but only a small percentage actually inducted in a draft.[35] Moreover, the Court noted that Congress had estimated that female volunteers would fill the available slots in a

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fessional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." (alteration in original) (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973))). The Court went on to quote *Orloff v. Willoughby*, 345 U.S. 83 (1953):

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

Rostker, 453 U.S. at 71.

30. *Id.* at 76 (citing S. REP. NO. 96-826, at 160 (1980)).

31. *Id.* at 78.

32. *Id.* at 79.

33. *Id.* at 80-81.

34. *Id.* at 81.

35. *Id.* The Court also cited the Senate Committee Report which acknowledged other administrative problems, including difficulties related to housing, treatment of dependents, and differences in physical standards. *Id.* (citing S. REP. NO. 96-826, at 159).

draft-time scenario.[36] Perhaps most important for the Court, however, was Congress's stated goal of military flexibility during wartime. According to congressional findings, military units and personnel must be available to fill both combat and noncombat roles, depending on mission requirements.[37] This fact would ostensibly make filling those 80,000 noncombat roles with primarily women infeasible. As to the argument that most military officials actually supported including women in the draft, the Court stated that Congress's findings showed that those officials who voiced support for including women in registration did so out of "equity" concerns, rather than military needs.[38] In conclusion, the Court found that the district court had erred in "undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence."[39]

In his dissent, Justice Marshall took issue with the majority's interpretation of congressional testimony. Justice Marshall noted that contrary to Congress's eventual exclusion of women from the MSSA, the Department of Defense and all four military service chiefs had unanimously advocated requiring women to register for the Selective Service.[40] He understood the congressional testimony regarding the potential 80,000 female inductees that could be absorbed into the military as having already accounted for the issue of military flexibility.[41] In other words, women could fill those positions without negatively affecting military flexibility. Two other dissenting Justices, Justices White and Brennan, also agreed with this understanding of the testimony.[42] Substantial numbers of women could be utilized in a draft, then, and there was an inadequate governmental basis for excluding them. Ultimately for the dissenters, some women could fill some roles, and that was a sufficient basis to include them in draft registration.

B. Criticism of Rostker

The *Rostker* decision, while enjoying popular support at the time, has faced strong criticism from legal scholars.[43] Particularly troubling

36. *Id.* (citing S. REP. NO. 96-826, at 158 (1980)).

37. *Id.* at 81-82 (citing S. REP. NO. 96-826, at 158 (1980)).

38. *Id.* at 80 (first citing S. REP. NO. 96-826, at 158 (1980); and then 126 CONG. REC. 13,893 (1980) (statement of Sen. Nunn)).

39. *Id.* at 83 (emphasis omitted).

40. *Id.* at 98-99 (Marshall, J., dissenting).

41. *Id.* at 100.

42. *See id.* at 83-113 (White, J., dissenting).

43. *See, e.g.*, Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 126 (2008) (stating that extrajudicial debate about women's role in society and the military significantly influenced Justice

was the Court's overly deferential acceptance of Congress's findings.[44] For example, after examining the legislative testimony, the three dissenting Justices explicitly disagreed with Congress's interpretation of military flexibility vis-à-vis the 80,000 slots that could have been filled by women.[45] Not only was the record of the flexibility justification doubtful, but even viewed in Congress's favor, exact details were quite unclear.[46] Although testimony did support the idea that service members serving in support roles would sometimes have to use basic combat skills, no clarification was made regarding the actual frequency of that occurrence or how often it would likely occur in the future.[47]

Perhaps most problematic was the *Rostker* Court's unbridled acceptance of factual determinations made by Congress that were at odds with military testimony. As emphasized in both dissents, the Department of Defense itself and all four armed service chiefs had recommended including women in the Selective Service.[48] Moreover, Congress's portrayal of military testimony in support of women's inclusion in the MSSA as based on "equity" concerns, rather than needs of the military, was potentially misleading. The term "equity," as Congress used it and the majority later adopted, implied that by advocating women's inclusion in Selective Service registration, the Pentagon was merely bowing to political correctness.[49] Instead, the term was used by military officials during testimony to contrast

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Rehnquist's majority opinion); Wildman, *supra* note 6, at 293-94 (arguing that the Court played a role in normalizing gender inequality by using Congress's discriminatory findings to justify its holding).

44. *See* Robin Rogers, Comment, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 CALIF. L. REV. 165, 182 n.81 (1990) (arguing that in *Rostker*, the Court utilized a highly deferential review which only paid "lipservice" to the established standard of scrutiny for gender-based classifications); *see also* William A. Kamens, Comment, *Selective Disservice: The Indefensible Discrimination of Draft Registration*, 52 AM. U. L. REV. 703, 720 (2003) (arguing that the Court did not use the accepted gender-based classification scrutiny level for the case and actually shifted the burden of proof to the plaintiff). *See generally* Ellen Oberwetter, Note, *Rethinking Military Deference: Male-Only Draft Registration and the Intersection of Military Need with Civilian Rights*, 78 TEX. L. REV. 173 (1999).

45. *See Rostker*, 453 U.S. at 84 (White, J., dissenting); *id.* at 107 (Marshall, J., dissenting).

46. *See id.* at 79-80 (majority opinion).

47. *See, e.g.*, *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearing on S. 2294 Before the S. Comm. on Armed Servs.*, 96th Cong. 1390 (1980) [hereinafter *Hearing on S. 2294*] (statement of Lieutenant General Robert Yerks, Deputy Chief of Staff for Personnel) (testifying that past conflicts have necessitated military support personnel becoming involved in combat and that trend generally increased during Vietnam). No clarifying questions were asked regarding projections for the actual number of support troops who would face this risk in the future.

48. *Rostker*, 453 U.S. at 83-84 (White, J., dissenting); *id.* at 98-99 (Marshall, J., dissenting).

49. *See, e.g.*, *Hearing on S. 2294*, *supra* note 47, at 1856 (statement of Richard Danzig, Principal Deputy Assistant Secretary of Defense).

absolute military requirements.[50] In other words, according to Pentagon officials, there were sufficient numbers of men to fill the ranks of the military in the event of a draft. Therefore, women, while they were valued members of the armed services and could certainly be useful in many military roles, were technically not "necessary." It was due to "equity," as opposed to absolute necessity, that the officials recommended women be included in the draft. Further, as Justice White noted in his dissent, there was a dearth of evidence on the record to show that sufficient females would volunteer for military service, thereby filling available "female" slots—a contention made by Congress and also adopted by the majority.[51]

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50. *See, e.g.*, *id.* In one heated exchange, Senator Roger Jepsen repeatedly questioned an Office of the Secretary of Defense official on whether it was essential that females be registered:

> Senator Jepsen. I cannot get a yes or no answer. Either we have a military need or we don't. That is what we are talking about when we talk about registration and draft, military need to protect the national security of this country which we are mandated to provide in this country.
>
> So, if there is a military need for registering women, we should do it. If there is no military need for registering women—and you talk about social acceptance and a few other things in this country that for 204 years has made us the country that we are—this won't look good for the record—but, I fail to understand at all where you're coming from.
>
> I admit I am not at all objective nor am I about to be or will I ever be on registering women. If you did not draft women, would you be unable to meet the Department of Defense requirements with men?
>
> Mr. Danzing. If we did not draft women, we could meet the Department of Defense requirements with men.
>
> Senator Jepsen. So, is there a military need to register women?
>
> Mr. Danzig. Senator, let me suggest I think we can agree on the proposition that security of the Republic does not rest on our capacity to draft women. If we did not draft women, military needs could be met exclusively with men. If the question is can women do things that are useful for military purposes, the answer is clearly yes. I think that we would both agree with that.
>
> Senator Jepsen. Are you associating your advocacy of registering women with the military need?
>
> Mr. Danzig. I think that the case for registering women does not stem from a need to have numbers of people to man the military forces of the United States.
>
> Senator Jepsen. So, your advocacy for registering women has more to do with equity in response to pushy groups at this time?

Id.

51. In fact, this conclusion is highly doubtful based on other testimony before Congress. During the 1981 appropriations bill testimony, Chairman Stennis asked General Bernard Rogers, Chief of Staff of the Army, if there had been any problems in recruiting women. General Rogers admitted the Army fell short of its female recruitment goals. *See Department of Defense Authorization for Appropriations for Fiscal Year 1980: Hearing on*

According to the precedent set in *Craig v. Boren*,[52] the Court should have used an intermediate scrutiny analysis for a gender discrimination claim.[53] Under intermediate scrutiny, the government must generally show that it has an important interest in the regulation and that the law at issue bears a substantial relationship to that interest.[54] Here, then, the government should have shouldered the burden in showing that the exclusion of females from draft registration served an important interest and that the interest—in raising and supporting military forces, maintaining readiness, preserving national security, or other justification—was substantially related to excluding women from registration. As the dissenters insinuated, this would have been a highly difficult task.[55] Parsing numbers aside, the number of military roles that could have been filled by women in a draft scenario was certainly not zero (or even close to zero). Therefore, registering and conscripting women would have in fact helped further the government's interest even if women could not have been utilized at the same rate of male draftees. The only justification to exclude women from registration would have been "administrative convenience," an inadequate justification in precedent military cases.[56]

S. 428 Before the S. Comm. on Armed Servs., 96th Cong. 663 (1979) (statement of General Bernard W. Rogers, Chief of Staff, U.S. Army).

52. 429 U.S. 190, 208-09, 218 (1976).

53. *See also* United States v. Virginia, 518 U.S. 515, 530, 532-34 (1996) (holding that the all-male Virginia Military Institute violated the Equal Protection Clause by refusing to admit female applicants). In that case, Justice Ginsburg, writing for the majority, stated that the state must evince an "exceedingly persuasive justification" in a gender-based discrimination claim, ostensibly raising the bar for the government to successfully defend a challenge based under equal protection. *Id.* at 524.

54. *Craig*, 429 U.S. at 197.

55. *See* Rostker v. Goldberg, 453 U.S. 57, 83-85 (1981) (White, J., dissenting); *id.* at 90-91 (Marshall, J., dissenting).

56. *See* Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) (holding that "administrative convenience" was not adequate justification for the military to require female, but not male, service members to prove spousal dependency before being eligible for military dependent benefits). Furthermore, as the Selective Service system is a separate entity from the Department of Defense, the administrative burden of registering women, even if a certain proportion would not eventually be conscripted, would fall on the independently funded agency, not the military. *See About the Agency*, SELECTIVE SERV. SYS., https://www.sss.gov/About [https://perma.cc/37CL-G4X2] (last visited Jan. 6, 2018). Other concerns cited by Congress during its hearings, including additional resources being necessary to build facilities—most likely barracks and bathrooms—for female recruits, should also be considered under this "administrative convenience" category. *See Rostker*, 453 U.S. at 81. In *Rostker*, the majority also accepted Congress's finding that military training would be burdened by processing and training women who could not be used in the war effort. *Id.* This risk, if it did hold any merit, seems to be mitigated by the military's new Occupational Physical Assessment Test initiative, which is designed to adequately screen all potential personnel for physical qualifications related to their anticipated military specialty. *See infra* note 61 and accompanying text.

Instead, however, the Court seemed to avoid this analysis entirely by deeming men and women "not similarly situated" because of the combat exclusion policy.[57] Unfortunately, the Court failed to articulate exactly how it applied intermediate scrutiny in conjunction with military deference. In fact, the Court's highly deferential treatment convinced some lower federal courts that the established intermediate scrutiny standard of review did not apply in military sex-discrimination cases.[58]

C. Rostker *and the Elimination of the Combat Exclusion*

The Court has never readdressed the male-only draft registration question. Changes in Pentagon policy since that time, however, have significantly changed the landscape of gender roles in the military. In 2013, then-Secretary of Defense Leon Panetta announced the elimination of the military's combat restrictions for females.[59] The military branches fully implemented the policy by January 2016, opening approximately 220,000 jobs to female service members.[60] Many have argued that the Pentagon's recent policy change to allow women into combat positions has fatally undermined the analysis and holding in *Rostker*.[61] Given a healthy dose of deference by the Court, however, it is not difficult to fathom how the government could attempt to justify

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57. Justice Rehnquist cited *Schlesinger v. Ballard*, 419 U.S. 498 (1975), as justification for this categorization. *Rostker*, 453 U.S. at 67. In *Schlesinger*, the Court considered a due process challenge to a naval policy that allowed female officers more time than male officers to gain promotion to the next highest rank, a necessary step in remaining in active service. *Schlesinger*, 419 U.S. at 501-05. The *Schlesinger* Court held the policy to be constitutional because males and females were not similarly situated in naval service. The Court reasoned that the "different treatment of men and women naval officers . . . reflects not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." *Id.* at 508. Because women were not eligible for combat or sea duty, the policy was simply a reflection of the reality that female officers took longer to move up the military ranks. *See id.* at 510 n.13.

58. As a result, these courts diverged from the scrutiny standard established by *Craig* and appeared to use a markedly lower standard for gender inequality claims in military cases. *See, e.g.*, Lewis v. U.S. Army, 697 F. Supp. 1385, 1390 n.5 (E.D. Pa. 1988) ("Based on my reading of *Rostker* . . . I conclude that the standard outlined in *Craig* is not applicable to gender-based equal protection claims raised in the context of military affairs . . . ."); Rogers, *supra* note 44, at 182 n.81.

59. Dempsey Memorandum, *supra* note 7.

60. Matthew Rosenberg & Dave Phillips, *All Combat Roles Now Open to Women, Defense Secretary Says*, N.Y. TIMES (Dec. 3, 2015), http://www.nytimes.com/2015/12/04/us/politics/combat-military-women-ash-carter.html?_r=0Dec. 3, 2015.

61. *See, e.g.*, Russell Spivak & Adam Aliano, *G.I. Jane and the Selective Service: Equal Protection Challenges to Male-Only Selective Service in the Modern Military*, HARV. J. LEGIS. ONLINE NOTES (Aug. 5, 2016), http://harvardjol.com/2016/08/05/gi-jane-and-the-selective-service-equal-protection-challenges-to-male-only-selective-service-in-the-modern-military/ [https://perma.cc/WU4D-CKZ7].

the law's continued constitutionality. In an argument to uphold the MSSA, the government could submit that although almost all military positions are now available to women, they do not meet the physical requirements of combat positions in high proportions.[62] Therefore, following the reasoning in *Rostker*, women are not "similarly situated" with men because they would not be able to effectively perform in combat positions that would become necessary to fill in a draft-time scenario.[63]

As a threshold matter, if not for the precedent of *Rostker*, this would be a difficult argument to sustain. Many senior military officials have recently given support to the inclusion of women in draft registration plans. In a February 2016 Senate Armed Services Committee hearing, two of the armed forces service chiefs agreed that women should be included in Selective Service registration.[64] There

62. As the military has only recently allowed women to fill roles within the combat arms, no widespread data is currently available showing the attrition rate for females in combat arms training. The U.S Army has recently started a program to physically screen soldiers and officers before they enter training for their occupation-specific branch. The Occupational Physical Assessment Test (OPAT) is a gender-neutral assessment tool designed to ensure soldiers meet the minimum physical requirements for their anticipated Military Occupational Specialty (MOS). The physical standards were developed by testing the capabilities of currently serving service members within those MOS categories. Currently in its diagnostic phase, the OPAT is anticipated to be an Army-wide accessions requirement by summer 2017. Interview with Major Dan Hayden, Dir. of Military Accessions, U.S. Military Acad., in West Point, N.Y. (Dec. 13, 2016). The ability of women to successfully meet OPAT requirements among combat specialties would certainly be influential to future litigation.

63. Another possible basis of objection to including women in registration is the unequal rate at which women have sustained injuries in ground combat training, particularly due to load bearing. *See* Memorandum from Ash Carter, Sec'y of Def. & Chairman of the Joint Chiefs of Staff, on Implementation Guidance for the Full Integration of Women in the Armed Services (Dec. 3, 2015), https://www.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf [https://perma.cc/KC2L-7TAN]. Finally, Defense Secretary Ash Carter also acknowledged the potential issues with female service members operating in cultural environments with allies and partners who are "culturally opposed to working with women." *Id.*

64. *The Implementation of the Decision to Open All Ground Combat Units to Women: Hearing Before the S. Comm. on Armed Servs.*, 114th Cong. 63-64 (2016) (statements of General Robert Neller, Commandant of the Marine Corps; Ray Mabus, Secretary of the Navy; Patrick Murphy, Under Secretary of the Army; and General Mark Milley, Chief of Staff of the Army). Interestingly, the civilian military leadership in attendance was less supportive of the measure. Secretary of the Navy, Ray Mabus, and acting Secretary of the Army, Patrick Murphy, stated that there should be public debate on the issue. The relevant testimony included, in part:

> Senator McCaskill. . . .
>
> I think one of the questions we have to address now is registering for the selective service. As some of you may know, there was a Supreme Court decision back in 1981 when in fact the question was put in front of the Supreme Court whether women should be required to register for the Selective Service under current law. Justice Rehnquist wrote, "the existence of combat restrictions clearly indicates the basis for Congress's decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since

was no mention of the government's important interest in "flexibility." Moreover, support roles in the armed services greatly outnumber combat roles.[65] Such support roles are in medical, logistics, engineering, aviation, intelligence, transportation, finance, and other specialties.[66] Women have been serving in these roles for years, effectively and with distinction. In fact, women now make up approxi-

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> women are excluded from combat, Congress concluded they would not be needed in the event of a draft and therefore decided not to register them." So in other words, the rationale that Rehnquist used for saying there was no requirement of women to register for the Selective Service has now been eliminated.
>
> And I guess I want to ask all of you your sense of this. . . . And if you would briefly go down the line and give me your sense as to whether or not Congress should look at requiring selective service registration for all Americans.
>
> General Neller. Senator, it is my personal view that based on this lifting of restrictions for assignment to unit MOS, that every American who is physically qualified should register for the draft.
>
> Senator McCaskill. Secretary Mabus?
>
> Mr. Mabus. Senator, I think you correctly pointed out this needs to be looked at as part of a national debate, given the changed circumstances.
>
> The one thing you did say, not selective service-related, but that we do believe that this will open up recruiting, that more women will be interested in—I will just talk about the Marines—in the Marines because these last restrictions have been removed.
>
> Senator McCaskill. Secretary Murphy?
>
> Mr. Murphy. Senator, I believe that, yes, there should be a national debate and I encourage the legislative body to look at that. I would say that unlike the decision in 1981 where we are now in the longest war in American history over the last almost 15 years, that we have had over 1,000 women killed or injured in combat. Now, with this implementation, if you can meet the standard, you are on a team no matter what MOS it is. So I highly encourage that national debate, ma'am.
>
> . . . .
>
> Senator McCaskill. General Milley?
>
> General Milley. Senator, I think that all eligible and qualified men and women should register for the draft.
>
> Senator McCaskill. Well, I do too. I think it is the right thing going forward.

Id. Secretary of the Air Force, Deborah Lee James, has also publicly voiced support for including women in draft plans. Richard Lardner, *Air Force Secretary Supports Draft Registration for Women*, MILITARY.COM (June 4, 2016), http://www.military.com/daily-news/2016/06/04/air-force-secretary-supports-draft-registration-women.html [https://perma.cc/6YCV-E5UP].

65. Among enlisted Army personnel, for instance, support troops outnumber combat troops over 3:1. *See* Bureau of Labor Statistics, *Occupational Outlook Handbook: Military Careers*, U.S. DEP'T OF LABOR, https://www.bls.gov/ooh/military/military-careers.htm [https://perma.cc/X6Z3-LVFH] (last updated Oct. 24, 2017).

66. *See id.*

mately fifteen percent of the current active duty force.[67] It is clear that women, if included in draft registration plans, would perform necessary and important functions in future conflicts if conscription was necessary, adding to the overall effectiveness of military operations. Undeniably, there is no important interest gained by *not* including them, especially with low-cost physical screening measures in place for filling combat roles.[68] As seen in *Rostker*, however, the views of Congress and arguments put forth by government counsel have sometimes outweighed even the expert opinions of Pentagon officials. Even with the lifting of the combat exclusion rule, any future legal challenge to the MSSA will hinge on the Court's use of deference.

III. MILITARY DEFERENCE

Undoubtedly, judicial deference to Congress's findings played a significant role in the Court's holding in *Rostker*. Deference in military matters, in fact, occupies a noteworthy position in many historic Supreme Court decisions concerning both military and national security issues. In an early case, *Martin v. Mott*,[69] the Court considered a challenge by a New York citizen who was conscripted for service in the militia. The President authorized the conscription under a 1795 law which gave the Executive the power to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe."[70] Congress passed the statute under its constitutional power to call forth the militia in times of national need.[71] After failing to obey his conscription order, Mott was tried by court-martial.[72] Mott later challenged his conviction on several grounds, most notably that the President lacked authority under the statute to call forth the militia

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67. *See* OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF DEF., 2014 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 18 (2014), http://download.militaryonesource.mil/12038/MOS/Reports/2014-Demographics-Report.pdf [https://perma.cc/4938-45CW]. In 2014, there were approximately 200,000 females on active duty in the various armed service branches, out of a total of 1.3 million active duty personnel. The gender make-up varied substantially between services, however. For example, women comprised almost 19% of the Air Force, but less than 0.8% of the Marine Corps that year. *Id.* at 19-20.

68. *See supra* note 62. The argument to include women is especially persuasive considering approximately 75% of young Americans are ineligible to join the military because of obesity, lack of high school education, felony convictions, medical conditions, and appearance issues. *See* Miriam Jordan, *Recruits' Ineligibility Tests the Military*, WALL ST. J. (June 27, 2014), http://www.wsj.com/articles/recruits-ineligibility-tests-the-military-1403909945.

69. 25 U.S. (12 Wheat.) 19 (1827).

70. *Id.* at 28-29.

71. "To provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions." U.S. CONST. art. I, § 8.

72. *Martin*, 25 U.S. at 28.

at that time because there was no imminent danger of invasion.[73] The Supreme Court rejected Mott's contention under two main justifications. First was a consideration of the role of the judiciary in such a case. Justice Story, writing for the unanimous Court, stated that military service carried the unique requirements of immediate obedience to the decisions of the chain of command.[74] Judicial interference with these judgments, according to Story, would be dangerous and "subversive of all discipline."[75]

The Court went on to state a second justification for rebuffing Mott's position. Judicial review was unwarranted in the case because of separation of powers considerations and the fact that the Executive possessed unique expertise in the area of national security:

> [I]n many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.
>
> The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander in chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts.[76]

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73. *Id.* at 24.

74. *Id.* at 30.

75. Justice Story went on to state that:

> A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. . . . If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation.

Id. at 30-31.

76. *Id.* at 31.

In other words, the President's constitutional role vested him with broad discretion to act in the interests of national security, and the Court was not privy to the information necessary to second-guess the Executive's judgment in this area.

Looking at the relevant historical case law, beginning with *Martin* and stretching into modern day, military deference comes in a variety of "flavors."[77] In general, the Court's use of military deference primarily occurs in two, sometimes overlapping, ways.[78] First is a commitment by the Court to abide by the constitutional prescription of separation of powers, and an acknowledgement that the judiciary is the branch with the least expertise in national security and war-related issues. In these cases, the Court generally relies on the war power provisions of the Constitution. Under Article I, Section 8, Congress has the authority to declare war, fund and maintain the armed forces, and make rules governing the armed forces.[79] And under Article II, Section 2, the President is Commander in Chief of the armed forces.[80] Historically, this type of deference has been influential in convincing the Court to abstain from reaching the merits of certain cases as being outside the scope of proper judicial review.[81] In other

77. The usual deference granted by courts to executive statutory interpretation is not considered under the umbrella of military deference in this Article. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (outlining the test for when reasonable executive agency interpretations of statutes should be granted broad deference by courts); *see also* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 444-46 (2005) (arguing that administrative deference analysis under *Chevron* should be followed by courts when granting deference to factual military determinations). *See generally* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1086-87 (2008); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 194-96 (2006) (discussing the role that *Chevron*-type deference has played in modern national security cases).

78. *But see, e.g.*, Barney F. Biello, Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference A Standard of Review?*, 17 HOFSTRA L. REV. 465, 474-77 (1989) (delineating a total of four distinct bases of military deference).

79. U.S. CONST. art. I, § 8.

80. U.S. CONST. art. II, § 2.

81. Justice Story's opinion in *Martin* is a good example. *See also, e.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65, 82-83 (1857). In *Dynes*, a Navy seaman filed suit on the basis that he had been tried for a crime for which he had not been charged. *Id.* Refusing to reach the merits of his case, the *Dynes* Court reiterated Congress's military-related powers and held that as long as a court-martial was properly convened and had jurisdiction over the defendant, civil courts had no role in substantive review. *Id. But see* Reid v. Covert, 354 U.S. 1, 63-64 (1957) (holding that despite international treaties in effect to the contrary, Congress lacked the constitutional authority to subject civilians accompanying the armed forces overseas to the Uniform Code of Military Justice during peace-time, and therefore, infringing on their Fifth and Sixth Amendments rights); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121-22 (1866) (holding that the executive branch lacked the authority to try a citizen accused of assisting the Confederacy in a military tribunal when regular courts were in operation).

cases, this justification failed to persuade the Court to abstain completely but nonetheless played an important role in its level of review or in its balancing of interests.[82]

The "separation of powers" deference argument has been influential in multiple cases involving the military's infringement on civil liberties. Perhaps the most maligned case in this line is the World War II-era decision *Korematsu v. United States*,[83] in which the Supreme Court upheld the constitutionality of the military's geographical exclusion of persons of Japanese ancestry on the West Coast.[84] The Court purportedly balanced the interests of national security and the due process rights of Japanese Americans, many of whom were citizens. Ultimately persuasive for the Court were arguments from the military espousing the dangers of disloyal Japanese Americans, grounded in the fact that when given the opportunity to renounce allegiance to Japan subsequent to the exclusion, 5,000 Japanese Americans declined to do so.[85] Although the *Korematsu* Court announced a strict scrutiny standard of review,[86] the Court's holding displayed a readiness to ascribe overwhelming weight to the government's national security arguments, despite a lack of reasonable proof of actual exigency or concrete risk. As discussed below, the deference derived from separation of powers concerns is frequently used in the context of national security and has been pertinent in the Court's GWOT cases.

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82. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 380-81 (1968) (holding that a federal law criminalizing the burning of draft cards was constitutional as an incidental content-neutral restriction on speech, as the government had a substantial interest in maintaining the integrity of the Selective Service system).

83. 323 U.S. 214 (1944).

84. In *Korematsu*, Japanese persons who refused to obey the exclusion order, like Mr. Korematsu, or who did not have the luxury of moving elsewhere, were detained in military detention centers. *Id.* at 215-17. The Court limited its review to the exclusion order itself and declined to rule on the constitutionality of the detention centers. *See id.* at 221-24. *See also* Hirabayashi v. United States 320 U.S. 81, 105 (1942) (upholding a conviction for violating a military curfew order on Japanese Americans). *But see Ex parte* Endo, 323 U.S. 283, 302, 304 (1944) (holding the U.S. government could not indefinitely detain a citizen whom it did not suspect of subversion on the same day *Korematsu* was decided).

85. According to the military, it was impossible to segregate the disloyal Japanese American from the loyal in the immediate aftermath of Pearl Harbor, so necessity dictated total exclusion from strategically vulnerable West Coast areas. *See Korematsu*, 323 U.S. at 219.

86. The Court stated:

> It should be noted, to begin with, that all 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; racial antagonism never can.

Id. at 216.

The second main justification for deference is the recognition that the military, as a unique war-fighting institution, has specific needs for its own operation.[87] In *Mott*, for example, the Court emphasized the need for unquestioned obedience on the part of soldiers, necessitating a limited role for the civilian judiciary in interfering with a commander's decision.[88] As discussed above, the *Rostker* Court largely justified its deference on this basis.[89] This "military needs" or "military necessity" deference justification is common in cases involving service member's rights and has become more influential to the Court in fairly recent times.[90] The military necessity justification most frequently plays a role in interests-balancing analyses, allowing the government to regulate behavior that would be unconstitutional in the purely civilian context. In *Goldman v. Weinberger*,[91] for instance, the Court upheld a military regulation prohibiting Jewish service members from wearing a yarmulke in uniform, against a First Amendment challenge.[92] Likewise, in *Parker v. Levy*,[93] the Court upheld an Army officer's criminal conviction for using language critical of the Vietnam war.[94] In both cases, the Court recognized the unique nature of the military; specifically, the need for uniformity and obedience, and the importance of mission accomplishment. These same justifications can also be seen in civilian cases, although less frequently and with seemingly less potency. For example, in *Greer v. Spock*,[95] the Court upheld a military commander's

87. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("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.").

88. *See* Martin v. Mott, 25 U.S. (12 Wheat) 19, 30 (1827).

89. *See supra* notes 25-39 and accompanying text.

90. *See* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 261-62 (2000) (tracing the history of judicial deference and finding this type's most robust usage by the Burger Court).

91. 475 U.S. 503, 509-10 (1986).

92. *Id.* at 507 ("The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.").

93. 417 U.S. 733, 761 (1974).

94. The Court stated:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. at 758.

95. 424 U.S. 828 (1976).

right to forbid civilian political speeches and distribution of campaign literature on a military installation.[96] The Court held for the military, stating that because allowing political speech on post would be a detriment to military training, no constitutional violation had occurred.[97]

To complicate matters, the above doctrinal flavors of deference may be further parsed into the manner in which the Court applies such deference. As discussed above, military and national security-specific arguments variously convinced the Court to abstain from deciding the central merits of a case, played a decisive role in interest-balancing, and heavily swayed its conclusion when applying a given standard of review.[98] Another way in which deference colors military cases, usually concurrently with the ways above, is through military fact deference. Usually based in the Court's acknowledgement that Congress, the President, or the military itself possesses unique knowledge or expertise in certain matters, the Court refrains from judging the veracity, importance, or immanence of facts submitted by the government.[99] This manner of deference was evident in the majority opinion of *Rostker*, as Justice Rehnquist accepted Congress's finding that the need for "military flexibility" justified the total exclusion of women from draft registration plans. Fact deference was also dispositive in *Korematsu*, as the majority opinion accepted the fact that 5,000 Japanese Americans had refused to renounce loyalty to Japan as evidence that they played a serious threat to national security, justifying their wholesale exclusion from the West Coast.[100] The Court gave great deference not just to a quantifiable fact proffered by the government, but also to the nexus between that fact, the risk to national security, and subsequent need for military deference.[101] As discussed below, relative deference given by the Court to

96. *Id.* at 839-40.

97. *Id.* at 839 (noting that the installation had not discriminated based on the content of the anticipated speech—no political speech had ever been allowed on the installation). *But see* United States v. Flowers, 407 U.S. 197, 198 (1972) (holding that the military could not prohibit First Amendment activity in an area of post that had been "abandoned" to public use).

98. *See supra* notes 77-97 and accompanying text.

99. For a historical study of fact deference, see generally Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 915 (2006).

100. *See* Korematsu v. United States, 323 U.S. 214, 219-20 (1944). The majority came to this conclusion despite wording from the same military report that referred to Japanese persons as belonging "to 'an enemy race' " whose "racial strains are undiluted," plainly indicating racial bias. *Id.* at 236 (Murphy, J., dissenting).

101. *See* Masur, *supra* note 77, at 454-57 (noting that the *Korematsu* Court failed to meaningfully inquire into the military report and essentially abdicated its judicial role to the "expertise" of the military).

factual determinations by the military regarding the status and criminal liability of GWOT detainees was the cornerstone of those cases.[102]

Judicial deference in military matters has been decisive in numerous historic cases, many times to the detriment of the preservation of civil liberties. Partly as a result, the military deference doctrine itself has been heavily criticized as being contrary to founding American principles.[103] Despite its consistent use of military deference, and its dispositive effect in many controversies, the Court has never announced a test or set definitive guiding principles to be used in military deference cases. Indeed, the lack of guidance on this matter has led to varying approaches by lower courts.[104] Legal scholars and practitioners have expressed frustration over the lack of Supreme Court guidance on the military deference doctrine, calling for a more authoritative standard of review in such cases.[105]

IV. THE SUPREME COURT'S MODERN APPROACH TO MILITARY DEFERENCE

In anticipating the nature of deferential treatment most likely to be accorded in a modern constitutional challenge to the MSSA, it is instructive to outline a framework of the Court's modern approach to deference cases. What follows is a brief examination of recent Supreme Court cases related to military matters. All cases involve controversies that pit national security or military-centric concerns against the individual rights of civilians. Cases involving military issues where the Court made a narrow ruling—when its decision was based purely on statutory interpretation, for example—have been omitted.[106] Although the Court has continued to refrain from setting

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102. For a full exploration of the principles behind national security fact deference, see Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1392-93, 1395-98 (2009).

103. *See, e.g.*, Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1 (1992); Stephanie A. Levin, *The Deference That is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1012 (1990); Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference:* Weiss v. United States, 70 CHI.-KENT L. REV. 265, 266 (1994).

104. *See also* Chesney, *supra* note 102, at 1434 (categorizing the approach to national security fact deference, and understanding of its theoretical underpinnings, among courts as inconsistent and troubling). *See generally* Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 389, 397-98, 400, 402-403 (1984).

105. *See*, *e.g.*, Biello, *supra* note 78, at 481-82.

106. *See, e.g.*, United States v. Apel, 134 S. Ct. 1144, 1153 (2014). In *Apel*, the respondent was barred from Air Force property because of misconduct, but violated the order by demonstrating in the base's protest area, at one point throwing blood on a sign for the in-

guidelines for its reliance on military deference, some general principles and trends may be gleaned from this recent case law.

A. Hamdi v. Rumsfeld *(2004)*

In an early GWOT case, *Hamdi v. Rumsfeld*,[107] an American citizen detained in Afghanistan by U.S. forces challenged his domestic detention as an enemy combatant.[108] Hamdi challenged his confinement on several grounds, including that the government had violated his Fifth Amendment due process rights because he faced indefinite detention without trial or access to counsel.[109] In a four-person plurality opinion by Justice O'Connor,[110] partially supported by two other justices, the Court held that although the government did generally have the power to detain a combatant for the duration of hostilities in a conflict without criminal trial, the Fifth Amendment guaranteed an American citizen the right to challenge the military's combatant detention determination in front of a neutral decisionmaker.[111] As envisioned by the plurality opinion, this review process could accommodate national security and war-fighting concerns put forth by the government; namely, by allowing hearsay evidence and having a presumption favoring the military's initial determination.[112] Such a compromise, in the eyes of the Court, would ensure the appropriate balance of military concerns with the risk of erroneous deprivation of the detainee's liberty.[113]

The Court's consensus was a far cry from the government's advocated position, however. Justice O'Connor first rejected the govern-

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stallation. *Id.* at 1148. He was prosecuted under 18 U.S.C. § 1382 for reentering a military area after having been ordered not to do so by a military commander. *Id.* at 1149. At issue before the Court was whether the protest area, being a part of military property but at the site of an easement, fell under the auspices of the statute. *Id.* at 1150. The Court concluded that it did and upheld Apel's conviction. *Id.* at 1153. Because the lower court had not ruled on the constitutionality of whether the statute itself or as applied violated the First Amendment, the Court reserved the constitutional issue for further proceedings. *Id.*

107. 542 U.S. 507 (2004).

108. *Id.* at 511.

109. *Id.*

110. Justice Scalia dissented, in perhaps the least deferential opinion, arguing that in the absence of a formal suspension of the writ of habeas corpus, the government must afford Hamdi a regular criminal trial. *Id.* at 554-79 (Scalia, J., dissenting). In a separate dissent joined by Justice Ginsburg, Justice Souter disagreed with the plurality that Congress had authorized Hamdi's detention through the 2001 Authorization for the Use of Military Force. *Id.* at 540-53 (Souter, J., dissenting).

111. *Id.* at 533 (majority opinion). This holding was the impetus for Congress creating Combatant Status Review Tribunals, which themselves were challenged in the *Boumediene* case, discussed below.

112. *Id.* at 533-34.

113. *Id.* at 534.

ment's contention that the Court should abstain from deciding the merits of Hamdi's challenge because of separation of powers concerns.[114] In its brief, the government espoused a very limited level and scope of review over combatant status determinations made by the military.[115] In fact, the level of deference granted to the military should be greater than in the usual wartime scenario, argued the government, since the enemy intentionally refused to wear distinctive markings among the civilian population, therefore failing to distinguish themselves as combatants.[116] The government also asserted that if the Court expanded the factual examination of combatant status determinations, it would negatively impair the ability of troops on the ground to conduct military operations, as "[a]ttempting to recreate the scene of Hamdi's capture is inconsistent with the practical reality that the troops in Afghanistan are charged with winning a war and not preparing to defend their judgments in a U.S. courtroom."[117] Arguing further, requiring service members and allies to appear as witnesses for detainee status cases would not only detract from the war effort in Afghanistan, but would also be "demoralizing" for troops.[118]

In the plurality opinion, Justice O'Connor doubted the severity of the risks outlined by the government. In discussing the Court's role in impacting military operations, she wrote: "We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts."[119] Supporting this assertion, Justice O'Connor wrote that the *Hamdi* holding only applied in a long-term detention scenario, and the detainee protections outlined by the plurality did not apply to immediate situations of apprehension on the battlefield.[120] Noting that the government had stipulated that collecting and storing information about battlefield detainees was already part of military practice, the fact-finding burden created by the Court's independent-review mandate would be minimal, and interference with mission accomplishment therefore would be low.[121] As to the government's argument that military personnel would be distracted from war-fighting with the threat of future litigation about detention decisions, Justice O'Connor found

114. *Id.* at 597-98 (Thomas, J., dissenting).

115. The government had advocated a "some evidence" standard of proof for courts reviewing such determinations. *Id.* at 598.

116. Brief for the Respondents at 31, *Hamdi*, 542 U.S. 507 (No. 03-6696).

117. *Id.* at 11.

118. *Id.* at 12.

119. *Hamdi*, 542 U.S. at 534.

120. *Id.*

121. *Id.*

little merit because of the limited scope of the anticipated tribunals.[122] The narrow scope of these review tribunals—dealing solely with the circumstances of the detainee's detention—would not, in her opinion, infringe upon military war-fighting conduct or strategy.[123] Ultimately, the military-need arguments put forth by the government did not overcome the essential right of a citizen to meaningfully challenge the military's detention determination.[124] In the absence of an independent review process established by Congress and the military, courts would have the authority to conduct a meaningful consideration of detainees' due process rights through habeas review.[125]

Compared to historic cases, including *Korematsu*, the Court in *Hamdi* seemed much more willing to involve itself in the national security controversy despite the separation of powers concerns.[126] Further, Justice O'Connor evinced an unabashed readiness to call the executive branch's military expertise into doubt, downplaying the actual risk she perceived to military operations. The plurality's prescribed terms for future military proceedings also indicate a willingness to get intricately involved in the conduct of the military detention program. There was almost a complete rejection of fact deference as it related to operational dangers. As related to the legitimacy of executive combatant determinations, however, the plurality seemed to take a balanced approach. Notable was the Court's articulation of the proper level of deference to apply, which it linked to the likelihood that an American citizen's rights would be needlessly deprived.[127] Justice O'Connor's approach specifically counterbalanced

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122. *Id.* at 535.

123. *Id.* In outlining the Court's role in the challenge at hand, Justice O'Connor went on to explain:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Id.

124. *Id.*

125. *Id.* at 534.

126. *See* Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89 (2012). Scheppele argues that the GWOT cases represent a watershed in Supreme Court jurisprudence. Under the "old deference" of WWII cases, such as *Korematsu*, the Court generally erred on the side of preserving national security, permitting civil rights violations that would never pass constitutional muster in peace time. *Id.* at 96-108. Beginning with the GWOT cases, however, the Court took a much more active role in checking constitutional war powers. Despite this change in the Court's jurisprudence, however, the ultimate practical effects of the GWOT cases were not overwhelmingly meaningful for the detainees. *Id.* at 169.

127. *See Hamdi*, 542 U.S. at 535.

deference to military-centric arguments against civilian rights, ultimately concluding that the military justifications were not of a sufficient magnitude to completely overcome the liberty rights at issue.[128] Although the Court ultimately came to a middle ground through a balancing of interests, making some procedural concessions based on military need—including the protection of classified information—the plurality opinion was mostly lacking in deferential language. As a starting point for subsequent GWOT cases, however, *Hamdi* was a relative high point of deference for the Court.

B. Rasul v. Bush *(2004)*

On the same day as it decided *Hamdi*, the Supreme Court also handed down the decision in *Rasul v. Bush*.[129] At issue in that case was whether U.S. district courts had the jurisdiction to hear habeas corpus petitions from Guantanamo Bay detainees.[130] In the majority opinion, Justice Stevens examined the history of the habeas statute and Supreme Court precedent.[131] The Court, ultimately holding that district courts did indeed have jurisdiction, relied on narrow statutory reasoning.[132] Military deference did not appear to sway the Court in its 6-3 holding or play even a small role in its analysis. Although it is difficult to judge the Court's deference perspective in the case, as it was decided on narrow grounds, it is still important to note the lack of any mention of deference from the majority opinion. Not only did deference concerns not impact the majority opinion, but they were apparently of so little import as to not warrant discussion.

Dissenting in the case, Justice Scalia alleged that the majority misread precedent and dangerously disregarded risks that would ultimately burden the military.[133] Indeed, the government's brief

128. *See id.* at 534-35.

129. 542 U.S. 466 (2004).

130. *Id.* at 472-73.

131. *Id.* at 473-81.

132. The statute at issue was 28 U.S.C. § 2241(c)(3), which allows habeas petitions from those who claim to be held "in custody in violation of the Constitution or laws or treaties of the United States." *Id.* at 473.

133. Justice Scalia wrote:

> Today's carefree Court disregards, without a word of acknowledgment, the dire warning of a more circumspect Court in *Eisentrager*: "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the pres-

warned about the serious separation of powers issues inherent in resolving *Rasul* and potentially negative ramifications in intruding upon ongoing intelligence-gathering operations at Guantanamo Bay.[134] For Justice Scalia, the Court's departure from the precedent cases was especially troubling. According to Justice Scalia, the Court was essentially changing the war-fighting rules mid-game because the Executive relied on that precedent in creating the detention scheme at issue.[135]

> tige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States."

Id. at 499 (Scalia, J., dissenting) (quoting Johnson v. Eisentrager, 339 U.S. 763, 778-79 (1950)).

134. In its brief, the government specifically linked the judiciary's interference with resulting negative effects to the military's effort to wage war on terror, stating that:

> Exercising jurisdiction over habeas actions filed on behalf of the Guantanamo detainees would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters. The detention of captured combatants in order to prevent them from rejoining the enemy during hostilities is a classic and time-honored military practice, and one that falls squarely within the President's authority as Commander in Chief.

Brief for the Respondents at 42, *Rasul*, 542 U.S. 466 (Nos. 03-334 & 03-343). The government went on to warn that:

> The intelligence-gathering operations at Guantanamo are an integral component of the military's efforts to "repel and defeat the enemy" in the ongoing military campaign being waged not only in Afghanistan but around the globe. Any judicial review of the military's operations at Guantanamo would directly intrude on those important intelligence-gathering operations. Moreover, any judicial demand that the Guantanamo detainees be granted access to counsel to maintain a habeas action would in all likelihood put an end to those operations—a result that not only would be very damaging to the military's ability to win the war, but no doubt be "highly comforting to enemies of the United States."
>
> More generally, exercising jurisdiction over actions filed on behalf of the Guantanamo detainees would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas, second-guessing the military's determination as to which captured aliens pose a threat to the United States or have strategic intelligence value, and, in practical effect, superintending the Executive's conduct of an armed conflict-even while American troops are on the ground in Afghanistan and engaged in daily combat operations.

Id. at 43 (citations omitted).

135. Justice Scalia wrote:

> Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of com-

C. Hamdan v. Rumsfeld *(2009)*

The Supreme Court considered two more landmark detainee cases following *Rasul*. In *Hamdan v. Rumsfeld*,[136] Salim Ahmed Hamdan—former chauffeur for Osama bin Laden—challenged the legality of the U.S. military commission process, designed to try select Guantanamo Bay detainees for war crimes.[137] The government argued that the Court should apply deference in several distinct ways. As a threshold matter, the government submitted that the Court should apply judicial comity to the case and abstain from intervening in an on-going military proceeding.[138] In examining the arguments which would weigh towards abstention, the Court followed the factors from *Schlesinger v. Councilman*.[139] As the Court stated: "[M]ilitary discipline and, therefore, the Armed Forces' efficient operation, are best served if the military justice system acts without regular interference from civilian courts."[140] This factor did not weigh in the Government's favor in *Hamdan*, according to the Court, because Hamdan was not a service member, and therefore military discipline concerns did not apply.[141] In his dissent, Justice Scalia noted the Court's seeming failure to examine other comity considerations at issue in *Councilman*; namely, whether the case involved other "military necessities" or "unique military exigencies," which should weigh in the Court's interference calculation.[142] The majority viewed *Councilman* narrowly, declining to look at broader deference considerations.

> batants at Guantánamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. . . . For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort.

Rasul, 542 U.S. at 506 (Scalia, J., dissenting).

136. 548 U.S. 557 (2006).

137. *See id.* at 567-70.

138. *Id.* at 585.

139. 420 U.S. 738, 758 (1975) (holding that federal courts should not intervene in a criminal case when a service member has failed to exhaust his remedies in the military justice system).

140. *Hamdan*, 548 U.S. at 586 (citing *Councilman*, 420 U.S. at 752).

141. *Id.* at 587. The Court did acknowledge that abstention may be justified in some future cases where, for example, detainees were seeking review of an ongoing military commission when that commission was convened in proximity to the battlefield. *Id.* at 590.

142. *Id.* at 673 (Scalia, J., dissenting) (citing *Councilman*, 420 U.S. at 757). Justice Scalia noted that while the issue in *Councilman* was whether a military officer could be tried in military court for selling marijuana off base, the issue in *Hamdan* involved the petitioner "joining and actively abetting the murderous conspiracy that slaughtered thousands of innocent American civilians without warning on September 11, 2001." *Id.* In his opinion, the weighing of military necessity by the majority in *Hamdan* was woefully inadequate considering the precedent of *Councilman*.

Interestingly, on the issue of comity, the Court found great similarity between *Hamdan* and *Ex parte Quirin*.[143] *Quirin* involved eight would-be German saboteurs who were captured on U.S. soil after traveling by U-boat and landing in Long Island, New York and Florida.[144] Confined and facing military commission for espionage, the saboteurs filed habeas corpus petitions in a U.S. district court.[145] Refusing to abstain from the case, the Supreme Court convened a special term to consider the case on expedited review.[146] The *Quirin* Court stated that review was appropriate because:

> [I]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay.[147]

In *Quirin*, the Court implicitly weighed the interests of civilian rights with military need, determining that the countervailing liberty interests—even those of foreign nationals—overcame military arguments for comity.[148] Likewise, the *Hamdan* majority found those factors compelling and abstention to be inappropriate in the case.

Turning to the merits of Hamdan's challenge, the Court considered the legality of the U.S. military commission as designed by the executive branch. The procedures for military commissions, the Court determined, were dictated by both domestic and international law. The Court interpreted Article 36 of the Uniform Code of Military Justice (UCMJ)[149] as requiring that such commissions must, if "practicable," follow the usual procedures of federal courts and be uniform to other proceedings under the UCMJ—namely, courts-martial.[150] Hamdan argued that the procedural rules of the commissions deviated substantially from both federal and military court procedures in that they permitted the accused to be excluded from the proceedings,

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143. 317 U.S. 1 (1942).

144. *Id.* at 21.

145. *Id.* at 18.

146. *Id.* at 19-20.

147. *Hamdan*, 548 U.S. at 588 (second alteration in original) (quoting *Quirin*, 317 U.S. at 19).

148. *See Quirin*, 317 U.S. at 25. Considering the merits of the case, the Supreme Court found that the pending charges and military tribunal were constitutional. All eight German saboteurs were convicted at military commission and sentenced to death. President Roosevelt later commuted two of the sentences. *See* Aileen Jacobson, *Nazi Saboteurs in the Amagansett Sands*, N.Y. TIMES (Sept. 12, 2014), https://www.nytimes.com/2014/09/14/nyregion/june-13-1942-saboteurs-land-in-amagansett-on-view-in-east-hampton.html.

149. 10 U.S.C. § 836 (2012).

150. *Hamdan*, 548 U.S. at 620.

denied access to certain evidence, and applied substantially different evidentiary rules.[151]

Through an executive order, President Bush determined that it was "impracticable" to apply federal district court rules and principles of law to U.S. military commissions.[152] As to that determination, the Court "assume[d] that complete deference [was] owed."[153] However, as the President never made a similar declaration of impracticability for the rules of courts-martial, and because the Court found nothing on the record which demonstrated that it would be impracticable to apply such rules in Hamdan's case,[154] the commissions failed the requirements of Article 36. Even if the majority would have considered the President's impracticality justifications as relevant for the purpose of diverging from federal court procedure, the Court stated that the security justifications found therein were too general.[155] Because the President only noted the dangers of "international terrorism" in broad terms, it was not sufficiently specific to satisfy the Court.[156]

In his dissent, Justice Thomas disagreed with the majority's assertion that the executive branch had not announced an "impracticality" need to diverge from Article 36's requirements.[157] He would find effective declarations made by the Secretary of Defense and Undersecretary of Defense for Policy.[158] In response to Justice

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151. *Id.* at 621.

152. *Id.* at 623.

153. *Id.*

154. The Court stated:

> There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming, *arguendo*, that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

Id. at 623-24 (footnotes omitted).

155. *Id.*

156. *Id.*

157. *Id.* at 713 (Thomas, J., dissenting).

158. Justice Thomas wrote:

> On the same day that the President issued Military Commission Order No. 1, the Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely the federal court system . . . and the military court system," and that "[t]he commissions are intended to be different . . . because the [P]resident recognized that there had to

Thomas, the majority stated that it was unwilling to grant deference to comments made to the media by such officials.[159] Going further, the majority remarked that, regardless, the comments made by those officials were not convincing because they also lacked specificity regarding the dangers of using usual court-martial procedures for detainees and instead only articulated generalized national security concerns and the issue of disclosing classified material in court.[160] Those justifications were deemed inadequate, however, as the majority considered the deficiencies in commission procedure to far exceed the scope of those bases.[161]

Here, the *Hamdan* majority set a limit on the nature and impact of persuasive military needs justifications—refraining from accepting a "necessity" argument made to the media by defense officials—in addition to mandating that the justification itself have a strong nexus to the challenged military action at issue. In essence, the majority required the government to make specific connections between articulated military concerns and deficiencies in commission procedure. As it was, the military justifications were inadequately general and, therefore, not palatable for the majority.

Justice Stevens, writing for the majority, also noted that one of the fundamental rights protected by military proceedings was the right to be present.[162] Withholding judgment on whether that difference was "contrary to or inconsistent with" the UCMJ, as disallowed by Article 36, the Court did state that "the jettisoning of so basic a right cannot lightly be excused as 'practicable.' "[163] In making this pronouncement, the Court appeared to make a comment on due deference, making it contingent on the individual liberty at stake. Because of the gravity of the individual right at issue, the required

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> be differences to deal with the unusual situation we face and that a different approach was needed." The President reached this conclusion because "we're in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States. . . . [T]here was a constant balancing of the requirements of our war policy and the importance of providing justice for individuals . . . and *each* deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike the balance between individual justice and the broader war policy."

Id. (alterations in original) (citations omitted).

159. *Id.* at 623 n.52 (majority opinion).

160. *Id.*

161. *Id.*

162. *Id.* at 624 (citing 10 U.S.C. § 839(c) (Supp. V 2000)).

163. *Id.*

showing of military need was correspondingly great.[164] The Court thus established an apparent sliding scale of deference—where less deference was due, and a requirement for a showing of military necessity was high—when the government has potentially infringed on a fundamental liberty right.

In his dissent, Justice Scalia took issue with the majority's rejection of military necessity altogether as forming the basis of the commissions. In criticizing Hamdan's conspiracy charge, the majority stated that "[t]he charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity."[165] The majority went on to explain that Hamdan's commission was not convened by a commander on the battlefield, but a retired general stationed at Guantanamo Bay.[166] Further, according to Justice Stevens, the conspiracy charge was not grounded in any acts committed in the heat of battle or the theater of war, wherein the military would have a significant interest in trying him swiftly.[167] Finally, according to the record itself and noted by the majority, it took the military almost three years to charge Hamdan after detaining him.[168] These factors indicated a complete lack of exigency and military need for the majority. For Justice Scalia, however, the majority's view of military necessity differed remarkably from that of Congress and the Executive. In passing the 2001 Authorization for the Use of Military Force, Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided" the terrorist attacks that occurred on September 11, 2001.[169] Subsequently, President Bush issued an executive order authorizing the detention of personnel captured in the course of the conflict and establishing military commissions to try detainees for war crimes.[170] For Justice Scalia, it was audacious for the Court to second-guess both Congress and the President on the

164. The Court went on to state that the Commissions system also violated international law—Common Article 3 of the Geneva Conventions—because the Commissions were not regularly constituted courts. *Id.* at 632. Therefore, even if the Executive had made an impracticality determination in compliance with Article 36 of the UCMJ, the Commissions as designed would likely still have been unlawful according to the Court.

165. *Id.* at 612.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 554.

170. *Id.* at 674 (Scalia, J., dissenting) (citing Military Order of Nov. 13, 2001, 3 C.F.R. § 1(e) (2001)).

issue of military necessity.[171] The majority, then, had wholeheartedly rejected appeals to both separation of powers and military necessity deference.

The Court in *Hamdan* seemed to take a much less deferential approach to the government's position than it had in *Hamdi*. For the majority, less deference was due because of the serious civil liberty concerns involved. The rejection of deference by the *Hamdan* Court appears to be at least partly a result of the length of time that the military had confined detainees. Justice Stevens pointedly rejected military necessity arguments in considering the commissions, remarking that Hamdan and other detainees were now distanced from the conflict by both time and geography.[172] Comparing the result with the outcome in *Hamdi*, it seems that not only the notion of military necessity but the persuasive role of deference itself decreased along with the relative decrease in exigency and uncertainty within the war on terror. As a result, the majority in *Hamdan* gave little regard to those deference arguments. Even if military needs justifications had been valid at some point during the conflict, the bases for such justifications grew stale with time and distance. Through its analysis, the Court directly refuted the relevance of military necessity to the legal issues at hand—as the nexus between the commissions and warfighting itself was weak—and the appeal to deference was undermined.

D. Boumediene v. Bush *(2008)*

In the wake of the Court's GWOT decisions, Congress continued its efforts to curtail the ability of Guantanamo Bay detainees to enter U.S. district courts. In the Military Commissions Act of 2006 (MCA), Congress stripped away jurisdiction from U.S. district courts to hear habeas corpus petitions from detainees at Guantanamo Bay completely.[173] In *Boumediene v. Bush*,[174] military detainee Lakhdar Boumediene challenged the constitutionality of the MCA, alleging that it infringed on his right to habeas corpus.[175] Where the holding in *Rasul* had been based on statutory habeas jurisdiction, now the more pressing issue of detainee constitutional habeas rights was at issue. The government argued that the law was constitutional because detainees held at Guantanamo Bay did not have a constitu-

171. *Id.* at 674-75 (Scalia, J., dissenting).

172. *Id.* at 612.

173. Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §§ 948-950 (2012)).

174. 553 U.S. 723 (2008).

175. *Id.* at 732.

tional right to habeas corpus.[176] Even if some limited right did exist, the government maintained that military tribunals established to determine the legal status of detainees—Combat Status Review Tribunals (CSRTs)[177]—were adequate and effective substitutes for habeas petitions.[178]

In determining the reach of the constitutional right of habeas corpus, the five-Justice majority relied on the precedent of *Johnson v. Eisentrager*,[179] a World War II-era case involving German soldiers who had been tried extraterritorially by the U.S. military commission. The *Eisentrager* Court concluded that three factors should be considered in determining whether a detained person held outside of the United States may have the right to bring a habeas petition in a U.S. district court: (1) the citizenship and status of the detainee, and the sufficiency of the process that made that determination; (2) the nature of the location where the detention took place; and (3) the obstacles that would be created if detained personnel were granted entitlement to the writ.[180] The three-factor test on which the Court relied balanced military necessity (i.e., how near to the heat of battle the apprehension and tribunal took place, and possible negative ramifications on the mission) with the detained person's liberties. In other words, whether the tribunal to determine the detainee's status adequately protected those liberties.

It was on the third prong of the *Eisentrager* factors that the government argued most vociferously that deference to the military should be observed. In its brief, the government advocated an approach aligned with *Eisentrager*, in which the Court acknowledged that granting the writ to aliens held abroad would "hamper the war

176. *Id.* at 739. The right of habeas corpus may only be suspended by Congress in limited circumstances circumscribed by the Constitution. The Suspension Clause states, "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." U.S. CONST. art. I, § 9, cl. 2.

177. The tribunals were designed to make determinations regarding the detainees' legal status—that is, if they were combatants that could be held for the duration of hostilities under domestic and international law. All Guantanamo Bay detainees were eventually evaluated by a CSRT—unlike military commissions, which were designed to try detainees for war crimes and used fewer than a dozen times as of early 2017. The CSRT tribunals were created by Congress after the due process guidelines set forth by Justice O'Connor in *Hamdi*. Although the *Boumediene* Court did not directly overrule *Hamdi*, it is difficult to reconcile the two cases.

178. *Boumediene*, 553 U.S. at 771-72.

179. 339 U.S. 763 (1950) (holding that the German soldiers did not have a right to bring habeas petitions in U.S. Courts as they had been captured in China and kept in German detention facilities).

180. *Boumediene*, 553 U.S. at 766 (citing *Eisentrager*, 339 U.S. at 777).

effort and bring aid and comfort to the enemy."[181] Additionally, relying on *Eisentrager*,

> [I]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from military offensive abroad to the legal defensive at home.[182]

While acknowledging that granting the habeas right to Guantanamo Bay detainees would force the government to incur additional monetary and administrative costs, as well as divert military personnel from important duties, the 5-4 majority did not find these concerns to be controlling in *Boumediene*. In the majority opinion, Justice Kennedy found that the government failed to provide a persuasive argument that the military mission would be compromised if detainees were granted the habeas right.[183] Focusing primarily on the

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181. Brief for the Respondents at 19, *Boumediene*, 553 U.S. 723 (Nos. 06-1195 & 06-1196).

182. *Id.* at 19-20.

183. The Court similarly dismissed concerns about the safety threat posed by the detainees themselves, as well as the possible repercussions on American-Cuban relations:

> The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.
>
> The situation in *Eisentrager* was far different, given the historical context and nature of the military's mission in post-War Germany. . . . In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerilla fighters, and 'were-wolves.' "
>
> Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.
>
> There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. Under the facts pre-

absence of security threats faced by Guantanamo Bay, the Court declined to accept a blanket—presumably unlimited by geography—national security justification from the government. The relatively stable security situation at Guantanamo Bay differed markedly from the dangerous situation in post-war Germany, where the persons in *Eisentrager* were detained, further curbing the government's necessity argument.[184] In his dissent, Justice Scalia strongly criticized the majority for substituting the judgment of both the executive and legislative branches in matters of national security with its own.[185]

By reframing the national security concerns carried by the case as limited by the location of the detainees, rather than by the geography of the global war on terror itself, the majority undercut the government's military needs justification. As in *Hamdan*, the Court faulted the government's arguments as being too general and lacking a basis in both gravity and exigency. Although military personnel may be burdened by being heralded into U.S. district court as a result of a detainee's constitutional right to review, the Court did not consider that to impact the overall military mission substantially. It was convinced neither by administrative and financial burdens on the military nor by arguments that granting the right to detainees would seriously injure the morale of troops.[186] In short, contrary to the government's contentions, the majority found that allowing detainees' recourse in U.S. courts did not actually pose substantial or pressing risks to military operations.

The Court did not completely neglect the deference arguments put forth by the government, however, and went on to caveat its holding for reasons of military necessity. For one, if the detention facility at issue were located more closely in proximity to a theater of war, or if

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> sented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them.

Boumediene, 553 U.S. at 769-70 (citations omitted).

184. *Id.*

185. According to Justice Scalia:

> The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

Id. at 831 (Scalia, J., dissenting) (citations omitted).

186. *See supra* notes 181-83 and accompanying text.

the Executive faced some kind of domestic exigency, the Court expressed an openness to more heavily weigh a military deference argument from the government.[187] Furthermore, the Court stated that reasonable time should be granted to the military in cases involving foreign citizens who are detained abroad, and a U.S. district court should decline to entertain such a case in the immediate aftermath of detention.[188] Moreover, in its initial screening and detention determination, the government is due strong deference.[189] In considering future cases, continued the Court, an important factor is whether there are secondary processes available that meaningfully check the government's power.[190] Deference did play an influential role, then, in the Court offering the government some forms of future leeway in acting in conformity with the its ruling.

After concluding that Guantanamo Bay detainees did, in fact, have the constitutional right to habeas corpus, the Court also held that the CSRTs established by the military were not effective substitutes for habeas petitions.[191] The CSRTs did not guarantee detainees the assistance of counsel, the government's case was granted a presumption of validity, detainees were limited in calling favorable witnesses, and the tribunal itself did not offer the full array of procedural outcomes that a habeas petition could.[192] Justice Kennedy made a nuanced pronouncement of what habeas hearings must entail for these persons, however, and allowed some compromises in order to reduce the burden that such proceedings would place on the military. Accommodations may include consolidation of habeas claims to one U.S. district court and established procedures to limit the dissemination of classified information.[193] These accommodations, however, did not appear to resolve the issue of requiring active duty military witnesses to appear in court—perhaps having been pulled from the field of battle—a problem argued by the government in its brief and subsequently emphasized by Justice Roberts in his dissent.[194]

In dicta, the Court went on to describe, in sweeping terms, the balance between judicial review and national security. In examining its own role in maintaining this balance, the Court also focused on a

187. *Id.* at 770.

188. *Id.* at 793.

189. *Id.* at 793-94.

190. *Id.* at 779. Although the MCA allowed detainees recourse in filing reconsideration petitions with the D.C. Circuit Court, the petitions would offer a level of review which was less comprehensive than habeas.

191. *Id.* at 792.

192. *Id.* at 783-84.

193. *Id.* at 795-96.

194. *See id.* at 816 (Roberts, J., dissenting).

third consideration—individual liberty. The Court stated that while national security depends upon the military, it is also dependent on personal liberty and freedom from erroneous deprivations of freedom.[195] In evaluating its own judicial role as an important element of national security and ultimately as a check to the other two branches, the Court emphasized the importance of taking into account the individual liberty at stake. Again, the Court considered individual rights as underpinning its determination to override the Commander in Chief and Congress, granting them little separation of powers deference in the process.

In explaining why the Court was not usurping or undermining the role of Commander in Chief, the majority noted that within the constitutional separation of powers structure, the judicial authority to hear challenges to executive determinations of combatant detention were both supremely "legitimate" and "necessary."[196] That power was even more essential because Boumediene had been in custody for over six years.[197] Not only was individual liberty at stake, but the magnitude of that liberty's deprivation was substantial and long-lasting. This fact was important to the Court in resolving the separation of powers issue in the national security arena.[198] Again, the Court emphasized the importance of individual rights when considering the degree of deference due to the Executive.

Taken as a whole, the GWOT cases show a general unwillingness by the Court to avoid the merits of national security cases because of separation of powers concerns. The level of deference granted to government arguments was issue- and fact-specific, but several principles emerged. The level of relative deference given to both Congress and the military appeared to shrink when the nexus to exigency was low, and also when the individual rights at issue were serious. Most importantly, however, the Court showed a consistent practice of closely examining the "military need" facts offered by the government, particularly as they related to war-fighting concerns, often ultimately disagreeing with the national security risks involved and the likelihood of harm to military operations.

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195. *Id.* at 797.

196. *Id.*

197. *Id.*

198. Previously in the decision, the Court appeared to hint that it took umbrage at the fact that the detention facility at Guantanamo Bay had been utilized for the very purpose of evading judicial review. *See id.* at 765-66.

E. Rumsfeld v. Forum for Academic & Institutional Rights, Inc. *(2006)*

The doctrine of military deference was also at issue in several cases involving matters far removed from the war on terror. The Court reaffirmed its own commitment to military deference apart from the context of detainee rights in *Rumsfeld v. Forum for Academic & Institutional Rights*.[199] In that case, the Forum for Academic and Institutional Rights (FAIR)—an association composed of law schools and law professors—challenged the constitutionality of the Solomon Amendment.[200] The Amendment required institutions of higher learning to give equal campus access to military recruiters and other employers or face a loss of federal funding.[201] Although the Solomon Amendment allowed exemptions for institutions with a long-standing tradition of pacifism based on religious beliefs, it was otherwise universally reaching. Alleging a First Amendment violation, FAIR argued that the Solomon Amendment forced institutions to choose between freely exercising their right to decide whether to accommodate, and sometimes disseminate, a military recruiter's message or receive federal funding.[202] The group was primarily concerned with the military's former "Don't Ask Don't Tell" program, which violated many school antidiscrimination policies.[203]

Beginning its discussion on the constitutionality of the Solomon Amendment, the unanimous Court[204] cited *Rostker*, stating that " 'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies."[205] Although Congress chose to control military recruiter access on campuses through its spending power rather than through direct legislation, in the Court's view, this fact did not reduce the degree of deference due to Congress.[206] In fact, the Court concluded that the requirements out-

199. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (*FAIR*), 547 U.S. 47 (2006).

200. *Id.* at 53.

201. 10 U.S.C. § 983 (2000). The original law stated only that schools must allow military recruiters access to their campuses. However, following Department of Defense interpretation and practice, Congress amended the statute to require equal treatment between military recruiters and other employment recruiters. *See* H.R. REP. No. 108-443, pt. 1, at 6 (2004). Under the statute, if even one part of a university—such as a law school—refused to allow recruiters equal access, the entire university would lose funding. 10 U.S.C. § 983(b) (2012).

202. *FAIR*, 547 U.S. at 53.

203. *Id.* at 68.

204. Justice Alito did not take part in the decision.

205. *FAIR*, 547 U.S. at 58 (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

206. *Id.* at 58-59.

lined in the law could have constitutionally been mandated by Congress, even absent its spending power.[207]

In general, the Court stated that the Solomon Amendment regulated conduct and only incidentally impacted speech.[208] Although schools might be required to send e-mails and print flyers advertising a recruiter's presence, as it would do these things for another employer, the inherent speech elements would be only incidental to the conduct.[209] Moreover, according to the Court, this situation was not similar to precedent cases where the Court found "forced speech" as objectionable, such as forcing a student to pledge allegiance to the flag,[210] or mandating that a Jehovah's Witness display a religiously offensive message on a license plate.[211] In fact, positioning FAIR in line with those First Amendment cases, wrote the Court, had the potential to trivialize the serious freedoms protected by those precedents.[212] In any case, the law did not dictate the content of speech and did not result in a requirement that schools endorse a specific message.[213] Importantly, noted the Court, schools were free to express opinions contrary to military policy.[214] Disagreeing with a central argument put forth by FAIR, the Court also stated that schools could not comply with the law by equally excluding all employment recruiters that violated school nondiscrimination policies.[215]

In the lower ruling, the Third Circuit Court of Appeals held that the Solomon Amendment's burden on speech was greater than necessary to further the government's interest in military recruiting.[216] The Third Circuit reasoned that the military had alternative means to accomplish its goal, such as loan repayment programs and media advertisements.[217] In response, the Supreme Court first disagreed with the Third Circuit's legal standard, stating that an incidental burden on speech was permissible as long as the neutral law promoted a substantial government interest that would be achieved

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207. *Id.* at 59.

208. *Id.* at 62.

209. *Id.*

210. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the First Amendment prohibited schools from forcing students to recite the pledge of allegiance).

211. Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that New Hampshire could not force residents to bear a license plate with the state motto "Live Free or Die").

212. *FAIR*, 547 U.S. at 62.

213. *Id.* at 65.

214. *See id.*

215. *Id.* at 56.

216. *Id.* at 67.

217. *Id.*

less effectively without the regulation.[218] Here, the law promoted the substantial government interest in raising and supporting the Armed Forces, and the law added to the effectiveness of military recruitment.[219] Then, disagreeing with the outcome of the Third Circuit, the Court stated that the fact that there may be other adequate ways of raising an army and providing for a navy was a separate question and a judgment best made by Congress, not the judiciary.[220] The Court ultimately upheld the constitutionality of the Solomon Amendment.

Although the unanimous Court referred to military deference at the outset, the opinion is not clear on how or to what degree deference was influential in its holding. The legal test used by the Court in *Rumsfeld*, as well as other incidental speech infringement cases, came from another military case in which deference was used.[221] Notably, *Rumsfeld* involved the free speech interests of institutions, rather than individuals. The Court also stressed the idea that universities possessed the meaningful choice to violate the terms of the law and face loss of federal funding. The individual liberty interest at stake in the case, then, was quite limited.

F. United States v. Alvarez *(2012)*

Conversely, the Court did not favor military deference arguments in another recent First Amendment case where more serious individual rights were implicated, *United States v. Alvarez*.[222] During a municipal board meeting in California, new board member Xavier Alvarez falsely stated that he was a retired Marine and had been awarded the Congressional Medal of Honor.[223] Alvarez was later convicted in federal court for violating the Stolen Valor Act of 2005,[224] which made it a crime to falsely represent having been awarded any military decoration or medal.[225] In his appeal, Alvarez argued that

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218. *Id.*

219. *Id.*

220. *Id.* (first citing U.S. CONST. art. I, § 8, cls. 12-13; then citing Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981)).

221. *See* United States v. O'Brien, 391 U.S. 367 (1968).

222. 567 U.S. 709 (2012).

223. *Id.* at 713-15.

224. *Id.*; *see* 18 U.S.C. § 704 (2006), *amended by* 18 U.S.C. § 704 (2013).

225. The law stated, in relevant part:

> (b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.

his lie was protected speech under the First Amendment, and therefore, the portion of the Stolen Valor Act under which he was convicted was unconstitutional.[226] The Ninth Circuit Court of Appeals reversed his conviction.

In its brief to the Supreme Court, the government relied heavily on the U.S. military's strong interest in prohibiting deceptive speech about military awards.[227] The law itself listed congressional findings that outlined specific concerns regarding false decoration claims:

> SEC. 2. FINDINGS. Congress makes the following findings:
>
> (1) Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
>
> (2) Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
>
> (3) Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.[228]

In addition to harming the prestige and recognition due to current service members and veterans, the government argued that false award representations had pernicious effects on the operation of the military. Citing testimony of a high-ranking military official before the House Armed Services Committee, the government contended that false representations of that kind undermined "morale, mission accomplishment, and esprit de corps within the military."[229] In detailing its compelling interest in the law, the government also asserted that the integrity of the military awards program was perhaps even more essential during times of conflict because such decorations encouraged brave deeds and helped sustain troops in the face of personal loss.[230] Noting why the Stolen Valor Act was necessary to

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> (c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.—(1) IN GENERAL—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

18 U.S.C. § 704 (2006).

226. *Alvarez*, 567 U.S. at 715.

227. Brief for the United States, *Alvarez*, 567 U.S. 709 (No. 11-210).

228. 18 U.S.C. § 704 (2006), *amended by* 18 U.S.C. § 704 (2013).

229. Brief for the United States, *supra* note 227, at 14.

230. In its brief, the government contended:

accomplish the government's goal in protecting the integrity of the awards system, the government cited Congress's findings that fraudulent claims about the receipt of military decorations damage the reputation of those decorations.[231] The government thus offered strong "military needs"-based deference justifications to the Supreme Court.

The Court considered these claims in its opinion, but in a 6-3 decision ultimately held that the charged provision of the Stolen Valor Act was an unconstitutional limitation on speech. In a plurality opinion joined by three other Justices, Justice Kennedy stated that the Act amounted to a content-based restriction on speech and that deception was not one of the several discrete categories of traditionally nonprotected speech.[232] As to the content-based strict scrutiny analysis, although the government's interest in ensuring the respect and esteem of service members was "beyond question," the regulation ultimately did not pass muster under exacting scrutiny.[233] Strict scrutiny required the government to not only prove a compelling interest but also to prove that the restriction was actually necessary to achieve its interest.[234] The government, according to the plurality, failed to prove that false claims such as those made by Alvarez actually tended to dilute the perception of military awards in general.[235] A common-sense causal link, articulated by the military and endorsed by Congress, was not sufficient for the Court. The plurality

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> The award of military honors is particularly important during wartime. For instance, as General George C. Marshall wrote in describing his advocacy during World War II for the creation of the Bronze Star, the medal would be used to "sustain morale and fighting spirit in the face of continuous operations and severe losses." Indeed, the importance of medals in fostering these values among service members has been recognized since the very first honors were created. General Washington, in establishing the first valor award, explained that it would "cherish a virtuous ambition in his soldiers, as well as . . . foster and encourage every species of military merit." Similarly, when Congress created the Medal of Honor during the Civil War, the bill's sponsor explained that the provision "need[ed] no explanation," as creating the honor would ensure that "the men in Navy shall be encouraged to brave deeds," and would be more effective in that regard than promotions and other incentives.

Id. at 38-39 (citations omitted).

231. *Id.* at 6.

232. United States v. Alvarez, 567 U.S. 709, 716-22 (2012).

233. *Id.* at 725-26. The Court also concluded that the government did not use the least restrictive means to accomplish its objectives. *Id.* at 729-30. Specifically, Congress could have directed the creation of a database that could be used to cross-check claims of military decorations. *Id.* The dissenting Justices, citing the Office of Undersecretary of Defense, Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database, stated that such a system would be impracticable. *Id.* at 743-44 (Alito, J., dissenting).

234. *Id.* at 725.

235. *Id.* at 725-26.

suggested that intentional counter-speech condemning false claims of military valor could result in satisfying the governmental interest.[236] Moreover, wrote Justice Kennedy, because the awarding of high-level honors such as the Medal of Honor, for example, was accompanied by media coverage and great acclaim, the risk of false claims being believed was actually low.[237] In making this holding, the Court rebuffed the significance of the congressional finding of fact noted above; namely, that false claims are a legitimate problem and do indeed damage the reputation and perception of military decorations.

According to the plurality, there was no general exception to First Amendment protection for false statements.[238] The plurality declined to include false claims of military decorations with other categories of false speech that it had deemed unprotected in previous cases because those categories all included some form of cognizable harm.[239] Where defamation, fraud, false commercial speech, and other examples all carried the consequences of legally recognized harm—such as invasion of privacy or tending to cause unnecessary litigation—the plurality was not persuaded that stolen valor incidents resulted in similar harm.[240] Moreover, according to Justice Kennedy, stolen valor claims were not tantamount to perjury, which had the potential to undermine the integrity of the judicial system.[241] Nor were the negative effects of stolen valor of a comparable magnitude to crimes of falsely impersonating a government officer, which tended to denigrate the integrity of government processes.[242] The plurality suggested that Congress could enact a more narrowly tailored law that would only ban falsehoods intended for monetary or other tangible gain.[243] The above analysis and suggestions show that the plurality implicitly rejected another of the government contentions—that false

236. *Id.* at 725-29.

237. *Id.* at 727-29. Justice Kennedy did not explain how this line of reasoning would apply for the great majority of lesser medals that are awarded by the military, however.

238. *Id.* at 716-18 ("This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.").

239. *Id.* at 718-20.

240. *Id.*

241. *Id.* at 720-22.

242. *Id.*

243. *Id.* (noting a history of such laws in the country such as criminal fraud). Indeed, as a result of *Alvarez*, Congress passed the Stolen Valor Act of 2013, which limited criminal liability for falsely claiming military medals only to higher-ranking and combat-related decorations, such as the Medal of Honor, Distinguished Service Cross, Silver Star, and only when the claim was made for material gain. *See* 18 U.S.C.A. § 704 (2013).

statements about military decoration have measurable adverse effects on military operations, equivalent to a material harm.[244]

In a separate concurring opinion joined by Justice Kagan, Justice Breyer stated that the Stolen Valor Act failed to pass intermediate scrutiny, as it was not adequately tailored to achieve its objective and operated to cause disproportionate constitutional harm.[245] Recognizing that many statutes throughout history had made certain false statements unlawful, Justice Breyer caveated that those statements were always accompanied by specific categories of harm: when harm was to identifiable victims; when tangible harm to others was especially likely; and when a certain type of lie was particularly likely to produce harm.[246] Again, the concurring Justices rejected the notion that military valor lies cause significant harm, warranting inclusion in one of those categories—despite the congressional testimony of military officials to the apparent contrary.

In these two recent cases, the Court appeared to resort to military deference when the law at issue had only an incidental effect on individual rights (e.g., the Solomon Amendment), but declined to rely heavily on deference when the law had a potentially strong impact on individual rights and the nexus to military operations—at least in the Court's opinion—was low. As in the GWOT cases, the majority of Justices were willing to evaluate the military necessity contentions made by the government and deemed them unpersuasive.

V. CONCLUSIONS AND FUTURE APPLICATION

A careful examination of the modern Supreme Court cases shows several trends. First, in general, the Court has not been sympathetic to calls by the government to either abstain from deciding the merits of individual rights cases or use a markedly lowered level of review, justified by "separation of powers" deference concerns. Most importantly, this review reveals a tendency on the part of the majority of sitting Justices to closely evaluate the government's articulated military need arguments and the facts underlying those justifications. In *Boumediene*, for example, Justice Kennedy unflinchingly rejected the idea that the Court's holding would significantly hamper military operations in the theater of war. Likewise, in *Alvarez*, the

244. Conversely, courts have, for example, upheld laws criminalizing impersonation of a government officer, even when the defendant did not have fraudulent intent or receive anything of value. *See, e.g.*, United States v. Parker, 699 F.2d 177, 178-80 (4th Cir. 1983). Congress's goal in passing the law criminalizing impersonation of a government officer was not only to prevent fraud, but also to maintain "the general good repute and dignity" of service to the government. United States v. Lepowitch, 318 U.S. 702, 704 (1943).

245. *Alvarez*, 567 U.S. at 734-36 (Breyer, J., concurring).

246. *Id.*

Court stated that Congress's finding of military valor harm as denigrating the public perception of military decorations was not adequately supported. The Court has shown a readiness to judge the merits of the government's military need arguments and dismiss them as being not likely, not germane, or of insufficient importance to be persuasive. This is true even when the arguments were endorsed by legislative findings, as they were in *Alvarez*. Not only were underlying facts themselves fair game for the Court, but the nexus between those alleged facts and the resulting need for judicial deference was frequently rejected. This was true even when the government's argument declared a threat to military operations and war-fighting abilities. In *Hamdan*, for example, the plurality acknowledged the military operational concerns before the Court but noted that the link between the military commissions at issue and the claimed operational needs in the GWOT conflict were weak. In considering the nexus between military need and the legal issue at hand, exigency was a primary concern in the Guantanamo cases, especially as the military's involvement in the war on terror became prolonged. [247] In general, when the nexus to military need was low, so was the level of deference.

Frequently, Justices specifically judged the persuasiveness of military deference arguments as inversely related to the relative weight of the individual rights at issue. This trend did not appear to be limited to war-time cases, as the Court showed a similar willingness to dissect the government's military deference arguments in *Alvarez*, pitting them against serious First Amendment concerns. When serious civil liberty deprivation was anticipated, generalized concerns about national security and the interruption of military operations were not persuasive for the majority of Justices.

The modern Court has shown a pattern of reduced deference in both "flavors" of military deference, as compared to the Court in *Rostker*. In applying these general principles to a future challenge to the MSSA, the most significant effect is in the Court's willingness to challenge not only the basis of military need and national security-type justifications, but its readiness to closely examine the actual severity, immanence, and likelihood of such operational concerns. This applies to not only arguments made by the government in

247. In an interesting article, Israeli legal scholars trace the decline of military deference shown by the Israeli Supreme Court during an extended period of hostilities (1990-2005). The authors posit that the decline is due to several factors, including repeated exposure to unnecessary infringement by the military on individual liberties and a loss of military urgency which undermines deference arguments. Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 LAW & SOC. INQUIRY 919 (2010).

general, but also specifically includes congressional findings as well as military testimony. It is impossible to predict, with any degree of certainty, the actual arguments that would be presented to the Court in a future challenge to the MSSA. Based on modern precedent, however, the majority of Justices would not hesitate in taking a hard look at the evidence submitted on behalf of military needs justifications in assessing the adequacy and importance of those arguments in a due process analysis. A poorly defended appeal to military "flexibility," for example, would likely not pass muster with the modern Court.

Also, based on recent cases, the use and extent of military deference is likely to be contingent on the gravity of the individual rights at issue. The liberties at stake in the all-male MSSA are serious and far-reaching. As noted previously, draftees served in large numbers during multiple conflicts during the twentieth century. At a high mark, conscripts made up approximately 62% of the American force in World War II, where over 290,000 total U.S. service members died in action.[248] In Vietnam, the last instance of conscripted service, draftees comprised more than 25% of total American troops,[249] where American troop battle deaths totaled over 47,000.[250] Individual interests are not limited to war service, however. Men who fail to register with the Selective Service, as required by the MSSA, face potential criminal penalties,[251] as well as a loss of various privileges, including access to federal job training and student financial assistance,[252] civil service appointments,[253] and U.S. citizenship.[254] Many states also tie eligibility to state financial assistance and the ability to attend in-state colleges and universities to the registration requirements of the MSSA.[255] Because of the great civil liberty concerns at issue, it is likely that the Court would use a limited version of judicial deference.

Although the above analysis has been limited in scope to the Court's treatment of civilian rights vis-à-vis a call for military defer-

248. DEP'T OF VETERANS AFFAIRS, AMERICA'S WARS FACT SHEET (2017), http://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf [https://perma.cc/7QMM-RZZW] (listing total American troop numbers for each conflict).

249. *Id.*

250. *Id.*

251. *See* 50 U.S.C. § 3811(a) (2012). There have been no prosecutions for failing to register with the Selective Service since 1986. KAMARCK, *supra* note 14, at 18.

252. Enforcement of Military Selective Service Act, Pub. L. No. 97-252, 96 Stat. 748 § 1113 (1982).

253. 5 U.S.C. § 3328 (2012).

254. 8 U.S.C. § 1427 (2012).

255. The Selective Service System maintains a list of state penalties by jurisdiction. *See Other Legislations by States, Territories, and the District of Columbia*, SELECTIVE SERV. SYS., https://www.sss.gov/Registration/State-Commonwealth-Legislation/Other-Legislations [https://perma.cc/M52M-GYWU] (last visited Jan. 6, 2018).

ence, it is also instructive to how the Court may treat future litigation involving service members.[256] Such likely future cases may involve challenges to the *Feres* doctrine[257]—which effectively bars active duty service members from suing the federal government in tort actions, most significantly in medical malpractice claims—as well as to military rules that inhibit certain religious practices.[258] This Article's analysis is particularly instructive when Congress and the military disagree on an issue, as it indicates the high degree to which the Court would examine the deference justifications and factual assertions of each.

256. The Court has never articulated a different standard for military deference in cases of civilian versus service member rights, although some authors have called for such a distinction. *See, e.g.*, Oberwetter, *supra* note 44, at 196-201. As the Court has not considered a service member rights case in years, it is difficult to predict whether its treatment would differ substantially from the cases discussed above.

257. Feres v. United States, 340 U.S. 135, 146 (1950) (holding that the government was not liable under the Federal Tort Claims Act for negligence leading to the serious injury or death of three service members).

258. *See, e.g.*, United States v. Sterling, 75 M.J. 407, 420 (2016) (holding that a Marine superior's orders to remove bible verses from a work area was lawful, and that appellant failed to assert a prima facie defense under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012). As the military is now under a strict scrutiny standard of review for religious expression and accommodation cases involving service members, the issue of the scope of service member free religious exercise under the First Amendment appears generally ripe for judicial review. *See* DEP'T OF DEF., INSTRUCTION, NO. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (2009), http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf [https://perma.cc/K9HA-N5M4] (incorporating statutory changes from RFRA).