ARTICLES

The Role of the Judiciary: A Critique of the Military Deference Doctrine

Major Melissa L. Ken & Brigadier General Linell A. Letendre*

ABSTRACT

The military deference doctrine has been a fixture in American jurisprudence since the early 1800s. While it has gone through a few iterations over history, we are currently in a period of increased deference to military decision making which undercuts civilian control of the military and degrades the judiciary's ability to act as a necessary constitutional check. Using a COVID-era vaccine case study, this article argues that the military deference doctrine has essentially become a rubber stamp of approval for military actions. It asserts the importance of bolstering civilian control of the military and enforcing the proper role of the judiciary in ensuring that the military is held to the correct level of constitutional scrutiny. These measures are necessary to protect the constitutional rights of our service members as well as our carefully constructed allocation of governmental power.

On March 11, 2020, the Department of Defense (DoD) issued a restriction limiting military members from engaging in any travel, both personal and official.[1] The cause of this moratorium was the COVID-19 virus. On the same day that the DoD put a stop to travel, the World Health Organization declared COVID-19 to be a pandemic.[2] Over the course of the following years, indeed to the writing of this article, COVID-19 has changed our nation and our world. According to the Center for Disease Control and Prevention (CDC), there have been over 110 million cases of COVID-19 in the United States alone resulting in more than one million deaths.[3] Among DoD employees (including military, civilian, dependent, and contractors), there have been 740,942 cases resulting in 6,587 hospitalizations and 690 deaths.[4]

In an effort to stem the tide, the United States Secretary of Defense implemented a mandatory vaccine requirement for all servicemembers.[5] As of December 20,

* Maj Melissa L. Ken, Judge Advocate General Corps, U.S. Air Force. Retired Brig Gen Linell A. Letendre, U.S. Air Force. Although one of the authors is an active-duty officer in the United States Air Force, the opinions, assertions, and views expressed in this article are those of the authors and do not reflect the official guidance or position of the United States Government, the Department of Defense, the United States Air Force or the United States Space Force.

1. *Coronavirus Timeline*, DEP'T DEF. (Mar. 18, 2024), https://perma.cc/68LN-RS52.

2. *Id.*

3. As of December 7, 2024, there were 98,174,364 reported cases and 1,213,046 deaths attributed to COVID-19 in the United States alone. *Covid Data Tracker*, CDC (Apr. 7, 2025), https://perma.cc/T3PP-XX66.

4. *Coronavirus Timeline*, *supra* note 1.

5. Memorandum from Sec'y of Defense Lloyd J. Austin on *Mandatory Coronavirus Vaccination*, (Aug. 24, 2021).

2022, just over two million service members have been fully vaccinated as a result of this official mandate.[6] After only a year of mandatory vaccines, Congress added a provision to the 2023 National Defense Authorization Act rescinding the military's vaccine mandate.[7]

While this article does not presume to address the issue of whether the military *should* have had a vaccine mandate for COVID-19, it does question the protections afforded to military decision makers by all branches of civilian government, chiefly the deference given by the judiciary. Particularly in the last twenty years, the general civilian population is deferential to military decisions due to military expertise and cultural expectations of servicemembers' character.[8] The military deference doctrine refers to the deference given to military decisions by civilian courts, not members of the general public.[9]

At the beginning of this nation's history, the military deference doctrine meant that as long as a military court had proper jurisdiction over an issue, a civilian court would not even hear that case.[10] In more modern deference doctrine jurisprudence, civilian courts will typically apply lesser scrutiny to cases that come from the military context than they would if that same case were in the civilian context.[11]

This article argues that the civilian judiciary must use its own expertise, not to govern the day-to-day operations of the military or determine military interests and priorities, but in the constitution and law to ensure that military members are protected and that military leadership is held to a higher standard. The military has evolved and more closely mirrors civilian society in many ways; however, the judiciary still insists on treating the military as a separate society with a separate standard of review for constitutional issues involving military members. This antiquated doctrine hinders the military's development and ability to evolve into a modern warfighting machine by unnecessarily restricting the membership of the military.

This article first provides some background on the military deference doctrine and how its jurisprudence developed over our nation's history. The next section explores the implications of the doctrine in *Austin v. U.S. Navy Seals,* a case recently heard by the Supreme Court of the United States and specifically considers how the application of the doctrine influenced the two written opinions. Finally, the article considers how a strict application of the military deference

6. *Coronavirus Timeline*, *supra* note 1.

7. *DOD Rescinds COVID-19 Vaccination Mandate*, DEP'T DEF. (Jan. 10, 2023), https://perma.cc/3ABG-FB3F.

8. Ronald R. Krebs & Robert Ralston, *More Deferential But Also More Political: How Americans' Views of the Military Have Changed Over 20 Years*, WAR ON THE ROCKS (Nov. 17, 2021), https://perma.cc/STJ6-7D6S.

9. "At the risk of oversimplification, the military deference doctrine requires that a court considering certain constitutional challenges to military legislation perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context." John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 161 (2000). *See infra* note 20 for Supreme Court's first explicit reference to this doctrine and its implementation.

10. *Id.* at 165.

11. *Id.* at 161.

doctrine hinders military strategic thought and accountability of military leaders before finally proposing the proper role of the civilian judiciary in the military.

I. HISTORICAL EVOLUTION OF MILITARY DEFERENCE AND CIVILIAN CONTROL OF THE MILITARY

The military deference doctrine has existed in some form since the inception of our nation.[12] This complex topic has developed over the years, going through various periods characterized by heightened or reduced tensions in those relationships.[13] Understanding the progression of these ideas through our nation's history is critical to grasping the current dynamics between the military and the judiciary, as well as the relationship's impact on civilian leadership and control of the military.

A. Brief History of Military Deference Doctrine

The United States Supreme Court has undergone three broad phases in its treatment of military cases: a period of almost complete non-interference (from 1828–1953); a short period of more robust challenge to areas of traditional military jurisdiction (1954–1969); and the modern concept of the military deference doctrine.[14] The first two periods of Supreme Court jurisprudence varied drastically from each other. Initially, the Supreme Court refused to intervene when constitutional challenges were brought by military members and would end its inquiry with a review of jurisdiction.[15] Essentially, if the military court-martial had proper jurisdiction, the Court would reject any challenge of the military court's decision brought on constitutional grounds.

The second period differed from the first in that the Supreme Court challenged the scope of standing military jurisdiction and even questioned the efficacy of the entire military justice process.[16] During this time, the Supreme Court overruled previous decisions upholding court-martial jurisdiction over the civilian dependents of active duty military members.[17] In its ruling, the Court questioned the standards applied in courts-martial and their ability to fairly try civilians as well as military courts' ability to protect constitutional rights.[18]

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12. "Alexander Hamilton stated that the Constitution granted the judiciary 'no influence over either the sword or the purse.' This sense that the courts had no legitimate role in reviewing military matters permeates the Court's early noninterference decisions." *Id.* at 166-67 (internal citation omitted).

13. "Oddly enough, the Supreme Court's skepticism about military justice emerged at about the same time Congress was making great efforts to eliminate some of the perceived failings of court-martial practice." *Id.* at 198.

14. *See generally id.* (This article provides a detailed history and analysis of the military deference doctrine and identifies three distinct periods in the treatment of that doctrine which proves helpful when conducting a review of these concepts.).

15. *Id.* at 165.

16. *Id.* at 198.

17. Reid v. Covert, 354 U.S. 1 (1957).

18. "[I]t remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." Reid v. Covert, 354 U.S. 1, 38 (1957). *See also* John

Following this period of so-called "flux" in the Supreme Court's treatment of military cases, the Court settled into what is now known as the modern understanding of the military deference doctrine.[19] One of the most important cases in the current doctrine is *Parker v. Levy*.[20] This is the first case to use an expressly different standard of review for military cases due to the military's special function in our society.[21] In *Levy*, the U.S. Supreme Court upheld certain criminal provisions of the Uniform Code of Military Justice (UCMJ) against constitutional challenges due to its application of this separate standard of review.[22] The *Levy* Court essentially held that civilian jurisprudence was inapplicable to the military, stating "[f]or the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."[23]

B. Modern Military Deference Jurisprudence

This deference doctrine and the application of a special standard to military cases has persisted since the 1970s.[24] In fact, a recent study found that "Supreme Court decisions had a pro-military position in 63 of 80 cases, or 78.75% (63-17) of all cases studied."[25] This deference has, naturally, limited the extent of oversight that civilian courts exercise over military regulation and operation, even in the context of potential implications of service members' constitutional rights.

This degree of deference was brought to the attention of the American public when the Supreme Court declined to let a practicing Orthodox Jewish service member wear his yarmulke while on duty indoors.[26] Instead of applying constitutional

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F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 690 (2007); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955); O'Callahan v. Parker, 395 U.S. 258 (1969).

19. Lieutenant Colonel Brian D. Lohnes & Major Nicholas D. Morjal, *A Separate Society: The Supreme Court's Jurisprudential Approach to the Review of Military Law and Policy*, 2 ARMY LAWYER 69, 71 (2021).

20. Parker v. Levy, 417 U.S. 733 (1974).

21. "Just as military society has been a society apart from civilian society, so 'military law. . .is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." Parker v. Levy, 417 U.S. 733, 744 (1974).

22. Specifically, Articles 133 and 134 of the UCMJ were challenged as being unconstitutionally void for vagueness under the Due Process Clause of the Fifth Amendment and overbroad under the First Amendment. Parker v. Levy, 417 U.S. 733, 733 (1974).

23. Parker, 417 U.S. at 739.

24. *See generally* Lieutenant Colonel Brian D. Lohnes & Major Nicholas D. Morjal, *A Separate Society: The Supreme Court's Jurisprudential Approach to the Review of Military Law and Policy*, 2 ARMY LAWYER 69, 71 (2021) (showing the longstanding practice of courts when applying this doctrine to military cases).

25. Allen Linken, *Examining the Civil-Military Divide Through New (Institutional) Lenses: The Influence of the Supreme Court*, UNIV. OF MASS. AMHERST 165 (internal citation omitted).

26. This article appeared on the front page of the New York Times and stated that "[t]he Court ruled 5 to 4 that the military's power to ban all wearing of headgear indoors as part of a uniform dress code prevailed over the religious duty of an Orthodox Jewish rabbi to keep his head covered." Stuart Taylor Jr., J*ustices Uphold Curb on Yarmulke*, N.Y. TIMES, at A1 (Mar. 26,1986), https://perma.cc/624E-FURE.

strict scrutiny review to this First Amendment claim, the majority held that the existing Air Force dress regulations "reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity."[27] Although Congress later effectively overturned this decision through legislation,[28] the enormous level of deference and the purpose of the doctrine itself remains —the military is separate and distinct from civilian society and courts must employ a different legal standard when reviewing military related issues.[29]

Another example of Supreme Court deference to military decisions came in 1983 with the *Chappell v. Wallace* decision.[30] In this case, five enlisted sailors sued their commanding officer and seven others in their chain of command. These five sailors alleged that "their minority race petitioners failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity."[31] In denying the sailors' ability to maintain a suit against their superior officers, the Supreme Court of the United States stated that "[t]he special nature of military life. . .would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."[32] Instead, the Court upheld the military's authority and sole prerogative to handle these types of issues internally as "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[33]

These examples demonstrate the degree of deference that civilian courts have shown and the hesitancy of courts to interfere with the good order and discipline needed within the special community of military operation. Historically, the courts have been content to keep military matters within the military's purview and to review any issues that come before them with a high degree of deference as to avoid improper interference within the military.

C. Brief History of Civilian Control of the Military

Our nation's government is built on the premise that our military is controlled by, and subservient to, civilian leadership. The Constitution explicitly grants the Commander-in-Chief power to the President[34] and the power to regulate the

27. Goldman v. Weinberger, 475 U.S. 503, 510 (1986).

28. National Defense Authorization Act for Fiscal Year 1988, S. 1174, 100th Cong. Title V (1987), "Authorizes a member of the armed forces to wear an item of religious apparel while in uniform, except when the Secretary of the military department determines that: (1) the wearing of the item would interfere with the performance of military duties; or (2) the item is not neat and conservative."

29. "[T]he military is often seen as a 'specialized society separate from civilian society,' that accordingly warrants a separate system of justice." Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI-KENT L. REV. 265, 274 (1994) (internal citation omitted).

30. Chappell v. Wallace, 462 U.S. 296 (1983).

31. *Id.* at 297.

32. *Id.* at 304.

33. *Id.* at 305.

34. U.S. Const. art. 2, § 2.

armed forces to Congress.[35] Thus in our founding documentation, control of the military, both operationally and regulatory, was firmly vested in the civilian branches of government. Throughout the history of our nation, civilian control over the military has never been in any serious danger, nor has the wisdom of this arrangement been seriously questioned by any member of military leadership.[36]

To secure lasting civilian control over the military, the founders enshrined those principles in the text of the Constitution. First, Article I states that no Senator or Congressperson can serve in that role while holding a position as an active-duty military member.[37] Furthermore, the Constitution assigns the position of Commander-in-Chief of the nation's armed forces to the President.[38] This allocation of power ensures that a civilian is always at the head of the military, thus securing the subordination of military might to the will of the people. George Washington set firm precedent for this concept as Commander-in-Chief of the Continental Army as well as in his role as our nation's first President. As Commander of the Continental Army, George Washington preempted a military coup when he convinced his officers to remain loyal to Congress instead of marching on the Capitol over issues of pay and pension.[39] As President, he did not call up the military to respond to the Whiskey Rebellion of 1794 until he had met the requirements of the governing statute and secured the cooperation of State governments who controlled the militia.[40] Both of these incidents were watershed moments in our nation's history during which the executive could have wrested power from the fledgling legislative branch. Under the leadership and precedent of George Washington, these moments cemented deliberate civilian control of the military.

This cemented control faced its first challenge during the Civil War, when the character of the American military changed forever. Our nation's founders were wary of establishing a standing military, seeing it as an inflation of executive power and a threat to democracy. When Congress finally acquiesced to a standing Army in 1789, it only authorized 800 soldiers to remain active at any given time.[41] A figure which pales in comparison to the size of our current standing military of more than 1.3 million active-duty members.[42] During the Civil War

35. *Id.* at art. 1, § 8, cl. 14.

36. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962), *reprinted in* 60 A.F. L. Rev. 5, 10 (2007).

37. U.S. CONST. art. 1, § 6. Current policy allows for a member of the National Guard or Reserves to serve in Congress provided that they are not ordered to active duty for more than 270 consecutive days, DEPARTMENT OF DEFENSE DIRECTIVE, 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES 4.2.2 (Feb. 19, 2008).

38. U.S. CONST. art. 2, § 2, Cl. 1.

39. Richard H. Kohn, *The Inside History of the Newburgh Conspiracy: America and the Coup d'Etat*, 27 Wm. & Mary Q., Vol. 27, 187, 188, 220 (1970).

40. Matthew Waxman, *Remembering the Whiskey Rebellion*, LAWFARE (Sept. 25, 2018), https://perma.cc/VL54-LGUM.

41. An Act to Recognize and Adapt to the Constitution of the United States, the Establishment of Troops Raised under the Resolves of the United States in Congress Assembled, S.1, 1st Cong. Ch. XXV (1789).

42. DEP'T OF DEF., 2022 DEMOGRAPHICS PROFILE TOTAL DEFENSE DEPARTMENT MILITARY COMMUNITY 1 (2022), https://perma.cc/2KG2-VVBP.

and into the early 1900s, the Army was substantially enlarged[43] and became a way of life for many which caused a seismic shift in the professionalization of the military and civilian control thereof.[44]

Due to this unprecedented level of knowledge, civilians (with no experience in military affairs) began to defer to the professional soldiers and their opinions regarding military matters.[45] Since World War II, military and former military personnel have had a stronger voice in DoD policy.[46] The prominence of military and former military personnel in these positions has resulted in restrictions on service members' eligibility to serve in civilian DoD positions.[47] In 2018, the National Defense Strategy Commission reviewed the National Defense Strategy and found that that "civilian voices were relatively muted on issues at the center of U.S. defense and national security policy, undermining the concept of civilian control."[48]

This recent trend toward a stronger military voice exerting influence over military issues shows a slow, but steady, shift of the concept of civilian control which previously limited military expertise to the strategy and execution of war.[49] In modern times, the military, through both active and retired members, has an increased voice in policy decisions which dictate when to bring to bear the formidable power of the U.S. Armed Forces.[50] All of these changes represent a divergence from the civilian-military divide which was carefully instituted by our founding fathers as an essential cornerstone of our democracy.[51]

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43. When the U.S. entered World War I, the U.S. Army's standing force was 127,151 soldiers, and the National Guard had 181,620 members. Jim Garamone, *World War I: Building the American Military*, U.S. ARMY (April 3, 2017), https://perma.cc/7X6R-8QB7.

44. By 1860, 41.5% of officers in the Army served 30 years, compared on to only 2.6% in 1797. WILLIAM B. SKELTON, AN AMERICAN PROFESSIONAL OF ARMS: THE ARMY OFFICER CORPS, 1784-1861 182 (1993).

45. Riley Callahan, *The Foundations of Civilian Supremacy: Civil-Military Relations During the American Civil War*, UNIV. OF DEN. 118-23 (2024).

46. Mathleen J. McInnis, Cong. Rsch. Serv. R44725, The Position of Secretary of Defense: Statutory Restrictions and Civilian-Military Relations, Congressional Research Service 3 (Jan. 6, 2021), https://perma.cc/2W8W-GNDU.

47. *Id.*

48. ERIC EDELMAN & GARY ROUGHEAD, PROVIDING FOR THE COMMON DEFENSE: THE REPORT OF THE NATIONAL DEFENSE STRATEGY COMMISSION (2018), https://perma.cc/5SWF-SFLZ.

49. This area of expertise is also referred to as "management of violence." Risa Brooks, *Paradoxes of Professionalism: Rethinking Civil-Military Relations in the United States*, 44 INT'L SEC., no. 4, at 7, 9 (2020).

50. *See generally*, Mackubin Tomas Owens, *Military Officers: Political without Partisanship*, 9 STRATEGIC STUDIES Q., no. 3 (2015) (The author argues that while military expertise and input is required for strategy decisions, these leaders must maintain trust between the civilian and military sides of policy formulation thus respecting civilian control over these decisions.).

51. This change is even apparent in recent conflicts as part of the larger war on terrorism where political leaders often relied on the advice of military professionals even if they were skeptical of the plan. During his presidency, former President Barack Obama noted that military officials "had trouble hiding their frustration at having their professional judgments challenged, especially by those who'd never put on a uniform," and that he "ultimately pursued a strategy recommended by the military." Riley Callahan, The Foundations of Civilian Supremacy: Civil-Military Relations During the American Civil

II. CASE STUDY: SEALS V. AUSTIN

The onset of COVID-19 and the military's mandatory vaccine policies brought the military deference doctrine back before the courts.[52] As seen in the case below, some military members challenged the constitutionality of the mandatory vaccine requirements, alleging that these policies violate their First Amendment right to the free exercise of their religious beliefs.[53] While this case is now moot given the repeal of the vaccine mandate, the resolution of a request for the partial stay of a preliminary injunction sheds light on judicial perspective regarding the military deference doctrine.[54] The *U.S. Navy Seal* case, specifically the U.S. Supreme Court's grant of the Government's request for a partial stay, is particularly illuminating regarding modern application of the military deference doctrine.[55]

A. Facts

In response to the COVID-19 pandemic, in August 2021, the Secretary of Defense directed all Military Departments to "immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve, including the National Guard, who are not fully vaccinated against COVID-19."[56] This directive resulted in a flurry of policies and orders from all the branches of military service, including the Navy.

To effectuate this order from the DoD, the Navy issued a policy of its own only a few days after the Secretary of Defense's memo. The Secretary of the Navy directed that all members of the Department of the Navy "who are not already vaccinated or exempted, are required to be fully vaccinated within 90 days and all Reserve Component Service Members are required to be fully vaccinated within 120 days of this issuance with an FDA approved vaccination against COVID-19."[57] This directive was implemented at the Naval command level by additional policy memos[58] and eventually instructed Naval commanders that any service members "who refuse the vaccine be processed for separation at the

War 144 (Jun. 15, 2024), (Master's thesis, University of Denver (Digital Commons @ DU) (citing BARACK OBAMA, *A PROMISED LAND* (2020)).

52. Austin v. U.S. Navy Seals, 595 U.S. _____ (2022).

53. U.S. Navy Seals v. Biden, 578 F. Supp. 822 (N.D. Tex. 2022).

54. Austin v. U.S. Navy Seals, 595 U.S. _____ (2022).

55. *Id.*

56. Memorandum from Sef. Def. Lloyd Austin, Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members to Senior Pentagon Leadership, Commanders Combatant Commands & Def. Agency and DOD Field Activity Dirs. (Aug. 24, 2021).

57. Memorandum from Sec. Navy Carlos Del Toro, Mandatory COVID-19 Vaccination Policy to ALNAV, par. 4 (Aug. 20, 2021).

58. "In consideration of this persistent health and readiness threat to Navy service members, vaccination against COVID-19 is now mandatory per [the Secretary of Defense Memo] and [ALNAV 062/21]." Mandatory COVID-19 Vaccination and Reporting Policy Memorandum from VADM W. R. Merz, Deputy Chief of Naval Operations for Operations, Plans and Strategy, to NAVADMIN, par. 1 (Aug. 31, 2021).

earliest possible opportunity."[59] These vaccination mandates were accompanied by accommodations for medical and religious purposes.[60]

The Plaintiffs attempted to request religious accommodation pursuant to the Navy's existing policy. The Plaintiffs belong to various religious backgrounds, including Catholic, Eastern Orthodox, and Protestant denominations. According to the Plaintiffs, their religious beliefs oppose the use of aborted fetal cells to develop vaccines; modifying one's body via the vaccine as stated by direct, divine instruction; and injecting trace amounts of animal cells into their bodies.[61] The Plaintiffs' religious accommodation requests were submitted and, in many cases, had the support of their commanding officers.[62] The Plaintiffs, however, were unsuccessful in their requests.

The Navy used a six-phase, fifty-step process to adjudicate religious accommodation requests[63] and "[all] waiver requests are reviewed on a case-by-case basis and each request will be given full consideration with respect to the facts and circumstances submitted in the request."[64] Despite the stated thorough process and case-by-case review, "Plaintiffs believe that this process is 'pre-determined' and sidesteps the individualized review required by law" because part of this process is to draft a prepared disapproval notification for every individual who requests religious accommodation.[65] When the Supreme Court considered this case in February of 2022, not a single request for religious accommodation had been approved by the Navy.[66] By January 2023, the Navy granted a total of fifty religious accommodations for the vaccine out of 3,336 requests.[67]

On November 9, 2021, thirty-five Navy Special Warfare service members, including SEALs, among others, (known as "Plaintiffs") challenged the Navy's vaccine mandate and sued the President, the Secretary of Defense, the Secretary

59. CCDA Execution Guidance to Commanders from VADM John B. Nowell to NAVADMIN, par. 1 (Dec. 15, 2021).

60. Religious and Medical exceptions

61. U.S. Navy Seals v. Biden, 578 F. Supp. 822, 827-28 (N.D. Tex. 2022). It is important to note that Plaintiff's claims about the composition of the vaccine were factually incorrect. Credible information about the vaccine indicates that aborted fetal cells were not used to develop the COVID-19 vaccines nor is there "any materials from any animal" in the vaccines. Additionally, an mRNA vaccine, such as COVID-19, "never enters the nucleus of your cells (where your DNA is kept), so it cannot" modify one's body. UNIV. MD. MED. SYS., *Understanding the COVID Vaccine and mRNA* (Sept. 30, 2022). *See also* UCLA HEALTH, *COVID-19 Vaccine: Addressing Concerns*, UCLA HEALTH, (Oct. 4, 2024), https://perma.cc/S3CE-8AJR; MICH. DEP'T HEALTH & HUM. SERVS., *COVID-19 Vaccines and Fetal Cells* (May 1, 2023), https://perma.cc/SQH2-LB9T.

62. U.S. Navy Seals v. Biden, 578 F. Supp. 822, 828 (N.D. Tex. 2022).

63. *Id.*

64. U.S. NAVY, *U.S. Navy COVID-19 Updates* (July 19, 2022), https://perma.cc/T7C3-KCU9.

65. U.S. Navy Seals v. Biden, 578 F. Supp. 822, 828 (N.D. Tex. 2022).

66. "Although more than 4,000 exemption requests had been submitted by Feb. 15, 2022, not a single one had been approved when the complaint in this case was filed." Austin v. U.S. Navy Seals, 595 U.S. ____ (2022), at 2 (dissenting opinion).

67. INSPECTOR GENERAL, US DEPARTMENT OF DEFENSE, AUDIT OF MILITARY SERVICES' PROCESSING OF CORONAVIRUS DISEASE – 2019 VACCINATION EXEMPTIONS AND DISCHARGES FOR ACTIVE DUTY SERVICE MEMBERS 23, Report No. DODIG-2024-061, (Table 13) (Mar. 12, 2024), https://perma.cc/NT48-5GZ9.

of the Navy, and the Department of Defense.[68] The Plaintiffs filed a motion for preliminary injunction to prevent the Navy from making deployment, assignment, and operational decisions while the question regarding the mandate worked its way through the court system.[69]

B. Brief Procedural Background

This preliminary injunction motion was heard and granted by the District Court for the Northern District of Texas.[70] The Government (or "Defendant") appealed this decision to the Fifth Circuit Court of Appeals who agreed with the District Court and denied the Defendant's motion to stay the preliminary injunction pending appeal.[71] The Defendant again appealed this decision and applied to the Supreme Court of the United States for a partial stay. The content of this request for a stay specifically pertained to the prohibition against making deployment, assignment, and operational decisions. The Supreme Court ultimately granted the Defendant's request for a partial stay in a 6-3 decision. The Supreme Court issued one concurring opinion, written by Justice Kavanaugh, and one dissenting opinion written by Justice Alito. After the Supreme Court's decision, the case went back to the District Court for the Northern District of Texas.

Since the decision in this case, Congress passed the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023. The NDAA for FY 2023 required the Secretary of Defense to rescind the vaccine mandate.[72] The following NDAA (FY 2024) contained a provision requiring that the Service Secretaries "shall consider reinstating" individuals discharged due to their refusal to receive a COVID-19 vaccine[73] and another provision requiring review of any request to reconsider discharge service characterization when the discharge was solely based on the failure to receive a vaccine for COVID-19.[74] It is important to note that the original provision did not require retroactive reinstatement or backpay for these individuals but a recent executive order required reinstatement with backpay.[75] As of January 2025, only forty-three of more than 8,000 service members discharged for failure to comply with the vaccine mandate had returned to service.[76]

68. U.S. Navy Seals v. Biden, 578 F. Supp. 822, 825 (N.D. Tex. 2022).

69. *Id.* at 828.

70. *Id.* at 823.

71. U.S. Navy Seals v. Biden, 2022 U.S. App. LEXIS 5262.

72. National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 § 525, 136 Stat. 2395, 2396 (2022).

73. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 117-263 § 525, 136 Stat. 2395, 2396 (2023).

74. *Id.* at § 527.

75. White House, Reinstating Service Members Discharged under the Military's COVID-19 Vaccination Mandate (Jan. 27, 2025), https://perma.cc/RNQ6-U2K8.

76. Nathaniel Weixel, *Trump Says He Would Reinstate Service Members Discharged Over COVID Vaccine,* THE HILL (Jan. 27, 2025), https://perma.cc/UWM8-3H32.

C. Brief Description of Legal Issues

For the purposes of this article, the main legal issue is whether the Plaintiffs are likely to succeed in their claim that the vaccine mandate violates the Religious Freedom Restoration Act (RFRA) as well as their right to the free exercise of their religious beliefs. To prevail, the Plaintiffs must show to the courts that the Government (Defendant) has substantially burdened the Plaintiffs' free exercise of religion. If such burden is established, the court then examines whether the vaccine mandate serves a compelling government interest and that the means of achieving that interest are narrowly tailored or are least restrictive means of protecting that interest.[77]

The First Amendment specifically provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[78] The second portion of that phrase has become known as the Free Exercise clause. When considering potential violations of this Constitutional provision, courts traditionally used the strict scrutiny test. In 1990, the Supreme Court determined that when Government policies were facially neutral and generally applied, that the rational basis test was the appropriate standard.[79] It only took three years from the Court's decision for Congress to rally and pass legislation rejecting this decision, and, in 1993, passed RFRA to require courts to apply strict scrutiny to all federal, state, and local government action[80] where the government substantially burdened the free exercise of religion regardless of whether that law or policy is religion-neutral or religion-based.[81]

Thus, in just three years, the constitutional standard of review for these cases went through a complete reversal, not once but twice. Under constitutional law, the rational basis test is the lowest burden a court can impose on the Government regarding constitutional rights,[82] whereas strict scrutiny is the highest.[83] The Congressional findings regarding RFRA state that the strict scrutiny standard "is a workable test for striking sensible balance between religious liberty and competing prior governmental interests."[84] The statute goes on to require that the Government "shall not substantially burden a person's exercise of religion even if

77. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2018).

78. U.S. CONST. amend I.

79. Emp. Div., Dep't of Human Ref. of Or. v. Smith, 494 U.S. 872, 878-79 (1990).

80. Originally, RFRA applied to state and federal cases pursuant to 42 U.S.C. § 2000bb-3(a) (2002). However, in the case *City of Boerne v. Flores*, the U.S. Supreme Court ruled that applying RFRA to the states was unconstitutional. As a result, RFRA was amended to only apply to federal actions; *see* City of Boerne v. Flores, 521 U.S. 507 (1997) and Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-2(1).

81. *Id.* at § 2000bb.

82. *Rational Basis Test*, CORNELL L. SCH. LEGAL INFO. INST. (Nov. 3, 2024), https://perma.cc/6EJW-YELS.

83. *Strict Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST. (Nov. 3, 2024), https://perma.cc/3VWF-GHZE.

84. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a)(5) (2020).

the burden results from a rule of general applicability" unless strict scrutiny is met.[85]

When requiring courts to employ the strict scrutiny test, Congress specifically referred to two cases as the standard that courts should apply to free exercise claims.[86] Before getting to the two-part inquiry of strict scrutiny, the threshold question addressed by the Supreme Court in both these cases determined whether there was a substantial burden on the free exercise of religion. Essentially, the Court determined that if the Government policy in question required an individual to choose between working and adhering to their religious tenants and beliefs[87] or the policy threatened the composition of the religion itself,[88] the policy imposes a substantial burden.

Once the Court has determined that there is a substantial burden on the free exercise of religion, the Government must then show that the policy imposing said burden is narrowly tailored to a compelling government interest.[89] A compelling government interest is a "paramount" interest, not simply a colorable government interest.[90] In *Wisconsin v. Yoder*, the Court acknowledged that compulsory education served the compelling government interests of preparing citizens to participate effectively and intelligently in our democratic system and preparing citizens to be self-reliant and self-sufficient in society.[91]

Even if there is a compelling government interest, then the Government must show that their policy is narrowly tailored to achieving that government interest. In the *Yoder* case, the Court determined that while compulsory education constituted a compelling government interest the policy was too broad in requiring students to attend until the age of sixteen as specifically applied to the Amish plaintiffs in this case.[92] This determination was made because of the evidence showing the Amish engaged in their own vocational training after their children graduated from eighth grade.[93] Thus, the government interest of preparing citizens for society and to engage in the democratic process was not served by compulsory education of Amish children after eighth grade.[94] Since the policy substantially burdened the free exercise of religion and was not narrowly tailored to the compelling government interest, the Court held that the Amish plaintiffs' free exercise rights were violated by the compulsory education law as written.[95]

85. *Id.* at § 2000bb-2(a)-(b).

86. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (specifically citing the purpose of the Act is to "restore the compelling interest test as set forth in Serbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972).").

87. Sherbert v. Verner, 374 U.S. at 403-04.

88. Wisconsin v. Yoder, 406 U.S. at 215-19.

89. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b).

90. Sherbert v. Verner, 374 U.S. at 406.

91. Wisconsin v. Yoder, 406 U.S. at 221.

92. *Id.* 234-36.

93. *Id.* 222-23.

94. *Id.* 225-26.

95. *Id.* 235-36.

Although legislative history makes it clear that Congress contemplated the application of RFRA to the military from the outset,[96] the DoD did not incorporate the strict scrutiny standard into its regulations until 2014.[97] The current DoD policy states that a religious accommodation request regarding a policy that substantially burdens a service member's exercise of religion can only be denied if the military policy is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling interest, i.e. strict scrutiny.[98] The instruction also states that the responsibility to prove this burden falls on the Government, not the member, and that "DoD Components have a compelling government interest in mission accomplishment at the individual, unit, and organizational levels, including such necessary elements of mission accomplishment as military readiness. . .and health and safety."[99] Thus, this policy indicates that whenever the military has a practice, duty, or policy impacting a member's exercise of religion, the focal point of the analysis is whether that practice, duty, or policy is the least restrict means of furthering that compelling interest of readiness or health and safety.

D. Current Stance of the Supreme Court

The case of *Austin v. U.S. Navy Seals* did reach the Supreme Court albeit on a procedural issue regarding a stay. While the merits of the case will not be addressed by this Court due to the repeal of the vaccine mandate, two of the Justices wrote separate opinions regarding the stay of the preliminary injunction. These opinions provide insight to these justices' perspectives regarding the application of the military deference doctrine.

1. Concurring Opinion – Justice Kavanaugh

Justice Kavanaugh wrote the only concurring opinion regarding the grant of the Defense's request for a partial stay. In his opinion, he emphasized the traditional deference given to the President and Executive branch regarding affairs of the military and national security.[100] Justice Kavanaugh goes even further, citing precedent that undermines the court's authority to even question decisions made by military leaders "as to the composition, training, equipping, and control" of military members.[101] Ultimately, Justice Kavanaugh asserts that the District

96. RFRA's definition of "government" includes "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States" in 42 U.S.C. § 2000bb-2(1). Additionally, both the House and Senate Judiciary Committees reports on RFRA stated that, under the Act, courts must review free exercise claims of "military personnel under the compelling government interest test." *See* H.R. Rep. No. 103-88, at 8 (1993); S. Rep. No. 103-111, at 12 (1993).

97. U.S. DEP'T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (Feb. 10, 2009) (Incorporating Change 1, Effective January 11, 2014) (now superseded). (2020).

98. *See* U.S. DEP'T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (Sept. 1, 2020).

99. *Id.* at 1.2(e).

100. Austin v. U.S. Navy Seals, 595 U.S. _____, 1 (2022) (Kavanaugh, J., concurring).

101. "Therefore, it is 'difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 2.

Court "while no doubt well-intentioned, in effect inserted itself into the Navy's chain of command, overriding military commanders' professional military judgments" and that "judicial intrusion into military affairs in this case" is not justified.[102]

In support of this position, Justice Kavanaugh cites to the *Youngstown Sheet & Tube Co. v. Sawyer* case. He states "[t]he Court 'should indulge the widest latitude' to sustain the President's 'function to command the instruments of national force, at least when turned against the outside world for the security of our society.'"[103] This articulated regard for the decisions of the Executive and military leaders reflects the traditional doctrine of military deference. Justice Kavanaugh concludes by asserting that he sees "no basis in this case for employing the judicial power in a manner that military commanders believe would impair the military of the United States as it defends the American people."[104]

2. Dissenting Opinion – Justice Alito

Justice Alito wrote the only dissenting opinion in this case, which Justice Gorsuch joined. While Justice Thomas would have denied the request for partial stay, he did not join in Justice Alito's opinion, nor did he write an opinion of his own.

In his dissent, Justice Alito focuses on more of the facts and anecdotes surrounding the Navy's religious accommodation policy. Specifically, Justice Alito quotes one of the Plaintiffs who "stated that a superior officer advised him that 'all religious accommodation requests will be denied' because 'senior leadership. . .has no patience or tolerance for service members who refuse COVID-19 vaccination for religious reasons and want them out of the SEAL community.'"[105] This testimony, and others like it, convinced Justice Alito that there is a significant issue with the methods used by the Navy to determine whether religious accommodation was warranted.

As mentioned above, the seminal question at this juncture is whether the Plaintiffs are likely to succeed in their free exercise claims under the First Amendment. To make this determination, the Court must ascertain whether the Government has presented a compelling government interest and whether the policy or law in question is narrowly tailored to achieving that compelling government interest.[106]

Justice Alito quickly and succinctly acknowledges that preventing COVID-19 from impacting mission accomplishment constitutes a compelling government interest.[107] He questions, however, whether the Navy's current treatment of religious accommodation requests is narrowly tailored to achieve that compelling

102. *Id.* at 2.
103. *Id.* at 2 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952)).
104. *Id.* at 3.
105. *Id.* at 3 (Alito, J., dissenting).
106. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b).
107. Austin, 595 U.S. at 4 (Alito, J., dissenting).

interest. In support of this opinion, Justice Alito presents two arguments: first, that available evidence "suggests that the Navy gave no real consideration to [Plaintiffs'] requests, and the Navy had no compelling need to proceed in that fashion."[108] Justice Alito goes on to compare the Court's likely outrage if the Navy's process was applied in other contexts, such as the reviews of discrimination claims based on race or sex.[109]

The second argument is that the Government's requested relief (the partial stay) "goes well beyond anything that can possibly be regarded as the least restrictive means of further [sic] compelling Navy interests."[110] Essentially, Justice Alito fears that granting this stay will allow the Navy to "warehouse" unvaccinated members for the "duration of the appellate process, which may take years."[111] According to Justice Alito, this course of action is not narrowly tailored to further the Government's compelling interest because the Government has not shown that allowing unvaccinated SEALs to go on missions *will* compromise the mission given "what is known about the spread of the virus and the effectiveness of the vaccines, prevalent practices, and the physical characteristics of Navy Seals and others in the Special Warfare community."[112]

While Justice Alito is wary of "judicial interference with sensitive military decision making," he would not simply "rubberstamp" the Government's request.[113] According to Justice Alito, the Court has done "a great injustice" to the Plaintiffs, and the Court should look at these alleged constitutional violations just as they would, and have looked at, any other similar claim from a civilian origin.[114]

III. THE NEED TO REASSERT CIVILIAN CONTROL INTO THE MILITARY DEFERENCE DOCTRINE

As discussed, the amount of deference that the judiciary is willing to afford to the military and its leadership makes an enormous difference in the ultimate outcome of a military-related litigation. While the military deference doctrine is firmly rooted in our nation's judicial traditions, that deference should be curtailed to enable the military to thrive in a modern environment.

The current degree of deference has allowed the military to operate in an increasingly antiquated system which harms the military's strategic thought and national security itself. It is the role of the judiciary to employ its own expertise, not as a substitute for military judgment, but to keep military leadership accountable and to protect military members' constitutional rights. In short, the judiciary needs to apply a more rigorous standard of constitutional scrutiny to help bring the military into the modern age.

108. *Id.* at 5.
109. *Id.*
110. *Id.*
111. *Id.* at 4.
112. *Id.* at 6.
113. *Id.* at 8.
114. *Id.* at 10.

This section first argues the need for civilian leadership to act as a check against unilateral decision making by military leaders in matters of constitutional import. The next section asserts the failure of strategic thought in the military which brings additional scrutiny upon military decision makers. Third, this section defines the proper impact that RFRA should have on the military deference doctrine. Finally, the section concludes by arguing the correct role of the judiciary in deciding issues of military policy that come before the courts.

A. The Importance of Checks and Balances from Civilian Leadership on Military Decision-Making

As previously mentioned, since World War II, the military and former military personnel have had a stronger voice in DoD policy.[115] The report produced by the National Defense Strategy Commission worryingly found a decrease in civilian voices on central defense and national security policy issues.[116] For example, two recent Secretaries of Defense are retired four-star generals, which required a waiver of the statutory requirement that a retired active duty member must be retired for at least seven years before serving in that role.[117] The widespread acceptance of these exceptions illustrates a public attitude which undermines the foundational concept that our military and policy decisions are controlled by our elected civilian government, not our military leadership. Having military members (current or former) in these critical posts has the potential of reducing true civilian control over strategy decisions and strengthens the military voice in our civilian-led government.

This deteriorating relationship and growing divide has led to a perception by some that we should rely on our military's expertise to lead our policy and strategy decisions overseas.[118] After all, it is our military leadership who often spend decades developing a very specific knowledge and skillset which seems to naturally lends itself to establishing sound national defense policy and strategy.[119]

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115. KATHLEEN MCINNIS, CONG. RSCH. SERV., R44725, THE POSITION OF SECRETARY OF DEFENSE: STATUTORY RESTRICTIONS AND CIVILIAN-MILITARY RELATIONS 3 (2021).

116. Eric Edelman & Gary Roughead (co-chairs), *Providing for the Common Defense: The Report of the National Defense Strategy Commission*, U.S. INST. FOR PEACE (2018).

117. "A person may not be appointed as Secretary of Defense within 10 years after relief from active duty as a commissioned officer. . .in the grade of O-7 or above." 10 U.S.C. § 113(a)(2)(B) (2025). General James Mattis and General Lloyd Austin both received Congressional approval to waive the statutory waiting requirement allowing them to serve as the Secretary of Defense in 2017 and 2021, respectively. See Joe Could & Leo Shane III, *US Congress Passes Waiver for Mattis to Lead Pentagon*, DEFENSENEWS (Jan. 13, 2017), https://perma.cc/5JS8-UG5L; *see also* Catie Edmondson & Jennifer Steinhauer, *Congress Grants Waiver to Austin to Serve as Defense Secretary,* N.Y. Times (Jan. 21, 2021), https://perma.cc/JMB2-TE3K.

118. *See generally* Owens, *supra* note 50 (the author discusses how the perceived disconnect between making war and accomplishing policy goals could be remedied by the military taking a larger role in the political realm of creating strategy).

119. "Since America puts so much faith in its military leaders and these national security decisions put American lives at risk, military officers are morally obligated to help craft the best possible policies and strategies." William E. Rapp, *Civil-Military Relations: The Role of Military Leaders in Strategy Making*, 45 PARAMETERS 13, 14 (2015).

With our military leaders at the helm, it seems logical that our government agencies would increase in efficiency as there would be a direct line between our strategic policy makers and the organization that executes those strategies and policies. After all, "[d]emocratic theory and historical practice recognize that military members are professionals with distinctive expertise that gives them an indispensable voice worth respecting in discussions of strategy."[120]

The role of the U.S. military in making national security policy, however, should be relegated to just that —an opinion worth respecting. It is the civilians who make the final decisions regarding national security policy. These decisions should consider military input and "best military advice," but should in no way be beholden to military opinions. While the practice of providing "best military advice" acknowledges the military's understanding of their role in providing their best practices and opinions, this moniker might feel more like an ultimatum for civilian authorities rather than a suggestion, especially for leaders without previous military experience.[121] This feeling of military advice as an ultimatum is further exacerbated when military members resign in protest when civilian authorities fail to heed their advice.[122] Despite this influence over civilian decision-making, in 2013, a staggering sixty-three percent of survey participants agreed that military resignation was an appropriate response to an "unwise" order.[123] More recently, in 2019, a survey indicated that the majority of Americans would grant the military a veto on the use of force even further cementing the tension between popular opinion of civilian-military relations and its traditional role in our governance.[124]

Yet, this is the hallmark of American society and government – "Civilians oversee national security decisions not because they are right but because the Constitution and laws give them the right, the authority, and the responsibility."[125] Even when civilians have less experience and knowledge in the area of national security than our seasoned military officers, our Constitution puts civilians squarely and "rightfully in charge."[126] Civilians have the right to be wrong and the obligation to consider "best military advice" in the context of the larger national picture. While this does entail civilian leadership taking the fall for failed policy decisions and objectives, this is solely where accountability should land – on the shoulders of our elected leaders.

120. Peter D. Feaver & Richard H. Kohn, *Civil-Military Relations in the United States: What Senior Leaders Need to Know (and Usually Don't)*, STRATEGIC STUD. Q., at 16 (2021).

121. Polina Beliakova, *Erosion by Deference: Civilian Control and the Military in Policymaking*, 4 TEX. NAT'L SEC. REV. 56, 69-70 (2021).

122. Brooks, *supra* note 49, at 18-19.

123. *Id.*

124. Ronald R. Krebs, Robert Ralston, & Aaron Rapport, *No Right to Be Wrong: What Americans Think about Civil-Military Relations*, 21 PERSP. ON POLS. 606, 607 (2023).

125. Feaver & Kohn, *supra* note 120 (internal citation omitted).

126. "[T]he claim of democratic theory is that even when civilians are less expert, they are still rightfully in charge." Jessica D. Blankshain, *A Primer on US Civil-Military Relations for National Security Practitioners*, WILD BLUE YONDER, 3 (July 6, 2020) (quoting DEP'T A.F., THE DIGITAL AIR FORCE USAF WHITE PAPER 2-4 (2019)).

This damage to the civilian-military relationship in national security policy is exacerbated by the strict application of the military deference doctrine, resulting in a hands-off policy by the judiciary. This policy increases the perception that the military is a community separate and apart from the average citizen, which increases the idea that the military is a power beholden only to itself. In fact,

> [T]he American military "has grown in influence to the point of being able to impose its own perspective on many policies and decisions," which manifests itself in "repeated efforts on the part of the armed forces to frustrate or evade civilian authority when that opposition seems likely to preclude outcomes the military dislikes." The result is an unhealthy civil-military pattern that "could alter the character of American government and undermine national defense."[127]

Additionally, this damage to the civilian-military relationship is detrimental to national security and the interests of this nation because we are losing that essential connection between our national security policy and the execution of those policies at the ground level.

The Navy Seal case discussed above demonstrates this loss of accountability of military leadership. The Navy petitioned the Court requesting that they be allowed to continue making deployment, assignment, and operational decisions regarding their unvaccinated members and, ultimately, that their policy regarding religious exception to policy waivers be upheld. This request in and of itself demonstrates military leadership's loss of touch with the needs of the service. Upholding this policy, which does not fully consider a sailor's application for a waiver, would give the military unfettered control over their member regardless of their assertion of their constitutional rights. If the Supreme Court deems that this allegation should be resolved internally, service members would further lose their ability to petition for their constitutional rights before a court. In essence, military leadership will not be held accountable for questionable practices involving their members' rights.

B. Failure of Strategic Thought in the Military

As previously described, the Navy's religious accommodation policy for COVID vaccine waivers did not seem to include a path for actual approval of a waiver.[128] In a fifty-step waiver process, it was only at step thirty-five that someone finally read the exemption request (note that the rejection letter had already been drafted and reviewed by seven officers at this point). Even at step thirty-five, though, the individual reading the exemption request did not appear able to recommend approval of that request.[129] Thus, the alleged exception to the policy process is really an evitable path to rejection. As noted by Justice Alito, more than 4,000 exemption requests had been filed as of February 15, 2022, but not a

127. Mackubin Thomas Owens, *What Military Officers Need to Know about Civil-Military Relations*, 65 Naval War Coll. Rev. 67, 72 (2012).

128. Austin v. U.S. Navy Seals, 595 U.S. _____ (2022) at 2 (Alito, J., dissenting).

129. *Id.*

single one was approved.[130] After the case was heard by the Supreme Court, the Navy did grant fifty religious accommodation requests.[131]

As of February 2023, 7,705 active-duty service members have been involuntarily separated from the military for their refusal to receive the COVID-19 vaccination.[132] The Marine Corps lost the largest number of members of any branch, constituting almost two percent of its total force.[133] As of June 2022, the Army National Guard reported that 40,000 of their soldiers nationwide (thirteen percent of the force) had refused the vaccine and were in danger of being forced out of the service.[134] Service members who refused the COVID vaccine may have been subject to a discharge with a general service characterization.[135] A general service characterization is lower than an honorable service characterization and is given to a service member "when negative aspects of the member's conduct or performance of duty outweigh positive aspects of the military member's military record."[136] Typically, a general service characterization is warranted when the service member has committed misconduct during the member's current term of service.[137]

The COVID-19 pandemic has already had a devastating impact on the military's recruitment efforts as a whole.[138] When the vaccine was still optional, about a third of active duty and National Guard troops decided not to take the vaccine.[139] Many of these individuals cited concerns about the experimental nature of the vaccine as well as unknown side-effects which have plagued required military vaccination mandates in the past.[140] The most notable previous vaccine mandate was the requirement that military members receive the anthrax vaccine. This

130. *Id.*

131. INSPECTOR GEN., U.S. DEP'T OF DEF., *supra* note 67 (by the same time, the Air Force granted 169, the Army 97, and the Marine Corps 23. Note that the Air Force number includes the Space Force.).

132. *Id.* at 38 (Total Service Discharges by service: Army = 1,903; Marine Corps = 3,730; Navy = 1,566; Air Force = 506).

133. In FY23, the Marine Corps' total force strength was 210,000. The total number of service discharges for the Marine Corps was 3,730 members which equates to 1.776% of their requested FY23 strength. OFF. OF THE UNDER SEC'Y OF DEF. (COMPTROLLER)/CHIEF FIN. OFFICER, DEFENSE BUDGET OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2023 BUDGET REQUEST 6-22 (2022).

134. *Thousands of National Guard Soldiers Risk Dismissal for Going Unvaccinated against COVID*, CBS NEWS (June 25, 2022), https://perma.cc/W8RU-8ADG.

135. Meghann Myers & Leo Shane III, *The Vast Majority of Troops Kicked out for COVID Vaccine Refusal Received General Discharges*, MIL. TIMES, (Apr. 27, 2022), https://perma.cc/9M7W-Q93K.

136. DEP'T A.F., DAFI 36-211, DEPARTMENT OF THE AIR FORCE POLICY DIRECTIVE ¶ 3.14.1.2 (2022).

137. Capt Bill Wicks, *Leaving on Good Terms: Types of Discharges, Their Consequences*, FORT HOOD SENTINEL (Feb. 16, 2012), https://perma.cc/HR7H-FNKB.

138. The Department of Defense total recruiting rate from October 2021 to May 2022 was just 85% of its normal goals with the Army reaching only 66% of its recruiting goal during that time. Lara Seligman, Paul Mcleary, & Lee Hudson, *Lawmakers Press Pentagon for Answers as Military Recruiting Crisis Deepens*, POLITICO (July 27, 2022), https://perma.cc/T6EH-4HYQ.

139. Jennifer Steinhauer, *Younger Military Personnel Reject Vaccine, in Warning for Commanders and the Nation*, N.Y. TIMES (Sept. 14, 2021), https://perma.cc/S7RM-52WV.

140. "Of these recipients, 85% reported experiencing some type of reaction. . .this overall rate reported for adverse reactions following anthrax immunization was more than double the rate published

mandate was influential in sixteen percent of guard and reserve pilots and aircrew leaving their flying positions to avoid the vaccine mandate, moving to inactive status, or leaving the military entirely.[141] The GAO's survey indicated that "two-thirds of the guard and reserve pilots and aircrew members did not support DoD's mandatory [anthrax vaccination program] or any future immunization programs."[142] Finally, the GAO's survey indicated that "only about 4 of 10 guard and reserve pilots and aircrew members were satisfied with the information DoD provided on the military threat from anthrax."[143]

It is telling that the DoD launched another mandatory vaccine campaign approximately twenty years later with similar results. As previously mentioned, many guard and reserve members refused to take the COVID vaccine when it was still optional, and "[t]he prevalence of fear about the safety and efficacy of the vaccine has frustrated military officials."[144] The apparent failure to learn from the lessons of the past indicates military leadership's failure to adjust to modern concerns, particularly when it comes to respecting constitutional rights affecting bodily integrity and religious accommodations. Only time will tell whether the military's hard stance on the COVID vaccine will deter citizens from joining the military in the future out of fear that the military will mandate another vaccine and not just be discharged for not complying with these requirements but receive a negative service characterization for their choice.

In addition to the potential of eroding confidence in the protection of service members' rights, the vaccine edict itself merits additional scrutiny for its failure to go "all in" on a complete vaccination series. As previously mentioned, service members were required to get the initial series of COVID-19 vaccines.[145] Notably, military members were not required to get any COVID-19 booster shots.[146]

If readiness and health were the two driving factors behind the Secretary of Defense's vaccination mandate, then it logically follows that the booster would be equally important to accomplish those goals. Secretary Austin, however, made no mention of booster shots in his vaccine mandate and his definition of "fully vaccinated" specifically addressed initial inoculation.[147] This is despite the fact that, mere days before Secretary Austin's memo, the Department of Health and Human Services, Center for Disease Control, and the Food and Drug Administration all released statements that booster shots of the COVID-19

in the vaccine manufacturer's product insert. . ." U.S. GEN. ACCT. OFF., GAO-02-445, ANTHRAX VACCINE: GAO'S SURVEY OF GUARD AND RESERVE PILOTS AND AIRCREW 4-5 (2002).

141. *Id.* at 3.

142. *Id.* at 4.

143. *Id.* at 4.

144. Steinhauer, *supra* note 139.

145. "Service members are considered fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose vaccine. Those with previous COVID-19 infection are not considered fully vaccinated." Austin, *supra* note 5.

146. "Service members are considered fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose vaccine. Those with previous COVID-19 infection are not considered fully vaccinated." *Id.*

147. Austin, *supra* note 5.

vaccine would be needed to "maximize vaccine-induced protection and prolong its durability" given that the protection from the benefits of the initial vaccination "against severe disease, hospitalization, and death could diminish in the months ahead."[148] This incomplete rollout of a vaccine mandate naturally raises questions about the true need for the vaccine in the military if the booster was not part of the required course, thus undercutting the military necessity of the vaccine in the first place.

C. RFRA and its Proper Impact on the Military Deference Doctrine

To ensure accountability in military decision-making, Congress declared its intentions for the military to be held to a higher standard than the judiciary utilized when RFRA became law in 1993.[149] Similar to how Congress overturned the *Goldman* decision through legislation in 1988,[150] Congress decided that the federal government and the military should be held to a higher standard when it comes to protecting constitutional rights in free exercise cases.[151] While these Congressional actions do not necessarily change the military deference doctrine, they demonstrate that, in certain circumstance, the military should be held to the same standard as the civilian world. Until very recently, courts have generally not followed this mandate, as demonstrated in the *Navy SEALs* case.[152]

The implications of RFRA should have immediately extended to the Department of Defense and the military as an entity within the federal government; however, it took decades for the DoD to adopt the RFRA standards into its regulations[153] and the courts are still not consistently applying the more rigorous standard to military cases of free exercise. It is the judiciary's responsibility to interpret and apply the law as established by Congress, including when Congress decides to impose a higher standard on the U.S. military.

Legislative history provides evidence that Congress intended for military deference to extend to these cases as well. Proponents of this approach point to the Senate Judiciary Committee's report on RFRA, which states that "[t]he courts have always recognized the compelling nature of the military's interest [and] have always extended to military authorities [sic] significant deference in effectuating these interests. The committee intends and expects that such deference will

148. Press Release, FDA, Joint Statement from HHS Public Health and Medical Experts on COVID-19 Booster Shots (Aug. 18, 2021), https://perma.cc/QS6W-9KWE.

149. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b).

150. *See* S. 1174, National Defense Authorization Act for Fiscal Year 1988, Pub. L. 100-180, Title V (1987) (authorizing "a member of the armed forces to wear an item of religious apparel while in uniform, except when the Secretary of the military department determines that: (1) the wearing of the item would interfere with the performance of military duties; or (2) the item is not neat and conservative.").

151. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b).

152. Austin v. U.S. Navy Seals, 1-26, 142 S. Ct. 1301, 1302 (2022).

153. U.S. DEP'T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (Sept. 1, 2020).

continue after this bill."[154] Thus, the intent behind RFRA was never to change the degree of scrutiny the courts apply to free exercise cases in the military.

These proponents, however, overlook the context of RFRA and inappropriately view the statements made by the Senate Judiciary Committee in a vacuum. In an era where the courts did not give enough protection to servicemembers' rights, Congress passed not one but two statutes to provide broader protections for the free exercise of military members' religious beliefs. While legislative history is persuasive, it is not binding on courts when interpreting "vague or ambiguous statutory language."[155] The strict scrutiny standard RFRA clearly applied to free exercise cases in the military does not constitute vague or ambiguous language; Congress made the legal standard clear. While there is a lingering question of whether courts should still offer deference to military interests for this two-pronged analysis, some courts have declined to offer that deference due to the absence of that deferential standard from the text of the statute itself.[156] Additionally, the Senate Judiciary Committee report states that the "less protective standard" used by the court, specifically in the *Goldman* case, was overruled by statute, indicating that lawmakers intended to provide more robust protections to servicemembers in free exercise cases.[157]

If the courts properly utilized the RFRA strict scrutiny standard, then servicemembers would enjoy more robust protection of their constitutional rights while ensuring that the needs of the military are met. While the military does have a truly unique mission which sets it apart from civilian society, military leadership must cautiously invoke the military deference doctrine to ensure that when the military actually needs that deference to accomplish its mission, courts will believe them. Rather than becoming the proverbial boy who cried wolf as the military risked with the *Goldman* case and the *Navy SEALs* case, military leadership must show a willingness to be fully supportive and accountable for their decisions as well as link any necessary curtailment of constitutional rights to an essential purpose. In this way, the U.S. military can join the ranks of modernity without compromising its ability to accomplish the mission.

D. Proper Role of the Judiciary in the Military

The implications of RFRA and Congressional acts demonstrate our government's renewed commitment to the principle that it is the function of the judiciary to serve as a check on our executive branch, including the military. "The potential for abuse in a hierarchical system like the military led this nation's founders to specifically provide for civilian checks on the power of the military establishment."[158] It is for this reason that the military has sometimes advanced the

154. S. REP. NO. No. 103-111, at 9 (1993).

155. *Federal Legislative History*, DUKE UNIV. SCH. OF L. (Oct. 2018), https://perma.cc/8KKQ-LRLY.

156. *See* Doster v. Kendall, 54 F.4th 398, 437 (6th Cir. 2022), *vacated sub nom* Kendall v. Doster, 144 S. Ct. 481 (2023).

157. S. REP. NO. 103-111, at 9 (1993).

158. Ruzic, *supra* note 29, at 284.

protection of individual rights even before civilian courts, such as the military's implementation of Article 31 protections before the creation of *Miranda* rights.[159] The modern judicial trend toward a large degree of deference to military decision-making and policy threatens servicemembers' Constitutional rights and allows the military to sacrifice those rights without accountability.

Not only has Congress attempted to correct this trajectory through RFRA, but, as seen in a series of Supreme Court decisions in the last two decades, the Court can, and has, acted as that check on the executive and the military.[160] In 2004, the Supreme Court was called upon to consider the military detention of U.S. citizens suspected of being enemy combatants in the war on terror at the U.S. military base at Guantanamo Bay, Cuba.[161] In *Hamdi*, the Court considered whether the military could detain U.S. citizens as enemy combatants and concluded that it could. The Court, however, took issue with the due process afforded to Hamdi regarding his contention that he was improperly classified as an enemy combatant. The Supreme Court, weighing Hamdi's private interest in his liberty and the government's interest in protecting national security, determined that Hamdi was entitled to more robust due process protections under the Constitution.

In requiring the government to provide additional due process, the Court rejected "the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."[162] Thus, in *Hamdi*, the Court acted as an effective check on the military and executive and protected the rights of American citizens even when the nation's interest in protecting national security was at its height. Similarly, civilian courts should be willing to protect the constitutional rights of those who serve our nation's interests. Just as the government was deterred from violating U.S. citizen rights in *Hamdi*, "[t]he fact that the Court will indeed substantively review military regulations. . .can have a deterrent effect in preventing Congress and the President from blatantly trampling on the rights of servicemembers and others on a whim or for purely vindictive reasons."[163]

The most common defense of a strict application of the military deference doctrine is the judiciary's lack of knowledge when it comes to military culture and mission needs.[164] These constitutional questions do not put the judiciary in the place of generals when it comes to making daily operational decisions. It is illogical to argue that judges should take on that role as judges, admittedly, do not make good generals. It is also true, however, that "generals don't make good judges—especially when it comes to nuanced constitutional issues."[165] In that

159. *Id.*

160. *See generally*, Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (in all three of these cases, the Court ruled in favor of the individual over the interests of the military and executive branch of the federal government).

161. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

162. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

163. O'Connor, *supra* note 9, at 310.

164. *Id.* at 230-31.

165. U.S. Navy Seals v. Austin, 588 F. Supp. 3d 1338, 1351 (M.D. Ga. 2022).

vein, the judiciary has been called upon by Congress to exercise their particular expertise and knowledge of constitutional law to protect servicemembers' constitutional rights - an expertise and knowledge that generals and the military do not possess. In the case of the Navy SEALs, the judiciary has refused to answer that call.

Instead of applying a rigorous standard of constitutional review to the Navy SEALs case, while ruling on a procedural matter, the majority opinion used language which essentially rubberstamped its approval of the military's policy simply because it is a military policy. In his dissent, Justice Alito is not saying that the judiciary should jettison the military deference doctrine. Justice Alito is more than willing to recognize the military's needs as a compelling governmental interest in the context of strict scrutiny constitutional review. The Court, however, should not be willing to accept that a military policy is narrowly tailored to that compelling interest simply because the policy came from the military. Rather, Justice Alito argues that the military should be held to the same rigorous standards as other governmental entities to ensure that the constitutional rights of service members are protected while still preserving the military's readiness and ability to accomplish its mission.

This is the proper role of the court in protecting military members' constitutional rights: hold the government to the same standard that it would in any other case. The court will consider the fact that the military serves a special purpose and protects the interests of the United States as an inherent part of the standard constitutional analysis performed in every case. If the government meets that burden, its policy will be upheld; however, if it does not, then it is the court's role to require the government to provide the necessary constitutional protections to its military members.

V. CONCLUSION

The main issue with the current application of the military deference doctrine is its outdated purpose and approach to constitutional law. The civilian judiciary needs to act as a check on the military to ensure that military members' constitutional rights are not being unnecessarily abridged. Just as civilian leadership holds military leadership accountable; the civilian judiciary needs to provide oversight and protect our military members' rights. These actions will help to bring our military into the modern age and strengthen our nation.

This article does not suggest that the military deference doctrine should be abandoned in its entirety. Civilian courts, however, should not "rubberstamp" military decisions. While courts should provide deference for *military judgments* (typically in findings of fact), it is the courts that have the expertise to make *legal* judgments and should utilize its full capacity to do so.[166] As with any governmental

166. For example, in the case study discussed throughout this article, the court should defer to the military's insights and expertise in their factual demonstration that the vaccine mandate served a compelling government interest, but courts should apply their legal judgment when evaluating whether that mandate was the least restrictive means and concluding whether the *legal* requirements were met to sustain that action.

entity, the military needs checks and balances provided by its civilian leadership as well as the courts to ensure the protection of our servicemembers' constitutional rights and that our military will continue to be the greatest and most powerful fighting force in the world.

As suggested above, the courts must provide that essential check and balance against the power of the executive, including the armed forces. Without the expertise and knowledge of the courts as well as civilian leadership maintaining control over the military, we risk losing some of the foundational building blocks of our democracy that our Founding Fathers worked so hard to instill and preserve in our government.

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