
Justice John Paul Stevens and Judicial Deference in Military Matters

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INTRODUCTION

With the death of Chief Justice William H. Rehnquist, Justice John Paul Stevens became the only sitting Justice with wartime military experience.¹ Chief Justice Rehnquist served as a Sergeant in the Army

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¹ Three other sitting Justices have worn the uniform. Justice Kennedy served as a Private First Class in the California Army National Guard in 1961, the year he graduated from Harvard Law School. See Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/servlet/tGetInfo?jid=1256> (last visited Apr. 22, 2009). Justice Breyer served in the Army in 1957 while he was a Stanford undergraduate. See *Stephen G. Breyer*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/b/stephen_g_breyer/index.html (last visited Jan. 11, 2010). Justice Alito participated in the Reserved Officers' Training Corps at Princeton and served on active duty for four months (followed by several years in the reserves) after graduating from Yale Law School in 1975. See *Alito Joined ROTC While at Princeton*, WASH. POST, Nov. 3, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/02/AR2005110202722.html>.

Air Force from 1943 to 1946.² Justice Stevens served as a naval officer at Pearl Harbor from 1942 to 1945, analyzing intercepted message traffic and decrypting enemy call signs.³ While the Chief Justice turned down the opportunity for a commission, Justice Stevens eventually attained the grade of Lieutenant Commander.

Despite their shared military background, Justice Stevens and Chief Justice Rehnquist take differing stances in cases relating to the armed forces. Justice Stevens's careful, nondoctrinaire approach is of a piece with the Supreme Court's World War II-era approach in *Duncan v. Kahanamoku*.⁴ In *Duncan*, the majority rejected military claims that it was necessary to employ military courts in Hawaii after Pearl Harbor.⁵ This is a far cry from the uncritical deference that typified Chief Justice Rehnquist's decision-making in cases such as *Goldman v. Weinberger*⁶ and *Winter v. Natural Resources Defense Council*.⁷

Military cases, even broadly defined, form a small part of the Court's docket. When they do occur, however, they present issues that are often both doctrinally challenging and symbolically potent. Examples of this appear in Justice Stevens's landmark Guantánamo-related opinions in *Rasul v. Bush*⁸ and *Hamdan v. Rumsfeld*,⁹ as well as in his eloquent dissent in *Rumsfeld v. Padilla*.¹⁰ Consistent with his abstention from the "cert pool," what emerges from his separate opinions in cases relating to the military — whether concurring, as in *Goldman v. Weinberger*¹¹ and *Solorio v. United States*,¹² or dissenting, as in *United States v. Scheffer*¹³ — is a determinedly independent perspective not easily pigeon-holed as liberal, conservative, or "activist." To be sure, at times he has been perfectly willing to join in

² Chief Justice William H. Rehnquist, Remarks at the American Meteorological Society (Oct. 23, 2001), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_10-23-01.html [hereinafter Remarks of Chief Justice Rehnquist] (noting that Chief Justice Rehnquist left air force because he "had had enough spit and polish for a while").

³ John Paul Stevens, Letter to the Editor, *The Dissenter*, N.Y. TIMES MAG., Nov. 4, 2007, at 12.

⁴ 327 U.S. 304, 335 (1946).

⁵ *Id.* at 324.

⁶ 475 U.S. 503, 507 (1986).

⁷ 129 S. Ct. 365, 382 (2008).

⁸ 542 U.S. 466 (2004).

⁹ 548 U.S. 557 (2006).

¹⁰ 542 U.S. 426, 455-65 (2004) (Stevens, J., dissenting).

¹¹ 475 U.S. at 510-13 (Stevens, J., concurring).

¹² 483 U.S. 435, 451-52 (1987) (Stevens, J., concurring).

¹³ 523 U.S. 303, 320-39 (1998) (Stevens, J., dissenting).

others' opinions. Examples of this are *Rostker v. Goldberg*,¹⁴ which upheld male-only draft registration, and *Rumsfeld v. Forum for Academic and Institutional Rights*,¹⁵ which upheld the Solomon Amendment requiring the Reserve Officers' Training Corps and recruiter access to college campuses.¹⁶

Those who have served in uniform can attest that military service is a vivid experience. This holds true even if one did not see action in combat and even if one's period of service was brief. Indeed, lawyers who served in World War II recall details of cases tried a lifetime ago. People form personal habits that may stay with them forever. It is tempting to speculate that the approach apparent in Justice Stevens's votes and writing in military-related cases reflect the three years he served in Hawaii.

This Article explores the effect of Justice Stevens's military experience on his judicial career. Part I of the Article explores military patriotism by examining language he contributed in a pair of flag burning cases. Part II puts this obvious sense of patriotism into context by reviewing how he defers to and occasionally rejects military traditions. Part III uses a pair of courts-martial cases to illustrate further how active military service may have influenced him and, finally, Part IV discusses the extent to which this perspective contributes to the Supreme Court.

I. FLAG BURNING

A starting point for this study is a pair of flag burning cases decided well into Justice Stevens's second decade on the Court — *Texas v. Johnson*¹⁷ and *United States v. Eichman*.¹⁸ Although these cases do not directly concern the military, they nonetheless afford an insight into his view of the related matter of patriotism.

A. *Texas v. Johnson*

In *Johnson*, the Court struck down a state flag-burning statute, holding that that activity was expressive and protected by the First Amendment.¹⁹ There were two dissenting opinions, one by Chief

¹⁴ 453 U.S. 57 (1981).

¹⁵ 547 U.S. 47 (2006).

¹⁶ *Id.* at 58; *see also* 10 U.S.C. § 983 (2006).

¹⁷ 491 U.S. 397 (1989).

¹⁸ 496 U.S. 310 (1990).

¹⁹ *Johnson*, 491 U.S. at 405-06.

Justice Rehnquist, with whom Justices White and O'Connor joined, and another by Justice Stevens. Both are remarkable. The Chief Justice's was as much an exercise in poetry and history as anything else. In it, he reproduced lines from Emerson's Concord Hymn, The Star-Spangled Banner, and John Greenleaf Whittier's Barbara Frietchie.²⁰ Martial visions from the Revolutionary War to Fort Sumter, Iwo Jima, the Korean War, and Vietnam round out the picture.²¹ It can only be called a bravura performance. The Chief Justice's distaste for the majority's approach is on display for all to see:

The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight.²²

Justice Stevens's dissent, in which no other Justice joined, was equally remarkable, but in a less flashily literary way.²³ No need here for the obligatory footnote, like the Chief Justice's opinion, cataloguing the numerous state flag-desecration laws. Indeed, the whole opinion is perhaps a quarter the length of his.²⁴ And it is *quieter*. Here is how it ends:

²⁰ *Id.* at 422-25 (Rehnquist, C.J., dissenting).

²¹ *Id.* at 422-23, 425-26.

²² *Id.* at 435.

²³ See Laura Krugman Ray, *Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge*, 41 CONN. L. REV. 211, 261 (2008) ("For Stevens, less is generally more when he chooses the most appropriate form for his ideas, however strongly held."). His opinion in *Rasul*, in which five other Justices joined, shows his awareness that sometimes the best rhetoric device is a complete absence of rhetoric. *Rasul v. Bush*, 542 U.S. 466 (2004). After briefly recording the terrible facts from which the controversy arose (the 9/11 attacks) and singling out the heroism of the passengers of one of the hijacked planes, the opinion is devoid of color. It is as distilled a legal analysis as can be imagined and the more potent for that. Resisting the temptation when others might not have done so makes it all the more salient when the pen of rhetoric is employed.

²⁴ Of Justice Stewart, Justice Stevens once stated, "He could say in a paragraph or two what someone else had been trying to say in 25 pages." *An Interview with Justice John Paul Stevens*, 39 THIRD BRANCH 1, 11 (2007), available at <http://www.uscourts.gov/ttb/2007-04/interview/index.html>; see also Ray, *supra* note 23, at 263. Justice Stevens's conflict-resolving opinion for a unanimous Court in *McLaughlin v. United States*, 476 U.S. 16 (1986), weighed in at a mere five paragraphs (plus three footnotes). I am grateful to my colleague Noah Messing for this reference.

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for — and our history demonstrates that they are — it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.²⁵

It is not immediately obvious which approach is more convincing. Nor is it immediately obvious why Justice Stevens did not join the Chief Justice's dissent, which had garnered the votes of two other Justices. Perhaps it was because Justice Stevens found the matter so profoundly disturbing that it was essential that the voice be his own, even if it was to be *only* his own. In a way, his very solitude in dissent on this is the obverse of *Cooper v. Aaron*,²⁶ the Little Rock school desegregation case, where greater moral authority was thought to come with an opinion signed by all nine Justices. One thinks here of the “still small voice” of which the Bible speaks, rather than the trumpets at Jericho.²⁷

B. *United States v. Eichman*

Almost exactly a year later, in *Eichman* the Court once again ruled on the constitutionality of the federal flag-desecration statute. The vote was the same, 5–4, but there was only one dissenting opinion, this time written by Justice Stevens.²⁸ The opinion is only a little longer than his opinion in *Johnson*, and it is perhaps less powerful rhetorically because he had already made the main point he wished to make the year before. This second effort is arguably the more powerful of the two because it speaks in a personal voice:

The impact [of flag burning] is purely symbolic, and it is apparent that some thoughtful persons believe that impact, far from depreciating the value of the symbol, will actually enhance its meaning. I most respectfully disagree. Indeed,

²⁵ *Johnson*, 491 U.S. at 439 (Stevens, J., dissenting).

²⁶ 358 U.S. 1 (1958). It is sometimes forgotten that Justice Frankfurter not only signed the Opinion of the Court, but also filed a separate concurrence. It is difficult to imagine that the other eight were pleased by his doing so.

²⁷ 1 *Kings* 19:12.

²⁸ *United States v. Eichman*, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting).

what makes these cases particularly difficult for me is what I regard as the damage to the symbol that has already occurred as a result of this Court's decision to place its stamp of approval on the act of flag burning. A formerly dramatic expression of protest is now rather commonplace. In today's marketplace of ideas, the public burning of a Vietnam draft card is probably less provocative than lighting a cigarette. Tomorrow flag burning may produce a similar reaction. There is surely a direct relationship between the communicative value of the act of flag burning and the symbolic value of the object being burned.

The symbolic value of the American flag is not the same today as it was yesterday. Events during the last three decades have altered the country's image in the eyes of numerous Americans, and some now have difficulty understanding the message that the flag conveyed to their parents and grandparents—whether born abroad and naturalized or native born. Moreover, the integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends. And, as I have suggested, the residual value of the symbol after this Court's decision in *Texas v. Johnson* is surely not the same as it was a year ago.²⁹

This is potent rhetoric. It acknowledges the power of symbols and seeks to carry that power to the reader, the American citizen. It conjoins the native-born and the naturalized. It speaks to the American people “as a country” and addresses others. The dissenting opinion comments that “[t]o the world, the flag is our promise that we will continue to strive for” the ideals of liberty, equality and tolerance.³⁰ This may foreshadow the opportunities and challenges presented by the post-9/11 cases, and the need to speak to an audience beyond our shores.

By voicing his own opinion, Justice Stevens adds to an already powerful opinion. Why did he not go along with the majority? After all, the Court decided the basic point in *Johnson*. As Justice Stevens explained — without invoking the notion that *stare decisis* is of less

²⁹ *Id.* at 323.

³⁰ *Id.* at 321.

importance in constitutional adjudication — doing so “would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake.”³¹ In other words, this is one of those occasions when a Justice feels impelled to stake out an irredentist position.³² When done judiciously, it can add to the force of an opinion. No wonder the four dissenters coalesced in a single opinion; there was no need for another.

As previously mentioned, these flag-burning cases do not directly involve the military. Their subject matter, however, does resonate with other, not-unrelated areas of our jurisprudence. In *Rumsfeld v. Padilla*, for example, the Court needlessly required a United States citizen who was being detained as an “enemy combatant” to restart his quest for habeas corpus after the government transferred him from civilian federal custody in New York to a naval brig in South Carolina. Justice Stevens concluded his dissent by pointing out, “[I]f this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”³³

There is no doubt that Justice Stevens spoke from the heart in *Johnson* and *Eichman*.³⁴ Comments he later made about a proposal to overturn these decisions with a constitutional amendment confirm this. They also say much about Justice Stevens and his commitment to freedom:

³¹ *Id.* at 324.

³² Justices Brennan and Marshall’s position, and later, that of Justice Blackmun, on the death penalty is perhaps the prime example of irredentism. *E.g.*, *Callins v. Collins*, 510 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting from denial of certiorari); *Brown v. North Carolina*, 479 U.S. 940, 942 (1986) (Brennan & Marshall, JJ., dissenting from denial of certiorari); *Stewart v. Wainwright*, 478 U.S. 1050, 1050 (1986) (Brennan & Marshall, JJ., dissenting from denial of stay).

³³ *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting). Professor Diane Marie Amann perceptively links this to his quotation from Thomas Paine in *United States v. Alvarez-Machain*, 504 U.S. 655, 688 (1992) (Stevens, J., dissenting). See Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 *FORDHAM L. REV.* 1569, 1578 & n.50 (2006).

³⁴ That Justice Stevens read his dissent from the bench is in itself a sign of the depth of his feeling. See Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, *N.Y. TIMES*, May 31, 2007, at A1. See generally John Q. Barrett, *Commending Opinion Announcements by Supreme Court Justices* (2007) (unpublished manuscript, on file with the author), available at <http://www.stjohns.edu/media/3/55c14b0772794f148fec48e3c14851a7.pdf> (collecting cases). A law clerk who was present reports that “his face was flush, his eyes just shy of tears” as he did so. Ray, *supra* note 23, at 261 n.292 (quoting EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 36 (1998)).

The proposed constitutional amendment that I shall now mention would authorize legislation making flag-burning a crime. As many of you know, I dissented in both of the 5–4 decisions holding that such laws violated the First Amendment. I remain firmly convinced that my dissents correctly interpreted the law — as well as the original intent of the Framers — and I must confess that I am rather proud of what I had to say in those opinions. Nevertheless, after thinking a good deal about the issue, I have concluded that it would be unwise to amend the Constitution to reverse those decisions. Ironically, those decisions seem to have solved the flag-burning problem because nobody burns flags any more. What once was a courageous act of defiant expression is now perfectly lawful, and therefore is not worth the effort. More importantly — given the decision of Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy, which is now the law [of] the land — burning the flag is now a symbolic act that conveys a far different message than it once did. If one were to burn a flag today, the act would convey a message of freedom — that ours is a society that is strong enough to tolerate such acts by those whom we despise. Today, one could not burn a flag without reminding every observer that we cherish our freedom.³⁵

II. DEFERENCE TO MILITARY TRADITIONS

Goldman v. Weinberger concerned an Air Force psychologist whose wearing of a skullcap while in uniform, contrary to regulations, became a serious issue only after he testified as a defense witness in a court-martial.³⁶ This is a disturbing case because not only does it seem wrongly decided, it also seemed unwise to cast the issue as Captain Goldman’s counsel had done. It would have been more productive to frame the case as one of retaliation forbidden by the Uniform Code of Military Justice (“UCMJ”).³⁷

³⁵ Justice John Paul Stevens, Remarks to the Chicago Bar Association and Chicago Bar Foundation: Canons to the Left, Canons to the Right (Sept. 14, 2006) [hereinafter Remarks by Justice John Paul Stevens], in CHI. B. ASS’N REC., Nov. 2006, at 54, 55.

³⁶ According to Justice Stevens’s concurring opinion, one or two complaints had been received before the court-martial, but they had not been acted on. *Goldman v. Weinberger*, 475 U.S. 503, 511 n.4 (1986) (Stevens, J., concurring).

³⁷ See *id.* at 511 n.5. Justice Blackmun’s notes for the January 17, 1986 conference indicate that Justice Stevens viewed *Goldman* as “a retaliation case (got his superior officer mad).” Harry A. Blackmun, Notes on *Goldman v. Weinberger* (Jan. 17, 1986) in

In any event, the Court, in a brief opinion by then-Justice Rehnquist, rejected Captain Goldman's free exercise claim, holding that the challenged portions of the regulation "reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity."³⁸ "The First Amendment," he wrote, "does not prohibit [dress codes] from being applied to petitioner, even though their effect is to restrict the wearing of the headgear required by his religious beliefs."³⁹ Not surprisingly, given his own admission that he had, in the service, "learned to obey orders,"⁴⁰ Justice Rehnquist invoked *Chappell v. Wallace*,⁴¹ a case that barred members of the armed forces from suing their superiors by arguing that Congress had provided other remedies. The Court had observed in *Chappell* that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."⁴² Writing in *Goldman*, Justice Rehnquist stated, "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."⁴³

Justice Stevens again found himself allied with Justice Rehnquist, this time in the majority rather than in dissent. Even though Justice Stevens joined Justice Rehnquist's Opinion of the Court, he also wrote separately. Joined by Justices White and Powell, each of whom had served during World War II,⁴⁴ Justice Stevens began by acknowledging, "Captain Goldman presents an especially attractive case for an exception from the uniform regulations that are applicable to all other Air Force personnel."⁴⁵ The concurring opinion goes on to recognize, in a variety of ways, both Captain Goldman's personal devotion and the authenticity of the yarmulke as an expression of deep, longstanding religious belief. The "interest in uniformity,"

Harry A. Blackmun Collection, Manuscript Division, Library of Congress, box 439, folder 4 [hereinafter HAB Papers].

³⁸ *Goldman*, 475 U.S. at 510.

³⁹ *Id.*

⁴⁰ Remarks of Chief Justice Rehnquist, *supra* note 2.

⁴¹ 462 U.S. 296 (1983); *see Goldman*, 475 U.S. at 507-08.

⁴² *Chappell*, 462 U.S. at 300.

⁴³ *Goldman*, 475 U.S. at 509.

⁴⁴ Indeed, Justices White and Stevens had known one another during World War II. *An Interview with Justice John Paul Stevens*, *supra* note 24, at 11.

⁴⁵ *Goldman*, 475 U.S. at 510 (Stevens, J., concurring).

however, trumps all these factors.⁴⁶ Justice Stevens noted that this interest “has a dimension that is of still greater importance for [him].”⁴⁷ It is enough for Justice Stevens that “professionals in the military service attach great importance to” the plausible interest in uniformity as such, “even though personal experience or admiration for the performance of the ‘rag-tag band of soldiers’ that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of that interest.”⁴⁸

It remains unclear what impelled Justice Stevens to write separately. Although his concurrence never explains this directly, it seems that he thought it was important to test the regulation as applied to all service personnel, not just Captain Goldman. Justice Stevens also appeared concerned that the decision might afford a basis for differentiating among faith groups,⁴⁹ a point nowhere made in Justice Rehnquist’s Opinion of the Court. Under this dimension, a soldier who was an observant Jew might fall on one side of the constitutional line, whereas the religiously driven appearance of a Sikh or Rastafarian might fall on the other. Justice Stevens saw the interest in uniformity in two dimensions: both within the armed forces as a whole, and across faith-group lines.

Reading between the lines, it is tempting to believe that Justice Stevens was uncomfortable with this conclusion. His observations on the issue are highly autobiographical. For example, he argued that “personal experience” might lead one to question military claims that perfect uniformity in dress is critical.⁵⁰ He also spoke of his respect for the ill-clad heroes of the Revolutionary War.⁵¹ Additionally, his emphasis on Captain Goldman’s personal sincerity and a footnote reference to the role of anti-Semitism in American history may sound like protesting too much.⁵² But however he actually felt about the outcome, his concurrence underscores the extent to which he is — or was at the time — willing to defer to the judgment of military professionals even when there is something of considerable moment on the other side of the scale.

⁴⁶ *Id.* at 512-13.

⁴⁷ *Id.* at 512.

⁴⁸ *Id.*

⁴⁹ *Id.* at 512-13.

⁵⁰ *Id.* at 512.

⁵¹ *Id.*

⁵² See Amann, *supra* note 33, at 1592-93, 1593 n.138 (pointing out that Justice Stevens’s attention to anti-Semitism in American history is deep and long standing); see also Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting).

Happily, Congress responded promptly to *Goldman* by enacting a statute that acknowledged the need to accommodate religiously-driven exceptions to military uniform regulations.⁵³ That law called for the issuance of regulations and the area has, overall, remained nearly free of controversy ever since.⁵⁴

A more recent decision, which has nothing to do with military personnel matters or the First Amendment, suggests that Justice Stevens may be less deferential to military decision-making now than he was in *Goldman*. Decided in 2008, *Winter v. NRDC*⁵⁵ concerned the effects of antisubmarine warfare training exercises on marine mammals. The Court vacated a preliminary injunction because, among other things, the lower courts had failed to defer sufficiently to the Navy's claims as to how the injunction would affect its operations.⁵⁶ Justice Stevens did not write separately. Rather, he joined in the portion of Justice Breyer's separate partial concurrence and partial dissent that would have required the lower courts to explain their conclusion that the balance of the equities favors the Navy.⁵⁷ In other words, Justice Stevens was unwilling to accept at face value the service's claims of injury. Of course, that is not to say he would not have deferred in the end. But by insisting with Justice Breyer that the lower courts do a better job in explaining what they made of the evidence, Justice Stevens appears to reject a position of unquestioning deference. At the very least, he waits until it is strictly necessary before deciding whether to defer. This stance is therefore respectful of both the Executive Branch and, even though it requires them to do more work, the lower federal courts.

⁵³ Pub. L. No. 100-180, § 508(a)(2), 101 Stat. 1019, 1086-87 (1987) (codified at 10 U.S.C. § 774 (2006)); John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 47 (2005) ("Congress wasted little time in responding to what it perceived as *Goldman*'s improper infringement on service members' religious rights."). Senators Frank Lautenberg (D-N.J.) and Alphonse D'Amato (R-N.Y.) introduced the measure on April 8, 1986, two weeks after *Goldman* was decided. Justice Blackmun's *Goldman* case file at the Library of Congress includes the *New York Times* account of the bill. See *Bill Offered on Headgear Ban*, N.Y. TIMES, Apr. 10, 1986.

⁵⁴ See Air Force Discharge Review Board, Hearing Record, Docket No. FD-2006-00118 (May 23, 2006), available at <http://boards.law.af.mil/AF/DRB/CY2006/FD2006-00118.pdf>.

⁵⁵ 129 S. Ct. 365 (2008).

⁵⁶ *Id.* at 382.

⁵⁷ *Id.* at 382-86 (Breyer, J., concurring and dissenting in part).

III. COURTS-MARTIAL

Even though the Supreme Court has had the power to review courts-martial — the quintessential military cases — by writ of certiorari for twenty-five years, it has rarely granted review. Two cases in which it has done so are *Solorio v. United States*,⁵⁸ and *United States v. Scheffer*,⁵⁹ each of which offer insight into how military service may have influenced Justice Stevens's decision-making process.⁶⁰

A. *Solorio v. United States*

Courts-martial have come before the Court on collateral review repeatedly over the Nation's history,⁶¹ but *Solorio* was the first to do so on direct review. At issue was whether offenses committed off base against dependents of another service member were subject to trial by court-martial if the only "service connection" lay in the fact that the accused was on active duty. The Court had previously held in *O'Callahan v. Parker*⁶² that nonservice connected offenses could not constitutionally be tried by court-martial. In the intervening years before *Solorio*, the United States Court of Military Appeals (now known as the United States Court of Appeals for the Armed Forces) developed a reasonably clear set of rules implementing both *O'Callahan* and a subsequent case involving application of the service connection test, *Relford v. Commandant, U.S. Disciplinary Barracks*.⁶³ Early in the *O'Callahan* era, that court repeatedly ruled that the victim's status as a military dependent was, standing alone, insufficient to support court-martial jurisdiction.⁶⁴

⁵⁸ 483 U.S. 435 (1987).

⁵⁹ 523 U.S. 303 (1998).

⁶⁰ I argued on behalf of the American Civil Liberties Union as an amicus curiae in support of Petty Officer Solorio. Justice Blackmun's papers at the Library of Congress reveal that the vote was 5–4 to permit me to argue. Harry A. Blackmun, Notes on *Goldman v. Weinberger* (Jan. 17, 1986) in HAB Papers, *supra* note 37, at box 439, folder 4. I wish we had done that well on the merits.

⁶¹ See, e.g., *Middendorf v. Henry*, 425 U.S. 25 (1976) (involving summary court-martial, not criminal trial); *Parker v. Levy*, 417 U.S. 733 (1974) (upholding articles 133-34 of Uniform Code of Military Justice, 10 U.S.C. §§ 933-34 (1974)); *O'Callahan v. Parker*, 395 U.S. 258 (1969) (holding court-martial for civilian offense requires service connection); *Reid v. Covert*, 354 U.S. 1 (1957) (finding no court-martial jurisdiction over military dependent); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (finding no court-martial jurisdiction over discharged personnel).

⁶² 395 U.S. 258 (1969).

⁶³ 401 U.S. 355 (1971).

⁶⁴ See *United States v. McGonigal*, 19 C.M.A. 94, 95 (1969); *United States v. Shockley*, 18 C.M.A. 610, 610-11 (1969); *United States v. Henderson*, 18 C.M.A. 601,

O'Callahan itself had been the subject of immediate and unending attacks in the literature,⁶⁵ thanks in large measure to the strident tone of the Opinion of the Court written by Justice Douglas.⁶⁶ When *Solorio* came along, the stage was set to reopen the issue. A military judge had dismissed the nonservice connected charges, but his decision was reversed by the Coast Guard's intermediate court of military review. The Court of Military Appeals, in turn, affirmed,⁶⁷ laboring to articulate a basis for upholding the exercise of jurisdiction over these offenses. It relied on, among other things, the fact that the law generally became more sensitive to the interests of victims since *O'Callahan*.⁶⁸ Thus, the Court of Military Appeals concluded that court-martial jurisdiction could be asserted over off-base offenses without offending *O'Callahan* or *Relford*.⁶⁹

Rather than take that approach, the Supreme Court simply overturned *O'Callahan* in an opinion by Chief Justice Rehnquist. The Court reasoned that the historical basis for the *O'Callahan* decision was "far too ambiguous"⁷⁰ and that the plain meaning of Article I, section 8, clause 14 of the Constitution — which does not include a service connection requirement — governed.⁷¹ The Court also claimed that the service connection approach "has proved confusing and difficult for military courts to apply," evidenced by how the decisions of the Court of Military Appeals shift far more in this regard than in dependent-victim precedents.⁷²

602 (1969).

⁶⁵ E.g., Norman G. Cooper, *O'Callahan Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165, 186-87 (1977); Robinson O. Everett, *O'Callahan v. Parker — Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853, 859-96; Jonathan P. Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker*, 25 A.F. L. REV. 1, 9-35 (1985). Professor Robinson Everett was later elevated to the Court of Military Appeals. See Mark S. Martins, Comment, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VA. J. INT'L L. 659, 670 (1996) ("Professor Everett, former Chief Judge of the United States Court of Military Appeals, has been one of the most eloquent and influential guardians of the military justice system.").

⁶⁶ *O'Callahan*, 395 U.S. at 264-66.

⁶⁷ *United States v. Solorio*, 21 M.J. 251, 252, 258 (C.M.A. 1986).

⁶⁸ *Id.* at 254-55.

⁶⁹ *Id.* at 254.

⁷⁰ *Solorio v. United States*, 483 U.S. 435, 445 (1987).

⁷¹ "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . ." U.S. CONST. art. I, § 8, cl. 1, 14.

⁷² *Solorio*, 483 U.S. at 448-49.

The vote was 6–3, with Justices Brennan and Blackmun joining in a dissent by Justice Marshall. Justice Stevens concurred in the judgment with a separate opinion that consisted of a single brief paragraph:

Today's unnecessary overruling of precedent is most unwise. The opinion of the United States Court of Military Appeals demonstrates that petitioner's offenses were sufficiently "service connected" to confer jurisdiction on the military tribunal. Unless this Court disagrees with that determination — and I would be most surprised to be told that it does — it has no business reaching out to reexamine the decisions in *O'Callahan v. Parker* and *Relford v. Commandant, U.S. Disciplinary Barracks*. While there might be some dispute about the exact standard to be applied in deciding whether to overrule prior decisions, I had thought that we all could agree that such drastic action is only appropriate when essential to the disposition of a case or controversy before the Court. The fact that any five Members of the Court have the power to reconsider settled precedents at random, does not make that practice legitimate.

For the reasons stated by the Court of Military Appeals, I agree that its judgment should be affirmed.⁷³

In a footnote, Justice Stevens commented that "[e]ven in its brief proposing the reconsideration of *O'Callahan*, the United States asked the Court to reconsider that decision only in the event that the Court disagrees with the United States' submission that petitioner's acts of sexual assaults on military dependents are service related."⁷⁴

For those on the losing side, it would have been more satisfying to see Justice Stevens as a fourth vote to reverse, but his approach was at least a small consolation. To be sure, Justice Stevens was correct in speculating that the Chief Justice and the four other Justices who joined his opinion would not have hesitated to uphold the decision of the Court of Military Appeals on the basis stated by that court. In that sense, the overruling of *O'Callahan* was indeed unnecessary and hence objectionable for the reason he powerfully states. However, an affirmance that left *O'Callahan* intact (even if only until an off-base drug case came along) and yet upheld the lower court's abandonment of its own correctly decided dependent-victim cases would have marred the integrity of the law. The Opinion of the Court should have

⁷³ *Id.* at 451-52 (Stevens, J., concurring) (citations omitted).

⁷⁴ *Id.* at 452 n.*.

made more of an attempt to defend itself against Justice Stevens's criticism. His vote in this case not only evinces his independence of thought, but also is a classic illustration of his commitment to avoiding constitutional issues where possible.

B. *United States v. Scheffer*

Compared with his one-paragraph, separate opinion in *Solorio*, Justice Stevens's solitary dissent in *Scheffer*⁷⁵ seems almost long-winded. The case involved a provision in the *Manual for Courts-Martial* ("MCM") that bars the use of polygraph evidence and considered whether Rule for Courts-Martial 707 ("Rule 707") violated the constitutional right to present a defense. The Court sustained the rule. Justice Thomas delivered the Opinion of the Court, garnering eight votes for parts of it, and only four for others. Justice Kennedy concurred in part and in the judgment, joined by three other Justices.⁷⁶

Only Justice Stevens dissented.⁷⁷ His opinion is noteworthy for several reasons. First, he was reluctant to address the constitutional issue at all. By his analysis, the threshold question ought to have been whether Rule 707 violated the rule-making provision of the UCMJ.⁷⁸ Only after resolving that question would Justice Stevens consider the constitutional question. The nonconstitutional ground involved Article 36 of the UCMJ, which provides that the President may make rules of procedure and evidence for courts-martial, and that those rules must conform to the rules generally applied to criminal trials in the federal district courts to the extent the President deems practicable. Cautioning that he wrote without the benefit of briefing and argument on the statutory issue, Justice Stevens analyzed the disparity between Rule 707 and the treatment of polygraph evidence in the district courts. He concluded "as presently advised"⁷⁹ that:

The stated reasons for the adoption of Rule 707 do not rely on any special military concern. They merely invoke three interests: (1) the interest in excluding unreliable evidence; (2) the interest in protecting the trier of fact from being misled by an unwarranted assumption that the polygraph evidence has "an

⁷⁵ *United States v. Scheffer*, 523 U.S. 303, 320-39 (1998) (Stevens, J., dissenting).

⁷⁶ *Id.* at 318 (Kennedy, J., concurring).

⁷⁷ *Id.* at 320 (Stevens, J., dissenting).

⁷⁸ *Scheffer*, 523 U.S. at 320 (Stevens, J., dissenting); see Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (2006).

⁷⁹ *Scheffer*, 523 U.S. at 320 (Stevens, J., dissenting).

aura of near infallibility”; and (3) the interest in avoiding collateral debates about the admissibility of particular test results.

It seems clear that those interests pose less serious concerns in the military than in the civilian context. Disputes about the qualifications of the examiners, the equipment, and the testing procedures should seldom arise with respect to the tests conducted by the military. Moreover, there surely is no reason to assume that military personnel who perform the fact-finding function are less competent than ordinary jurors to assess the reliability of particular results, or their relevance to the issues. Thus, there is no identifiable military concern that justifies the President’s promulgation of a special military rule that is more burdensome to defendants in military trials than the evidentiary rules applicable to the trial of civilians.

It, therefore, seems clear that Rule 707 does not comply with the statute. I do not rest on this ground, however, because briefing might persuade me to change my views, and because the Court has decided only the constitutional question.⁸⁰

Justice Stevens thus reveals not merely a willingness to go it alone, but also a reluctance to address constitutional issues unnecessarily (as in *Solorio*). He also expresses a willingness to probe, albeit tentatively, behind claims of military judgments (in this case ostensibly a presidential judgment, because the Rules for Courts-Martial are promulgated by Executive Order), and to do so in the particular context of the UCMJ’s rulemaking provision. That provision turned out to be important ten years later, when the Court decided *Hamdan v. Rumsfeld*. *Hamdan* involved a military commission rather than a court-martial.⁸¹

Hamdan merits close study for, among other things, what it reveals about the virtues and weaknesses of minimalism.⁸² The case has

⁸⁰ *Id.* at 325 (footnote omitted).

⁸¹ At the time, the UCMJ applied to both courts-martial and military commissions. When it enacted the Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600, 2602 (2006) (“MCA”), Congress added a separate chapter 47A to title 10 to cover military commissions that involve offenses by unlawful enemy combatants. The UCMJ itself continues to cover courts-martial and military commissions that try lawful enemy combatants.

⁸² Compare Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES L. 643 (2008) (criticizing minimalism), with John Paul Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437 (1985) (arguing that constitutional framers left gaps for future legislators to fill).

already generated a considerable body of commentary, but one point that deserves greater attention is the debate between Justices Stevens and Thomas concerning Article 36 of the UCMJ, referred to above. Article 36 has two parts, both of which were amended after *Hamdan* by the MCA. Subsection (a) concerns “conformity.” It sets district court practice as the benchmark for court-martial practice in the absence of a countervailing statute or impracticability determination by the President. Subsection (b) concerns “uniformity.” Both concepts came into play in *Hamdan*. Writing for the majority, Justice Stevens concluded that in order to satisfy Article 36 and meet the “regularly constituted court” requirement of Common Article 3 of the Geneva Conventions, military commission procedures had to conform to court-martial procedures.⁸³

Justice Thomas had the better of the argument with respect to Article 36. In order to understand why, a short history lesson is required. The Articles of War were the Army and Air Force antecedent to the UCMJ. As enacted in 1916, Article of War 38 included a rulemaking provision very much like Article 36. It included no uniformity clause, even though it applied to both courts-martial and military commissions. That clause appeared in 1950 when Congress enacted the UCMJ,⁸⁴ creating for the first time a single military criminal code applicable to all branches of the armed forces. Quite simply, as Justice Thomas explained,⁸⁵ Congress intended the uniformity clause to ensure uniformity from service to service, rather than as between courts-martial and military commissions.⁸⁶

On the other hand, Justice Stevens’s willingness⁸⁷ (along with Justice Kennedy)⁸⁸ in *Hamdan* to probe Executive Branch assertions that it was impracticable to follow court-martial procedures in the pre-MCA military commissions is correct. The empty assertions in President Bush’s November 13, 2001 Military Order⁸⁹ that set the stage for the

⁸³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 620-25, 631-33 (2006).

⁸⁴ Uniform Code of Military Justice, Pub. L. No. 81-506, pt. I, art. 2, 64 Stat. 107, 109 (1950).

⁸⁵ *Hamdan*, 548 U.S. at 712 & n.17 (Thomas, J., dissenting).

⁸⁶ As Professor Vagts, Colonel Sullivan and I had suggested in 2005, this is the better reading of the statute. Eugene R. Fidell et al., *Military Commission Law*, 12 *ARMY LAW.* 47, 47 n.8, 48 & nn.8-10 (2005).

⁸⁷ *Hamdan*, 548 U.S. at 623-25.

⁸⁸ *Id.* at 640-41 (Kennedy, J., concurring in part).

⁸⁹ Notice, Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (to be codified at 3 C.F.R. pt. 918 (2001 Comp.)). See generally Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 *GREEN BAG* 379 (2003) (exploring deficiencies in process

pre-MCA military commissions, even with the additional comments of subordinates to the media,⁹⁰ were deficient. The Military Order itself offered no specifics in support of its determination that district court prosecutions were impracticable, merely citing “the danger to the safety of the United States and the nature of international terrorism.”⁹¹ Such a transparently deficient rationale asks the impossible of a coordinate Branch that might have been entirely willing to defer if given a rationale by the White House that contained even a modicum of substance.

Scholars will debate the best course of action to take if an impracticability determination was flawed. Professor Samuel Estreicher and Judge Diarmuid O’Scannlain have suggested that a *Chenery*-style⁹² remand was required to afford the President a second bite at the apple.⁹³ The Court took the position that recourse to court-martial norms was required, as indeed is suggested by the preamble to the MCM, which provides that absent a contrary “applicable rule of international law” or “regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by” court-martial rules and principles.⁹⁴

This may be sound as a matter of international law, but it is possible that Article 36(a) dictates otherwise. Although the outcome in *Hamdan* is desirable, the statutory default mode is district court practice, rather than court-martial practice. Accordingly, if the President’s determination that conformity with district court practice is impracticable, the result should arguably have been a ruling that required conformity with district court practice.

It is unfortunate that, despite their dueling references to Article 36, the Justices seem not to have had this aspect of the statute in proper focus. If Congress revisits the MCA and the changes it made in the UCMJ, both it and the Executive Branch would do well to explore this aspect of the matter with care. This might redeem both for the hasty process by which the MCA found its way into the statute book,

surrounding rulemaking for military commissions).

⁹⁰ See *Hamdan*, 548 U.S. at 624 n.52 (claiming need to protect classified information).

⁹¹ Military Order, *supra* note 89, at 57,833.

⁹² SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

⁹³ Samuel Estreicher & Diarmuid O’Scannlain, *The Limits of Hamdan v. Rumsfeld*, 9 GREEN BAG 353, 357 (2006).

⁹⁴ JOINT SERV. COMM. ON MILITARY JUSTICE, DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, 2(b)(2) (pmb.) (2008 ed.).

pushed along by gale-force winds from the White House on the eve of the 2006 congressional elections.

IV. DESIRABILITY OF MILITARY EXPERIENCE

The goal of this Article is not to offer a pop-psychology “take” on Justice Stevens. His judicial history is too nuanced for that. Rather, this Article first analyzes his distinctive approach to military-related cases by comparing it with the approaches of other Justices. Second, it evaluates his impact on the Court’s developing jurisprudence in this area. The pattern that emerges has significant institutional implications.

The country is both curious and anxious about what the Court’s direction may be when, inevitably, vacancies must be filled. Must the next appointment go to another woman⁹⁵ (even after the elevation of Justice Sotomayor to succeed Justice Souter)? A Hispanic? A Native American? Are six Catholics too many?⁹⁶ Are there too many Harvard and Yale graduates⁹⁷ or former Supreme Court law clerks? Is prior service as a federal appellate judge essential, merely desirable (as Chief Justice Roberts has suggested)⁹⁸ or downright undesirable?

⁹⁵ See Neil A. Lewis, *Speculation Grows About Minority or Woman Nominee*, N.Y. TIMES, Sept. 4, 2005, http://www.nytimes.com/2005/09/04/politics/politicsspecial1/04cnd-candidates.html?_r=2; Adam Liptak, *Justice Ginsburg Undergoes Surgery for Cancer*, N.Y. TIMES, Feb. 6, 2009, at A12. One school of thought holds that even before President Obama nominated Justice Sotomayor, the Court has already had a Hispanic Justice, although it may depend on whether Portuguese-Americans (Cardozo, J.) count as Hispanic. See Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 7-14 (2002). Compare Dahlia Lithwick, *Chief Justice Roulette*, SLATE, Nov. 25, 2002, <http://www.slate.com/id/2074450> (Nov. 26, 2002 correction) (“Cardozo — of Portuguese-Jewish descent — may well have been the first Hispanic justice, depending on who you consult; some Hispanic organizations classify Portuguese-Americans as Hispanic, and many others do not.”), with Kevin R. Johnson, *The First Latino Supreme Court Justice? What the Controversial Nomination of Miguel Estrada to a Federal Appeals Court Seat Is Really About*, FINDLAW’S WRIT, Oct. 17, 2002, http://writ.news.findlaw.com/commentary/20021017_johnson.html (pointing out that if named to Supreme Court, Mr. Estrada would have been first Latino Justice).

⁹⁶ See Lynette Clemetson, *Alito Could Be 5th Catholic on Current Supreme Court*, N.Y. TIMES, Nov. 1, 2005, at A23; Robin Toner, *Catholics and the Court*, N.Y. TIMES, Aug. 7, 2005, at C4.

⁹⁷ See Laurie Goodstein & David D. Kirkpatrick, *Class Matters: On a Christian Mission to the Top*, N.Y. TIMES, May 22, 2005, at A1, A22.

⁹⁸ Adam Liptak, *Roberts Sets Off Debate on Judicial Experience*, N.Y. TIMES, Feb. 16, 2009. Chief Justice Roberts’ lecture is available on the Internet. See John G. Roberts, Jr., Chief Justice of the Supreme Court of the U.S., 2009 Rehnquist Center Lecture, Feb. 4, 2009, <mms://www.law.arizona.edu/archive/events/RehnquistCenterLecture2009.wmv>.

That conversation should also address whether the Court should have more Justices with extended service in the active duty military. Nominees with military experience would broaden and enrich the experience base of the Justices.⁹⁹ In addition, and perhaps more importantly, Justices (and judges generally) without active military experience may be (or may *feel*, which can amount to the same thing) at a disadvantage when dealing with cases that involve military matters, even though they seem utterly lacking in fear when it comes to tackling equally (or more) arcane or inaccessible areas of the law. Phrases like “deference . . . is at its apogee” or “separate society” come to mind.¹⁰⁰ Judicial caution may confer on the government so significant — and, at times, undeserved — an advantage as to erode the adversary process in our highest court. To be sure, whether and how any particular veteran who is elevated to the bench is influenced by military experience will vary.¹⁰¹ Counterintuitive though it may seem, judges with real military experience may be less likely to defer, at least around the edges, than those with none.

It would be as improper for Justices with even substantial military experience to assume the mantle of a specialized court¹⁰² as it would

⁹⁹ See *supra* text accompanying note 16. Deconstructing Alfred, Lord Tennyson’s *Charge of the Light Brigade* for a bar audience in 2006, Justice Stevens advised that:

The famous line in the poem — “Theirs not to reason why / Theirs but to do and die” — reflects the poet’s understanding of a soldier’s duty to execute unambiguous orders. The actual battle, however, teaches two lessons that may be useful not only to junior officers in combat but to judges as well. Text does not always convey the meaning its author intended; and knowledge of the author’s purpose may avoid unfortunate and unintended consequences. The ever-present risk of a scrivener’s error should never be ignored entirely.

Remarks by Justice John Paul Stevens, *supra* note 35, at 55. It is hard to imagine that this insight did not reflect his own long-ago experience as a relatively junior naval officer.

¹⁰⁰ *Rumsfeld v. F.A.I.R.*, 547 U.S. 47, 58 (2006) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“[S]pecialized society separate from civilian society.”).

¹⁰¹ “[W]hile military service is formative, it does not set everyone on the same path.” Amann, *supra* note 33, at 1599.

¹⁰² There of course is a specialized court for military matters, the United States Court of Appeals for the Armed Forces, 10 U.S.C. § 941 (2006), although the Supreme Court has not been shy about substituting its judgment for that court’s. See *Clinton v. Goldsmith*, 526 U.S. 529, 539 (1999); *Middendorf v. Henry*, 425 U.S. 25, 42-43 (1976). Justice Stevens was on the Court when *Middendorf* was decided but did not participate, having been elevated only after it had been argued (and re-argued). Because in the end the Court split 5–3, his vote could not have changed the outcome.

be for a trial judge to rely on personal knowledge of surgery when deciding a medical malpractice case. But it seems fair to suggest that having veterans in the Conference can add to the robustness of both discussion on and scrutiny of government claims that might otherwise be embraced uncritically.¹⁰³ Experience since 9/11 demonstrates that Justices are not reluctant to test and, when appropriate, reject government claims sounding in military or national security matters.

But the Executive Branch's litigative advantage in these fields is profound. Despite occasional setbacks,¹⁰⁴ this advantage remains daunting despite the impressive mobilization of the civilian bar in the wake of the Guantánamo and other "enemy combatant" detentions. As a result, a cautious approach seems justified. It is not desirable, in a democratic society, for the government to have an effective monopoly on learning or credibility in these areas. It is therefore a good thing that law schools increasingly offer courses in military and national security law.

At most, only a handful of lawyers with the credentials to be plausible candidates for appointment also have significant military experience. An appointment strategy that took particular note of substantial military service may therefore be difficult to achieve when the next one or two vacancies arise. As time passes, however, and as more and more young people serve in conflicts like the Gulf Wars, combat in Afghanistan, or elsewhere, the number of veterans will increase. Inevitably some will find their way to law schools and the legal profession. When that happens, those responsible should have no difficulty finding highly qualified veterans to serve on the Court. Equally clearly, among them will be found another Holmes, another

¹⁰³ Is the same true of Congress, which has experienced a steady decline in the number of veterans? See generally Donald N. Zillman, *Where Have All the Soldiers Gone? Observations on the Decline of Military Veterans in Government*, 49 ME. L. REV. 85, 91, 100 (1997) (tracking decline in number of veterans in Congress); Donald N. Zillman, *Where Have All the Soldiers Gone II: Military Veterans in Congress and the State of Civil-Military Relations*, 58 ME. L. REV. 135, 137-38 (2006) (same). President Zillman's latest research reveals that "[a]fter the 2008 election the percentage of veterans continued a consistent decline since 1992 and was only 21% of the Congress." E-mail from Donald N. Zillman, Interim President, University of Maine at Presque Isle to author (Apr. 22, 2009, 10:45:00 EST) (on file with author). Only 11 members of the current Congress, all Representatives, served in the military after 1990. *Id.*

¹⁰⁴ See, e.g., *United States v. Denedo*, 129 S. Ct. 2213 (2009) (5-4 decision) (ruling that service court of criminal appeals had authority to issue writ of error *coram nobis*). The author was co-counsel for Petty Officer Denedo.

Brennan, another Powell,¹⁰⁵ another Rehnquist, and, yes, another Stevens.

¹⁰⁵ Justice Holmes left the Union Army as a brevet lieutenant colonel. Max Lerner, *Holmes: A Personal History*, in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* xvii, xxiv (Max Lerner ed., 1943). Justices Brennan and Powell served as colonels in World War II. HUNTER R. CLARK, *JUSTICE BRENNAN: THE GREAT CONCILIATOR* 33 (1995); JOHN C. JEFFERIES, JR., *JUSTICE LEWIS F. POWELL, JR.* 108 (1994); Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1998, at A1, D19.