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Military Social Science Research and the Law

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Yael Enoch and Abraham Yogev

Military Social Science Research and the Law

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The Catholic University of America

In "Consequences of Social Science Research on the U.S. Military," Morris Janowitz focused on policymakers at the highest level of the executive branch.¹ However, military personnel policy is made by the judiciary as well: as a result of federal court decisions, the services are obliged to pay "turncoat" POWs, change the way they characterize administrative discharges, eliminate mandatory chapel attendance at service academies, and increase the compensation of some women in the armed forces.² Three of these cases were decided on the purely legal grounds that the challenged actions exceeded the authority granted by statute and the Constitution. In the decision on chapel attendance, civilian judges expressly rejected the military's secular rationale based on considerations of morale and discipline.

This paper will examine recent court decisions in which morale and discipline were the sole criteria for adjudication. Examination of the appellate briefs submitted in those cases suggests that government lawyers have begun to rely on social science concepts—particularly primary group cohesion—to justify the military's treatment of individual members of the armed forces. Paradoxically, these efforts to establish a rational basis for military decisions may encourage judicial intervention in the internal affairs of the military.

The Courts and Military Discipline

The Civil Context

When Charles Moskos and Morris Janowitz debated the pros and cons of the institutional/occupational model, both assumed that one sign of change was a new willingness on the part of service members to sue over matters that had traditionally fallen within the institution's control.³ In fact, service members' suits challenging their superiors' decisions have been reported since the earliest days of the Republic.

The United States did not waive its sovereign immunity from suits on contracts, regulations, or laws until 1863, or its immunity from tort suits until 1946. Consequently, the earliest legal challenges to military decisions did not seek compensation but rather writs of habeas corpus, in which aggrieved servicemen complained that they were being improperly held on active duty. As early as 1799, records exist of such an application having been made.⁴ By the time of the Civil War, these suits were common and a body of jurisprudence had developed,⁵ culminating in 1890 with a Supreme Court opinion that contained this principle:

An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer or the duty of obedience in the soldier.⁶

In language redolent of the cohesion concept, the Court went on to say that "the confidence among the soldiers in one another is impaired if any questions be left open as to their attitude to each other."⁷ The same considerations discouraged civilian judges from reviewing allegedly improper courts-martial and administrative decisions on promotions and separation. A 1911 opinion of the Supreme Court was particularly candid in acknowledging the consequences of this policy: "to be promoted or to be retired may be the right of an officer. . . but greater even than that is the welfare of the country and, it may be, even its safety through the efficiency of the Army."⁸ Nineteenth- and early twentieth-century cases offered three reasons against intervening in the affairs of the military: impairment of efficiency, interference with command authority, and damage to group morale. Although this deference to military policy may have led to injustices, judicial "second guessing" of military decisions affecting members of the armed forces was rare.⁹

However, the policy of deference to military authority did not ex-

tend to the Court of Claims. Established in 1853 as an administrative body to hear—and report to Congress—claims against the United States based on a contract, statute, or regulation, the court routinely considered servicemen's suits for entitlements without any objection by the executive branch that such claims were a threat to military efficiency or discipline.¹⁰ Because the Court of Claims began as an arm of Congress, to whom all citizens (including members of the armed forces) have a constitutional right to address petitions, the executive branch apparently did not think it appropriate to challenge the court's right to hear servicemen's suits. Moreover, most Court of Claims cases involved controversies over entitlements defined by statute and thus did not question military expertise in the exercise of discretionary judgments. Now restructured as the U.S. Claims Court, it continues to decide cases challenging military pay¹¹ and promotion¹² decisions, which may involve the exercise of discretion but not of military expertise.

The civil courts' deference to military expertise and consequent reluctance to intervene in internal military decision making were thrown into sharp relief after 1946, when Congress passed the Federal Tort Claims Act, waiving the United States' sovereign immunity from suits for damages caused by the negligence of government officers and employees in the course of their duties. Within three years, the Supreme Court was obliged to decide whether servicemen could bring such suits.

In *Brooks v. United States*, the Court rejected the government's argument that members of the armed forces were, ipso facto, barred from asserting negligence claims against the United States.¹³ The claim arose when a carelessly driven Army truck collided off post with a car driven by a serviceman on furlough. However, a year later in *Feres v. United States*,¹⁴ the Court limited such suits by members of the armed forces to cases in which the injury was not "incident to service"; in a series of subsequent rulings, the Court held that the "*Feres* doctrine" should be applied in situations in which a suit would interfere with "the habit of immediate compliance with military procedures and orders [that] must be virtually reflex with no time for debate and reflection."¹⁵ Of course, it is difficult for civilian judges to know when a particular law suit will have an adverse effect on military discipline. For example, in *Atkinson v. United States* a federal appeals court concluded that, in treating a servicewoman for complications arising from her pregnancy, her military physician was "implementing decisions of military judgment only in the remotest sense."¹⁶ The court further concluded that her malpractice suit against the United States should not be barred by the *Feres* doctrine. The *Atkinson* decision is atypical. In most cases, judges defer to the

government's assertion that a service member's tort suit against the United States is a threat to morale and discipline.

The *Feres* decision, which obliged civilian courts to determine whether an injury was "incident to service," was paralleled by the Supreme Court's 1974 decision in *O'Callaghan v. Parker*, which limited the military's right to court-martial active duty personnel to those cases in which an off-post offense was "service connected."¹⁷ It is not surprising that government lawyers sought to justify the exercise of court-martial jurisdiction using the same rationale.¹⁸ Government arguments initially emphasized the threat to the habit of obedience by attempting to show, for example, how off-post marijuana use flaunted discipline; but subsequent arguments stressed the effect of off-post offenses on unit efficiency and morale.¹⁹ This approach was exemplified in the court-martial of Richard Solorio for the off-post sexual abuse of fellow coast guardsmen's daughters, in which both the prosecution and defense offered testimony from members of the unit (including the victims' fathers) on the offenses' effect on unit cohesion.²⁰ When Solorio's conviction reached the Supreme Court, it was affirmed on the grounds not that his offenses were service connected but that *O'Callaghan v. Parker* had been wrongly decided and that court-martial jurisdiction depended on the status of the accused, not on the nature of the offense.²¹ However, the effect of particular actions on morale and discipline will continue to be the subject of judicial review.

The law discourages, but does not prohibit, civilian judges from substituting their judgments for those made by military authorities. The following three cases, drawn from lower-court decisions that overruled military judgments, illuminate some aspects of military social science. In *Geller v. Secretary of Defense*—decided in 1976, the same year that Moskos first offered his occupational model of the military—a reserve chaplain brought suit in federal court, seeking to enjoin the military from transferring him to the inactive reserves because he refused to remove his beard. He claimed that his decision to wear a beard was religiously motivated and was therefore protected by the Constitution, as it would have been in civilian life. The district court judge, while declining to define what legal standard was applicable "in the context of military employment," ruled in his favor.²² Similarly, in *ben shalom v. Secretary of the Army*, a federal district court judge enjoined the Army from honorably discharging a homosexual reservist because to do so, in his words, would mean that "the petitioner lost her job simply because of what she is."²³ Finally, in *Goldman v. Secretary of Defense*, the same judge who had permitted Rabbi Geller to wear his beard enjoined the Air Force

from applying a regulation that would have prohibited a psychologist from wearing his yarmulke with his uniform while on duty in a military hospital, although the government had submitted an Air Force general's affidavit regarding the adverse effect such deviations from uniform standards would have on discipline, esprit de corps, and the public image of the military as strong and reliable.²⁴ The *Goldman* trial judge accepted the affidavit but disagreed with the general's assessment.

Shortly after the *Goldman* decision, however, another judge in the District of Columbia was called upon to adjudicate a similar claim in *Bitterman v. Secretary of Defense*, in which an Air Force sergeant sought to enjoin the enforcement of a regulation so that he could wear his yarmulke in uniform. In his case, an Air Force general testified regarding the positive effect adherence to uniform standards had on unit morale and discipline, offering his own experiences in Vietnam as examples. The trial judge accepted his testimony, rejecting a contrary opinion offered by the sergeant's witness, a clinical psychologist and retired Air Force colonel, on the grounds that "his opinion was based neither upon any studies that he had conducted or read, nor upon any material gathered pursuant to scientific method."²⁵ Subsequently, the Court of Appeals overturned the ruling of the trial judge in the *Goldman* case and was sustained by the Supreme Court in a 5-4 decision, in which the majority emphasized the judiciary's traditional reluctance to intervene in military decision making in matters involving morale and discipline and the dissenters focused on the military's failure to justify its "asserted need for rigidity of enforcement."²⁶ Judicial deference was stretched nearly to the breaking point, and it will be tested again if the Supreme Court hears the case of *Watkins v. U.S. Army*, in which two of three Federal Circuit Court of Appeals judges concluded that considerations of morale and discipline could not justify Army regulations discriminating against homosexuals.²⁷

The Court-Martial Context

Two recent court-martial decisions illustrate the lack of deference shown by judges in the military justice system to the government's assertions regarding morale and discipline. At Coast Guardsman Solorio's trial, the military judge had originally ruled that, contrary to the prosecution's assertions, "there was no showing of diminished morale, discipline or effectiveness within the military community in Juneau, Alaska" and concluded that the offense was not service connected.²⁸ Although this ruling was subsequently reversed, the military judge clearly felt qualified to make an independent determination that conflicted with that of

the commander who had referred the case to trial. Similarly, in *Johanns v. United States*, the civilian Court of Military Appeals affirmed a decision by an Air Force Court of Military Review, staffed by career military personnel, that an officer's sexual relationships with three enlisted women in his unit was not conduct prejudicial to good order and discipline—in the absence of an explicit prohibition in service regulations.²⁹ These recent decisions exemplify the military legal system's willingness to second-guess commanders' decisions based on considerations of morale and cohesion.³⁰

Thus, the effect of certain acts on unit morale and discipline will continue to be the object of judicial scrutiny in the civilian and military systems. Is the state of discipline a "social fact" susceptible of proof in the courtroom?

Social Science and the Law

It has been suggested that judges use social science in three ways: to determine a "legislative fact" (e.g., the effect of a "separate but equal" school system on black students' academic performance) when called upon to decide whether a legal rule should be changed; to determine an "adjudicative fact" (e.g., the degree of consumer confusion between similar products in a copyright infringement suit) when called upon to decide a particular case; or to establish a social framework by creating a context or background within which facts specific to a case can be determined (e.g., the behavioral traits typically observed in abused children, in a case in which a court must decide whether a particular child has been abused).³¹ The effect of certain behavior on morale and discipline seems to call for either the finding of an adjudicative fact ("was discipline affected by *Johanns'* or *Solorio's* behavior?") or the establishment of a social framework fact ("is the witness's testimony that discipline would be affected by permitting yarmulkes or *Feres* suits consistent with empirical knowledge?").

The courts' treatment of discipline as a social fact has been ambiguous. In *Feres* cases, the state of discipline is seen to be part of the social framework for the decision. Neither side offers "case specific" data. The adverse effect of a particular claim on military discipline is simply asserted by a civilian Department of Justice lawyer as part of the legal brief arguing for dismissal of the suit. If pressed to justify applying the general rule in a particular case, the lawyer would presumably point to the agency's denial of the claim as evidence of the military's considered and expert judgment. However, claims are often adjudicated at the

agency level by lawyers far removed from the unit and individuals whose morale or respect for authority would be affected by payment. In the Army, for example, such claims would be decided at Ft. Meade, Md., no matter where they arose, if they were in excess of \$5,000 or were recommended for disapproval. Therefore, if morale is a consideration in the administrative resolution of *Feres* claims, it must be the morale of the armed service or of its hierarchy, not the morale of the individuals directly concerned with the claim. Those few courts that have permitted a *Feres*-type suit to proceed on the grounds that no threat to discipline existed simply applied *logic* and *common sense* in arriving at their judgments.³²

In the uniform cases, expert witnesses were used to help the court decide whether the desired exception would affect morale and discipline. By virtue of their training and experience, the Air Force generals who testified in the yarmulke cases were, in the eyes of the law, as qualified to offer an opinion regarding discipline as was the clinical psychologist who testified on Rabbi Geller's behalf. However, the thrust of the generals' testimony was unclear. Would an exception in the particular case have an adverse effect on the individual's unit, on members of any unit with whom he came in contact, or on members of the armed forces who learned that an exception was made? Nor is it clear whether the generals were addressing the fact of the exception or the fact that the exception would be made by a branch of government not charged with the administration of the armed forces. Given that military commanders routinely change, enforce, or relax uniform requirements with the goal of improving morale, discipline, or recruitment, the generals' objection was presumably to the fact of judicial intervention.³³ Meanwhile, the petitioners in the uniform cases, and the judges who agreed with them, were concerned with the effect of the deviation, not with the agency that would authorize it.

In the cases concerned with the application of the *O'Callaghan* rule, "morale and discipline" arguments were advanced in civil courts following a *Feres* approach; that is, no attempt was made to justify, through expert opinion or empirical data, that a specific off-post offense would have an effect on morale or discipline. In cases before military courts the government might, as it did in the *Solorio* case, rely on the observations of lay witnesses familiar with the unit's morale and efficiency to determine the adjudicative fact of the impact of a particular offense on a particular unit's morale and discipline. In the *Johanns* (sexual fraternization) case, the government simply established that members of the unit were aware of his liaisons. When the Court of Military Review over-

turned his conviction, they relied on an anecdotal article stating that some forms of fraternization had become acceptable in the Air Force following World War II and on the fact that such behavior had been condoned in the past. Neither the government nor the defense alluded to social science research on cohesion, women in the military, or sexual harassment in the workplace.

Is it appropriate to describe these legal disputes as ones that involved the social sciences? In the *Geller* case, the only one in which a social scientist testified, the judge disregarded the testimony. In others, judges relied on "self-evident" facts or anecdote.³⁴ However, these cases involved an assessment of the effect of certain acts on unit behavior, one of the favored topics of military social scientists.

Arguably any judicial second-guessing of military decisions would have an adverse effect on the habit of obedience (discipline in the vertical sense)³⁵ and possibly on unit morale (discipline in the horizontal sense).³⁶ But judges are, in some circumstances, obliged to second-guess military decisions and, in doing so, routinely rely on the opinions of military professionals, whose specialized objective knowledge is derived from experience. Presumably the facts and data on which the professionals rely can be either buttressed or rebutted by social science methodology. However, few legal scholars have looked to social science research as an aid in their analyses of military cases, and those who have done so have arrived at widely divergent conclusions.³⁷

Challenging Expert Opinion

We have seen why courts are called upon to examine decisions involving members of the armed forces and how, in some cases, the outcome of the case will depend on the court's assessment of morale and discipline before and after a particular act. This kind of assessment is often based on facts or data susceptible of social science research and its methodology. There are four criteria for evaluating social science research.³⁸ When these criteria are applied to typical military cases, it becomes apparent that the legal reasoning courts use in such cases is inconsistent with, or cannot be justified by, military social science.

The first criterion is the extent to which the research relied on has survived the critical review of the scientific community. None of the professional opinions offered in the cases was based on research subject to formal peer review. The trial judge in the *Bitterman* (yarmulke) case placed great reliance on the "fact" that General Patton's emphasis on strict adherence to appearance standards improved the combat effec-

tiveness of U.S. troops in the North African campaign.³⁹ The assertion that dress and combat effectiveness are somehow directly related is often made by military professionals, and yet it has never been subject to critical analysis.

The second criterion relates to the validity of the research. None of the opinions in the cases cited above can be said to rely on valid research. In the *Johanns* case, a dissenting Court of Military Review judge observed that *Johanns* should have "recognized that his moral behavior, while not particularly offensive to him would, nevertheless, have been blatantly offensive to that large group of basically fundamentalist churchgoers that populated his, and practically every other base in the Air Force."⁴⁰ The American Civil Liberties Union riposte that "criminal law is not something to be decided by a show of hands in the base chapel" leaves open the question of whether a social science survey of base personnel, administered on neutral ground, would have been accorded any weight by the court-martial.⁴¹ *Johanns'* wing commander was permitted to testify, stating that had the fact of *Johanns'* sexual activities become known, "it might have generated a good item of conversation at the O[fficers] W[ives] C[lub] coffee, but beyond that I cannot see where it would harm the wing, or its image, or its ability to carry out its mission."⁴² This suggests that the state of discipline is an appropriate subject for expert testimony, and thus for rebuttal, by survey data.⁴³

The third criterion for determining the value of social science findings is the extent to which they can be generalized or externally validated. Stanford Gregory's paper, which concluded that the data relied on by Paul L. Savage and Richard A. Gabriel could not be generalized over time and across settings, is representative of this kind of critical analysis.⁴⁴ One may question whether the Air Force generals' opinions in the *Goldman* case concerning dress and appearance standards have application to the state of discipline in, for example, the Navy. Similarly, there is no empirical justification for concluding, as the Court of Military Appeals did in the *Johanns* case, that behavior acceptable in the Air Force would meet the other services' standards. In this regard Franklin Margiotta's observation regarding the diversity of values and operating styles in the U.S. military is particularly pertinent.⁴⁵

The fourth and final criterion for evaluating social science findings is the extent to which they are confirmed by subsequent independent study. There is no indication that military or social science professionals have attempted to replicate the experiences relied on by military professionals in deciding that a particular act would adversely affect morale and discipline. Indeed, it may be that this is an impossible task.⁴⁶

Although social science has rarely been used in military cases, its terminology, particularly the concept of cohesion, has begun to affect the way government lawyers advance their arguments. For example, military lawyers arguing on Solorio's behalf before the Supreme Court asserted that "the record is devoid of any direct or empirical evidence that the offenses had a greater impact on the morale of the military organization than [the same offenses committed by a civilian]."⁴⁷ If the defense had succeeded in its claim that the government was obliged to produce social science research to establish an effect on morale and discipline, then the government should be required to establish that the payment of *Feres* claims would adversely affect discipline.⁴⁸ In practice, however, courts accept or reject professional military judgments on matters relating to morale and discipline without reference to social science data. Military professionals claim a specialized cognitive base, derived from their collective experience, that gives them the right to make the appropriate intuitive decisions affecting morale and discipline. When the professionals vacillate, judges intervene: Goldman had been permitted to wear his yarmulke under previous commanders; Watkins openly acknowledged his homosexuality and continued to receive outstanding performance reports; Johanns' prior commander was aware of, and did not forbid, sexual fraternization. Yet Chief Justice Earl Warren's statement that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have"⁴⁹ remains true. It may be that the terms *discipline* and *morale* are susceptible only of description and not of definition.

Civilian judges have been reluctant to intervene in the internal management of the armed forces because they feared their intervention would have an adverse effect on discipline and morale. When government lawyers justify management decisions by using the methodology and vocabulary of the social sciences, they implicitly suggest that these decisions can be validated (or challenged) scientifically. At present, military social science research may aid policymakers in the executive and legislative branches; however, judges may draw the erroneous conclusion that such research will solve the problem posed by the individual service member who challenges legal rules.

Notes

1. Morris Janowitz, "Consequences of Social Science Research on the U.S. Military," *Armed Forces and Society* 8 (Summer 1982): pp. 507-524.
2. *Bell v. United States*, 366 U.S. 393 (1961); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Anderson v. Laird*, 466 F.2d 283 (D.C.Cir.), cert. denied, 409 U.S. 1076 (1972); and *Frontiero v. Richardson*, 411 U.S. 677 (1977).
3. Moskos spoke of "the increasing tendency of active duty personnel to bring grievances into litigation" in "From Institution to Occupation: Trends in Military Organization," *Armed Forces and Society* 4 (Fall 1977): pp. 41, 45, and Janowitz seemed to accept the accuracy of the observation while noting that the Supreme Court continued to reaffirm the officer corps' autonomy in such areas as promotion and decision making about military organization. See Janowitz, "From Institutional to Occupational: The Need for Conceptual Continuity," *Armed Forces and Society* 4 (Fall 1977): p. 52. *Life in the Rank and File*, ed. David R. Segal and H. Wallace Sinaiko (Washington, D.C.: Pergamon-Brassey's, 1986), describes without comment the changes wrought in the American military by *Frontiero*.
4. *Case of Husted*, 1 Johns Cas. 136 (N.Y. 1799).
5. See, for example, *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 480 (1864).
6. *In re Grimley*, 137 U.S. 147, 153 (1890).
7. *Ibid.*
8. *Reaves v. Ainsworth*, 219 U.S. at 306 (1911).
9. See, for example, the courts' refusal in *Reid v. United States*, 161 F. 469 (S.D.N.Y. 1908), writ of error dismissed on jurisdictional grounds by the Supreme Court, 211 U.S. 529 (1909), to review the discharge "without honor" of members of an all-black unit suspected of terrorizing the town of Brownsville, Texas, who refused to cooperate with military investigators.
10. See, for example, *Ellsworth v. United States*, 1 Ct.Cl. 113 (1864), a suit by captain of the U.S.S. *Constitution* for prize money; and *Powell v. United States*, 1 Ct.Cl. 400 (1865), a suit by officer for property and horses lost to Confederate forces when he was captured in 1862.
11. See, for example, *Cherry v. United States*, 225 Ct.Cl. 312, 640 F.2d 1184 (1980), modified 697 F.2d 1051 (Fed. Cir. 1983), a suit by highest-ranking black POW in the Vietnam war; the court concluded that the Air Force abused its discretion in disbursing money earned during his seven-and-a-half years in confinement. Compare with *Luna v. United States*, 810 F.2d 1105 (Fed. Cir. 1987), a Court of Claims decision dismissing another POW's claim, affirmed because there was no evidence the Air Force had abused its discretion in allowing his wife to make withdrawals from his pay account.
12. Compare *Braddock v. United States*, 9 Cl.Ct. 463 (1986) (an Army case) and *Etheridge v. United States*, 8 Cl.Ct. 736 (1985) (a Navy case), in which the court expressed its reluctance to second-guess military promotion boards' decisions regarding individual officers, with *Yerxa v. United States*, 11 Cl.Ct. 110 (1986), in which the court concluded that the secretary of the Air Force had abused his discretion by appointing only one reserve officer to a promotion board of 27 members when the law required reserve officer representation.
13. *Brooks v. United States*, 337 U.S. 49 (1949).

14. *Feres v. United States*, 343 U.S. 135 (1950).
15. *Chappell v. Wallace*, 462 U.S. 296 (1983), barring "constitutional tort" claims against other members of the armed services for the same reasons. See also *United States v. Shearer*, 473 U.S. 52 at 58 (1985), in which the Court concluded that such suits went "directly to the 'management' of the military, . . . question[ing] basic choices about discipline, supervision and control of a serviceman." Compare with *United States v. Brown*, 348 U.S. 110 (1954), in which the *Feres* doctrine was held inapplicable where an ex-serviceman was not subject to military discipline at the time he sustained his injuries.
16. *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986); opinion modified on rehearing, 813 F.2d 1006; rev'd on rehearing, 825 F.2d 202 (1987); cert. denied, 108 S.Ct. 1288 (1988). See also *Cole v. United States*, 755 F.2d 873 (11th Cir. 1985); reh. denied, 765 F.2d 1123 (1985), in which another court concluded that a suit based on the allegedly negligent exposure of soldiers to radiation during atomic tests would not "adversely affect the future practices of the armed forces," id. at 879. In *Hinke v. United States*, 524 F.Supp. 277 (E.D. Pa. 1981); rev'd 715 F.2d 96 (3d Cir. 1983); cert. denied, 465 U.S. 1026 (1984), and in re "Agent Orange" Prod. Liab. Litig., 580 F.Supp. 1242, 1253-54 (E.D.N.Y. 1984), trial judges concluded that the passage of time since the allegedly careless command decision minimized any adverse effects of the suit on discipline and effectiveness.
17. *O'Callaghan v. Parker*, 395 U.S. 258 (1974).
18. See, for example, *United States v. Chambers*, 7 M.J. 24 (C.M.A. 1979).
19. See, for example, *United States v. Trotter*, 9 M.J. 337 at 353 (C.M.A. 1980) (Fletcher, J., concurring in the result) and the amicus curiae brief submitted by the Navy in that case, Atch 1, Higley, *Lessons in Prerogatives of Command*, Court of Military Appeals Docket file.
20. Record of Trial, extracts, *United States v. Solorio*, Court of Military Appeals Docket file 48,445 and Supreme Court Docket file 85-1581. A typical question: "Has the case affected the way you trust your other Coast Guard friends?" [R-92] Some representative answers: "The question keeps coming up 'would it affect morale?' I don't know if it would affect the morale but would definitely affect reputation and integrity" [R-101]; "I have known a lot of people in the Coast Guard. This has made me leery of the people I work with" [R-127].
21. *Solorio v. United States*, 107 S.Ct. 2924 (1987).
22. *Geller v. Secretary of Defense*, 423 F.Supp. 16 at 18 (D.D.C. 1976), emphasis supplied.
23. *ben shalom v. Secretary of the Army*, 489 F.Supp. 964 at 965 (E.D. Wisc. 1980), emphasis supplied.
24. *Goldman v. Secretary of Defense*, 530 F.Supp. 12 at 14 (D.D.C. 1982); rev'd 734 F.2d 1531; reh. denied, 739 F.2d 657 (D.C. Cir. 1984); aff'd 106 S.Ct. 1310 (1986).
25. *Bitterman v. Secretary of Defense*, 553 F.Supp. 719 at 721 (D.D.C. 1982).
26. *Goldman v. Secretary of Defense*, 106 S.Ct. at 1326 (O'Connor, J., dissenting); see also Justice Brennan's statement that he found "totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed [to deviate from the regulation]," id. at 1319.
27. *Watkins v. U.S. Army*, 837 F.2d 1428 (9th Cir. 1988). In its brief to the Court of Appeals, the Army asserted that unit cohesion would be affected by an individual's homosexual reputation, which would become "a source of ostracism and disruption," p. 31, n. 18.
28. *Solorio v. United States*, 21 M.J. 251 (1985). *Petition for certiorari*, Appendix E, p. 58a, Supreme Court Docket file 85-1581.
29. *Johanns v. United States*, 20 M.J. 155, cert. denied 106 S.Ct. 147 (1985).
30. See also *United States v. Wysong*, 9 USCMA 249, 26 CMR 29 (1958), which holds that an order telling a suspect NCO not to talk to members of his unit regarding an investigation was illegal although the commander who gave the order claimed it was intended to maintain the unit's combat capability, i.e., cohesion; *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979), which holds that an officer who smoked marijuana off post with his subordinates had not committed a service-connected offense.
31. *Walker and Monahan, Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).
32. See cases cited in text accompanying note 16 supra.
33. The Army's and Navy's conflicting policies regarding the wearing of turbans by Sikh members of their respective services are discussed in Noone, *Rendering Unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces*, 18 ST. MARY'S L. JNL. 1233 at 1264 n. 147 (1987).
34. In *Dronenburg v. Zech*, which involved challenges to the military rules regarding homosexual behavior, the court ruled that "the Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate." 741 F.2d 1388 at 1398 (D.C. Cir. 1984).
35. *Bernott, Fairness and Feres: A Critique of the Presumption of Injustice*, 44 WASH. AND LEE L. REV. 51 (1987). See also House of Representatives, 99th Cong., 1st sess., 1985, H. Rept. 288, p. 17, in which the General Counsel of the Department of Defense opposed any legislative relaxation of the *Feres* rule on the grounds that it would interfere with the superior subordinate relationship.
36. *Testimony of Assistant Attorney General Willard Before the House Judiciary Committee*, May 1987, in which he opposed legislation intended to permit *Feres* claims for medical malpractice on the grounds that such suits would oblige members of the armed forces to testify for and against one another. Since military courts and boards routinely hear such testimony, his objection must be directed to the adverse effects if civilian judges were permitted to rule on such claims.
37. The earliest allusion to legal use of military social science appears to have been at a symposium whose proceedings were subsequently published in 49 IND. L. JNL. (Summer 1974). Although Edward Sherman concluded that "there is a well developed body of social science research which is relevant to the question of controlling the military through legal mechanisms," id. at 541, citing various works on military sociology, none of the papers addressed the use of social science in the courtroom. James Hirschhorn's *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N. CAR. L. REV. 177 (1984), relied on military sociology to justify the thesis that civilian courts should not apply civilian criteria of legality to military members' claims, while a student author in a Note, *Intramilitary Immunity and Constitutional Torts*, 80 MICH. L. REV. 312 (1980), had relied on many of the same authorities to come to the conclusion that no separate treatment was necessary.
38. Derived from Monahan and Walker's *Social Authority: Obtaining, Evaluating and Establishing Social Science in Law*, 134 UNIV. PENN. L. REV. (1986).

39. Note 25, *supra*.
40. 17 M.J. 862 at 887 (Miller, J., dissenting in part and concurring in part).
41. *Amicus Curiae Brief submitted on behalf of the appellee*, p. 18. Court of Military Appeals Docket file 48,445.
42. *Supplement to petition for grant of review on behalf of appellant*, 4 March 1987. Court of Military Appeals Docket file 48,445.
43. Experience suggests that research undertaken by the military in this context would not be free from bias. Responding to a legislative mandate, which arose during the *Goldman* (yarmulke) controversy, the Department of Defense reported to Congress that 88.5 percent of military personnel surveyed concluded that permitting exemptions for the wear of religious articles while in uniform would have a negative effect on military effectiveness. Only resident students attending officer and NCO service schools were surveyed. *Joint Service Study on Religious Matters*, March 1985, Appendix, 36.
44. Stanford Gregory, "Toward a Situated Description of Cohesion and Disintegration in the American Army," *Armed Forces and Society* 3 (Spring 1977): pp. 463-473.
45. Franklin Margiotta, *The Changing World of the American Military* (Boulder, Colo.: Westview Press, 1978), pp. 442-443. The Court of Military Appeals seems to have rejected the possibility that the violation of a particular service's unwritten custom could ever constitute an offense under the Uniform Code of Military Justice. *United States v. Johanns*, 17 M.J. 862 at 876-878 (Miller, J., concurring in part and dissenting in part).
46. Roger Beaumont and William Snyder make the same point in a different context; see "Combat Effectiveness: Paradigms and Paradoxes," in *Combat Effectiveness: Cohesion, Stress, and the Volunteer Military*, ed. Sam C. Sarkesian (Beverly Hills, Calif.: Sage, 1980), pp. 20, 30-31.
47. *Brief of Defense Appellate Division*, U.S. Army, p. 10, as *Amicus Curiae*, U.S. Supreme Court Docket file 85-1581.
48. Justice Scalia noted the incongruity of such arguments in a recent opinion dissenting from the majority's view that a serviceman's family was barred by the *Feres* decision from suing for his death, which was caused by the negligence of an FAA controller: "After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death." *Johnson v. United States*, 107 S.Ct. 2063 at 2074 (1987).
49. Warren, *The Bill of Rights and the Military*, 17 N.Y. UNIV. L. REV. 181, 187 (1962).

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"Ceausescuism" And Civil-Military Relations in Romania

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In light of serious economic decline and social unrest in Romania since the early 1980s, one must ask what alternatives, if any, exist to the current leadership of that country. One possibility, unambiguously given rise to by General Jaruzelski's example in Poland, is that East European military establishments might serve as feasible substitutes for the Communist party when a given leadership proves unable to rule effectively. But the ability of the armed forces of any particular country to establish a caretaker or successor regime depends upon the institutional capabilities of the military in question, its national traditions, and its relations with domestic political actors, as well as the nature of constraints imposed by the international environment. This study assesses the status of Romania's armed forces in order to provide a basis for determining whether a "Polish solution" is feasible in the Romanian political context.

Civil/military relations in Romania differ significantly from such relations in other countries within the Warsaw Treaty Organization. Romania's divergence from the Soviet Union left the Romanian Communist party more dependent on its own armed forces than are the rulers of any other East European WTO state. Consequently, maintaining control over the military is a more complex task in Romania and has comprised an area of special concern for the regime of Nicolae Ceausescu since its formation in the mid-1960s. The regime's tenuous position within the Soviet alliance creates a twofold problem for the RCP leadership. First,

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