EQUAL PROTECTION—THE FIRST AMENDMENT DOES NOT REQUIRE THE MILITARY TO ACCOMMODATE CERTAIN RELIGIOUS PRACTICES WHEN THEY WOULD DETRACT FROM THE UNIFORMITY SOUGHT BY THE DRESS REGULATIONS.—*Goldman v. Weinberger*, (U.S. Sup. Ct. 1986).

Captain S. Simcha Goldman, an Orthodox Jew and ordained rabbi, was a clinical psychologist in the United States Air Force.[1] In April of 1981, when Goldman testified as a defense witness in a court-martial hearing, opposing counsel lodged a complaint that Goldman's wearing of a yarmulke while in uniform violated the Air Force Regulation 35-10 (AFR 35-10).[2] Colonel Gregory, the hospital commander, ordered Goldman to refrain from wearing a yarmulke outside of the hospital while in uniform.[3] Although the majority of Goldman's time on base was spent working in the hospital, he refused to abide by the Colonel's order.[4] After Goldman protested the order with the Air Force general counsel, the order was revised to prohibit him from wearing a yarmulke indoors as well.[5] Goldman was also given a formal reprimand and warned that failure to comply with AFR 35-10 could result in a court-martial.[6]

Captain Goldman then initiated suit against the Secretary of Defense and others claiming that the application of the military regulation infringed upon his first amendment freedom to exercise his religious beliefs.[7] The United States District Court for the District of Columbia preliminarily enjoined the enforcement of this regulation,[8] and upon a full hearing permanently enjoined the Air Force's action concerning Goldman.[9]

On appeal, the Court of Appeals for the District of Columbia Circuit reversed, holding that when a military regulation and constitutional right clash, the judicial level of scrutiny should be neither strict nor rational.[10] Rather, the military regulation in question was to be examined to determine whether "legitimate military ends are sought to be achieved,"[11] and whether

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1. Goldman v. Weinberger, 106 S. Ct. 1310, 1311 (1986).

2. *Id.* at 1312. Air Force Regulation 35-10 relates to uniform dress code. *Id.* at 1314. *See also infra* note 56.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Goldman v. Weinberger, 530 F. Supp. 12, 16 (D.C. 1981), *rev'd*, 734 F.2d 1531 (D.C. Cir. 1984), *aff'd*, 106 S. Ct. 1310 (1986).

9. *Id.* at 16.

10. Goldman v. Weinberger, 734 F.2d 1531, 1535-36 (D.C. Cir. 1984), *aff'd*, 106 S. Ct. 1310 (1986).

11. *Id.* at 1536.

the regulation is "designed to accommodate the individual right to an appropriate degree."[12] Applying this test, the court of appeals concluded that the Air Force's interest in uniformity was great enough to permit the strict enforcement of the regulation.[13] The full court of appeals denied a rehearing *en banc*, with three judges dissenting.[14]

In a 5-4 decision, the United States Supreme Court *held*, affirmed.[15] The first amendment does not require the military to accommodate certain religious practices when, in its view, they would detract from the uniformity sought by the dress regulation. *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

The majority, in an opinion written by Justice Rehnquist, stated that the military is a unique organization and is different from civilian society.[16] The Court stated that a soldier's first amendment claim against the military should not be analyzed according to the standards set forth in similar cases involving civilians.[17] Rather, a new standard of review was adopted for military regulations that clash with first amendment free exercise claims.[18] The Court stated that under this new standard, much greater deference will be given to a military regulation when it clashes with a first amendment free exercise claim.[19] This deference will be given because, according to the Court, the professional judgment of military authority is best equipped to determine what is necessary for maintaining the discipline of soldiers.[20]

The majority agreed with the professional judgment of the Air Force that the traditional uniform encourages subordination of individual identities in favor of an overall group mission.[21] Unity and obedience were considered to be of vital importance, and must therefore be developed in peacetime so as to be virtually reflex in time of war.[22]

The Court observed that the military's need for uniformity was the basis upon which the Air Force adopted AFR 35-10.[23] The pertinent part of

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12. *Id.*
13. *Id.* at 1540.
14. Goldman v. Weinberger, 739 F.2d 657 (D.C. Cir. 1984), *aff'd*, 106 S. Ct. 1310 (1986).
15. Goldman v. Weinberger, 106 S. Ct. 1310, 1311 (1986).
16. *Id.* at 1312-13. *See* Parker v. Levy, 417 U.S. 733, 743 (1974) ("The military is, by necessity, a specialized society separate from civilian society.").
17. Goldman v. Weinberger, 106 S. Ct. 1310, 1313 (1986). *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (religious beliefs of petitioner prevented him from working on a department that built weapons); Wisconsin v. Yoder, 406 U.S. 205 (1972) (respondents violated a compulsory school attendance law by declining to send their children to school after completing the eighth grade); Sherbert v. Verner, 374 U.S. 398 (1963) (appellant was fired by her employer for refusing to work on the Sabbath day of her faith).
18. Goldman v. Weinberger, 106 S. Ct. at 1313.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 1314. AFR 35-10 describes in detail all of the apparel that may and may not be

this regulation at issue in *Goldman* stated "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in performance of their duties."[24]

Goldman contended that the wearing of a yarmulke in no way undermined the military's interest in discipline and obedience.[25] He even provided expert testimony that religious exceptions to AFR 35-10 were actually desirable and would increase morale in the Air Force.[26] But the Court countered, stating that the expert testimony was not of importance in this decision.[27] Rather, what was of importance to the Court was the professional judgment of the appropriate military officials.[28] The Air Force had apparently drawn a line for the wearing of religious apparel between that which is visible, and that which is not.[29] Therefore, the majority held that since the challenged regulation was reasonably and evenhandedly administered in the military's interest of uniformity, the first amendment did not prohibit its enforcement against Goldman.[30]

A concurring opinion written by Justice Stevens, in which Justices White and Powell joined,[31] presented a more practical aspect of Captain Goldman's alleged first amendment claim. Justice Stevens first noted that the strict enforcement of AFR 35-10 against Goldman was probably based on a retaliatory motive,[32] since the original complaint against Goldman was not lodged until he appeared as a witness for the defense in a court-martial hearing.[33]

From September 1977 until May 7, 1981, Captain Goldman wore his yarmulke indoors while in uniform.[34] Although no objection was made to his actions, he apparently was in violation of AFR 35-10 at that time as well.[35] It was only after he testified that opposing counsel lodged the complaint.[36] It appears most obvious that Goldman's participation as a witness resulted in this retaliatory effort by opposing counsel.

Although Justice Stevens believed that the motive behind strict enforcement of the regulation may have been retaliatory, he stated that the validity of the Air Force's regulation should be tested not only as applied to

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worn by Air Force personnel. *Id.*

24. *Id.* at 1312 (citing AFR 35-10, ¶ 1-6.h(2)(f) (1980)).
25. *Id.* at 1314.
26. *Id.* Goldman also stated that the Air Force lacked any scientific study or otherwise to prove to the contrary. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1314 (Stevens, J., concurring).
32. *Id.* at 1315 (Stevens, J., concurring).
33. *Id.* at 1312.
34. *Id.* at 1326 (O'Connor, J., dissenting) (citing 29 E.P.D. ¶ 32,753 (1982)).
35. *Id.* at 1326 (O'Connor, J., dissenting).
36. *Id.* at 1312.

Goldman individually, but also as applied to all military persons who have religious beliefs which may conflict with military commands.[37] Justice Stevens argued that Goldman's claim created the possible danger that a similar claim based on some other religious belief might be dismissed.[38] He noted that if exceptions such as Goldman's were granted on the basis of some multifactored test, certain religious apparel would be allowed while others not allowed, and all of these decisions would be based on more of a subjective standard.[39] Justice Stevens felt that the Air Force had no business drawing these lines of distinction.[40]

Justice Stevens agreed with the majority that uniformity should be recognized as a legitimate and rational interest.[41] Although many may believe that the government had exaggerated the importance of this interest, Justice Stevens believed that because the military authorities attach such a great importance to the interest of uniformity, that interest must be considered legitimate.[42]

Justice Stevens concluded by reiterating the Court's rationale concerning the neutrality of the Air Force's dress regulation.[43] In his opinion, AFR 35-10 was not motivated by hostility against any religious faith;[44] therefore, an exception for Captain Goldman's yarmulke would represent a departure from the uniformity surrounding the regulation.[45]

The majority and concurring opinions in *Goldman* were not without controversy. Three rather harsh dissenting opinions, representing the views of four members of the Court, severely criticized the majority's ruling.[46]

Justice Brennan, with whom Justice Marshall joined, in a lengthy dissenting opinion, challenged the Court's rationale.[47] Justice Brennan agreed that a soldier's mere personal preference in dress was not constitutionally protected,[48] but he also believed that the first amendment did not allow the

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37. *Id.* at 1315 (Stevens, J., concurring).

38. *Id.* at 1316 (Stevens, J., concurring).

39. *Id.* (Stevens, J., concurring). This subjective standard, according to Stevens, would result in more exceptions being granted for mainstream religious apparel, such as crosses, than for minority religious apparel, such as turbans. *Id.*

40. *Id.* (Stevens, J., concurring).

41. *Id.* at 1315-16 (Stevens, J., concurring).

42. *Id.* (Stevens, J., concurring).

43. *Id.* at 1316 (Stevens, J., concurring). Justice Stevens stated that, "the rule . . . challenged in this case is based on a neutral, completely objective standard—visibility." *Id.*

44. *Id.* (Stevens, J., concurring).

45. *Id.* (Stevens, J., concurring).

46. *Id.* at 1316 (Brennan, J., dissenting); *id.* at 1322 (Blackmun, J., dissenting); *id.* at 1324 (O'Connor, J., dissenting).

47. *Id.* at 1316 (Brennan, J., dissenting).

48. *Id.* at 1317 (Brennan, J., dissenting). He pointed out that if Captain Goldman had wished to wear a hat on his head to cover a bald spot, that action would not be constitutionally protected. *Id.* at 1316 (Brennan, J., dissenting).

government to prevent a Jewish serviceman from wearing a yarmulke.[49] He believed that servicemen in uniform should not be stripped of their basic rights simply because they no longer wear civilian clothes.[50]

In Justice Brennan's view, the Court had evaded its responsibility by virtually eliminating judicial review of military regulations that clash with first amendment rights of military personnel.[51] Justice Brennan characterized the Court's standard of judicial review of military regulations as subrational.[52] The majority, in his opinion, would accept the conclusion of military authorities that a regulation was important, even if the conclusion was unsupported by evidence.[53] He observed that the Air Force offered no evidence that the wearing of a yarmulke by Goldman would in any way undermine the Air Force's interest in discipline and uniformity.[54] Justice Brennan argued that the Air Force must, at a minimum, give some rational reason before denying free exercise rights to servicemen.[55] He noted that the service's own regulation states that the Air Force does not expect absolute uniformity of appearance.[56] It was the total lack of any reasoned basis by the Air Force that most disturbed Justice Brennan's sense of logic.[57]

Justice Brennan proceeded to attack Justice Stevens' views on the "visibility test."[58] Justice Brennan believed that this so-called neutral standard could result in disparate treatment of minority religions.[59] Although the Air Force's standard may appear neutral on its face, he stated that the majority

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49. *Id.* at 1317 (Brennan, J., dissenting).

50. *Id.* (Brennan, J., dissenting). *See* Chappell v. Wallace, 462 U.S. 296, 304 (1983); *see also* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188.

51. Goldman v. Weinberger, 106 S. Ct. at 1317 (Brennan, J., dissenting).

52. *Id.* (Brennan, J., dissenting).

53. *Id.* (Brennan, J., dissenting).

54. *Id.* at 1318 (Brennan, J., dissenting).

55. *Id.* (Brennan, J., dissenting).

56. *Id.* at 1318 (Brennan, J., dissenting). AFR 35-10 states in part:

> (1) The American public and its elected representatives draw certain conclusions on military effectiveness based on what they see; that is, the image the Air Force presents. The image must instill public confidence and leave no doubt that the service member lives by a common standard and responds to military order and discipline.
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> (2) Appearance in uniform is an important part of this image . . . . Neither the Air Force nor the public expects absolute uniformity in appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on excludes the extreme, the unusual, and the fad.

Id. at 1318-19 (Brennan, J., dissenting) (quoting AFR 35-10, ¶ 1-12a.(1) & (2) (1978)).

57. *Id.* at 1319 (Brennan, J., dissenting).

58. *Id.* at 1320 (Brennan, J., dissenting).

59. *Id.* (Brennan, J., dissenting). The neutral standard that Justice Stevens referred to was the Air Force's standard of drawing lines between visible and non-visible apparel. *Id.* at 1314.

religions are, in reality, favored over the minority ones.[60]

Justice Brennan concluded his argument by stating that the Court is bound by the Constitution to make sure that a rational basis exists for assertions of military necessity when military regulations interfere with first amendment free exercise rights.[61] In his view, this necessity did not exist in *Goldman*.[62]

The dissenting opinion of Justice Blackmun took a slightly different view of the majority's conclusions.[63] He agreed with the majority's conclusion that the military was justified in considering cumulative costs regarding religious exemptions;[64] but he argued that the Air Force had failed to show that these cumulative costs were significant.[65]

Justice Blackmun then reiterated Justice Brennan's view that the desire to follow one's faith is not merely another personal preference.[66] He pointed out that in *Wisconsin v. Yoder*,[67] the Court had stated that the free exercise clause of the first amendment requires that "only those interests of highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[68] Justice Blackmun believed that although the requirement of AFR 35-10 appeared neutral, a showing of neutrality still must be made.[69]

Justice Blackmun also believed that the facts of this case did not require the Court to establish a first amendment test for military regulations because the Air Force had failed to show even a minimal explanation for denying Captain Goldman's modest request.[70] He agreed with the majority that some deference should be given to the professional judgment of military authority;[71] however, in his opinion some minimal explanation still should be required.[72]

The majority stated that if exemptions were allowed, the military would have no way of distinguishing fairly between Goldman's request and other

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60. *Id.* at 1321 (Brennan, J., dissenting). "[I]n pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority." *Id.* (Brennan, J., dissenting).

61. *Id.* at 1322 (Brennan, J., dissenting).

62. *Id.* at 1321-22 (Brennan, J., dissenting).

63. *Id.* at 1322 (Blackmun, J., dissenting).

64. *Id.* (Blackmun, J., dissenting).

65. *Id.* (Blackmun, J., dissenting).

66. *Id.* (Blackmun, J., dissenting).

67. 406 U.S. 205 (1972).

68. Goldman v. Weinberger, 106 S. Ct. at 1322 (Blackmun, J., dissenting) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

69. *Id.* at 1322 (Blackmun, J., dissenting). *See also* Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

70. Goldman v. Weinberger, 106 S. Ct. at 1323 (Blackmun, J., dissenting).

71. *Id.* (Blackmun, J., dissenting).

72. *Id.* at 1322 (Blackmun, J., dissenting).

possible religious requests that may seriously conflict with the dress code.[73] Justice Blackmun believed, however, that there would be no constitutional problem in making these distinctions on the basis of how difficult it would actually be to accommodate these requests.[74] He did feel, however, that making distinctions based on the obtrusiveness of a practice would be to favor the country's more mainstream religions.[75] Justice Blackmun concluded by stating that although the judgment of the military must be respected, the judgment must also be a reasoned one.[76]

Justice O'Connor, with whom Justice Marshall joined, wrote a dissenting opinion that not only criticized the majority's opinion, but also proposed an appropriate standard of review for military first amendment free exercise claims.[77] Justice O'Connor believed that all free exercise claims, whether military or civilian, should be reviewed on the same grounds.[78] She proposed a standard of review involving two consistent themes which had developed from past precedents.[79] The two themes were stated as follows:

> First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served."[80]

Justice O'Connor stated that there was no reason given by the majority why these principles should not apply to the military.[81] She concluded by stating that the appropriate standard of review for free exercise claims in the military context should remain the same as those set forth for civilians.[82]

The *Goldman* decision established a new standard of judicial review for first amendment religious claims when dealing with military regulations. The Court has carved out an exception to the more rigid standard which has generally applied to similar civilian claims.[83]

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73. *Id.* at 1316 (Stevens, J., concurring).
74. *Id.* at 1323 (Blackmun, J., dissenting).
75. *Id.* (Blackmun, J., dissenting). This could "create serious problems of equal protection and religious establishment . . . ." *Id.*
76. *Id.* at 1324 (Blackmun, J., dissenting).
77. *Id.* at 1324 (O'Connor, J., dissenting).
78. *Id.* at 1325 (O'Connor, J., dissenting).
79. *Id.* (O'Connor, J., dissenting).
80. *Id.* (O'Connor, J., dissenting).
81. *Id.* at 1325 (O'Connor, J., dissenting).
82. *Id.* at 1326 (O'Connor, J., dissenting).
83. *Id.* at 1313. *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (religious beliefs of petitioner prevented him from working in a department that built weapons); Wisconsin v. Yoder, 406 U.S. 205 (1972) (respondents violated a compulsory school attendance law by declining to send their children to school after completing the eighth grade); Sherbert v. Verner, 374 U.S.

Courts following the *Goldman* decision will likely give much greater deference to military regulations when challenged on first amendment grounds. The majority has taken the view that if the Court allowed Goldman's exemption, it would be opening the door for multitudes of unnecessary litigation. Instead of filling the courtrooms with military personnel all claiming religious exceptions from the dress code, the Court has decided that exceptions to the dress code would best be granted by the proper military authority.[84]

In the future, because of the less rigid standard of review and more deference given to military authority, fewer military regulations will be successfully challenged on first amendment grounds.

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398 (1963) (appellant was fired by her employer for refusing to work on the Sabbath day of her faith).

84. Goldman v. Weinberger, 106 S. Ct. at 1314 (1986).