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The Application of the Religious Freedom Restoration Act to Appearance Regulations That Presumptively Prohibit Observant Sikh Lawyers From Joining the U.S. Army Judge Advocate General Corps

*Rajdeep Singh Jolly**

PURPOSE

Observant Sikh lawyers are presumptively prohibited from joining the U.S. Army Judge Advocate General (JAG) Corps because they cannot satisfy the Army's appearance regulations. This essay argues that this presumptive prohibition violates the Religious Freedom Restoration Act (RFRA). Under RFRA, the federal government may substantially burden an individual's exercise of religion only if it demonstrates that its application of the burden furthers a compelling governmental interest by the least restrictive means.¹ The Army's appearance regulations are designed to promote two interests—uniformity and safety. In the course of furthering these interests, the Army's appearance regulations effectively preclude observant Sikhs from joining the U.S. Army JAG Corps. The Sikh religion requires its male followers to wear turbans and forbids all of its followers from cutting their hair. Both requirements purportedly interfere with the Army's asserted interests in uniformity and safety. This purported interference forms the basis for a conclusion that observant Sikhs are appropriately excluded from joining the U.S. Army JAG Corps. This essay argues against the necessity of such a conclusion by demonstrating that under RFRA (1) the Army does not have a compelling interest in disallowing exceptions to its appearance regulations, and (2) the Army's appearance regulations do not constitute the least restrictive means of promoting safety. Because the Army's appearance regulations violate RFRA, they must be amended to allow for the accommodation of observant Sikhs in the U.S. Army JAG Corps.

OBSERVANT SIKHS IN CONTEXT

As of 2006, there were approximately 25 million Sikhs in the world.²

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

² *Worldwide Adherents of All Religions, Mid-2005*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9432620/Worldwide-Adherents-of-All-Religions-Mid-2005> (last

The overwhelming majority of them live on the Indian subcontinent.³ In contrast, only an estimated 251,000 live in the United States.⁴ The formative phase of Sikh history began with Guru Nanak (1469–1539),⁵ the founder of Sikhism, and continued for two centuries under the leadership of nine successive Gurus.⁶ The last of these Gurus, Guru Gobind Singh (1666–1708),⁷ presided over a transformative phase of Sikh history; Guru Gobind Singh not only vested permanent spiritual authority in the Sikh scripture—the Adi Granth—but also inaugurated a fellowship of orthodox Sikhs—the Khalsa—which “provided a visible insignia and an explicit discipline which members of the community could renounce only at the cost of virtual excommunication.”⁸ One of the most conspicuous components of the Khalsa code of discipline is a prohibition on hair-cutting.⁹ In practice, even among Sikhs who do not live in complete accordance with Khalsa traditions, a turban and unshorn hair are important marks of a Sikh male’s personality.¹⁰ These identifiers link the Sikh community and also serve as “a declaration of privilege [and] also of the intent to be prepared steadfastly to uphold the ideals [that Guru Gobind Singh] had demarcated.”¹¹ Those who decline to accept these aspects of the Sikh identity are

visited Sept. 14, 2007).

³ *Id.*

⁴ *Religious Adherents in the United States of America, 1999–2005*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9432619/Religious-Adherents-in-the-United-States-of-America-1900-2005> (last visited Sept. 14, 2007).

⁵ See W.H. McLeod, *Guru Nanak and the Sikh Religion*, in *SIKHS AND SIKHISM* 1, 1–5 (Oxford Univ. Press 1999) [hereinafter *Guru Nanak*].

⁶ *Id.* at 1. The basis of Sikh theology, according to Professor McLeod, is:

a belief in a personal God, the omnipotent Creator of the universe, a Being beyond time and human comprehending yet seeking by His grace the salvation of man and for this purpose revealing Himself in His own creation. To the offer of salvation man is called to respond by a life of meditation on the divine self-revelation and of conformity to it. If man responds he progressively grows into the likeness of God and ultimately into an ineffable union with [Him]. If he refuses he follows the path of spiritual death and remains firmly bound to the wheel of transmigration.

Id. at 5–6.

⁷ AMANDEEP SINGH MADRA & PARAJIT SINGH, *WARRIOR SAINTS: THREE CENTURIES OF THE SIKH MILITARY TRADITION* 7 (1999).

⁸ *Guru Nanak*, *supra* note 5, at 1, 2. Professor McLeod suggests that these two features—the immutable scripture and the recognizable insignia—have preserved Sikhism from irrevocable dissolution. *Id.* at 3. According to Professor McLeod:

The Khalsa is best described as an order, as a society possessing a religious foundation and a military discipline. The religious base was already in existence and a military tradition had been developed, but something much stronger was required. The military aspect had to be fused with the religious, and this Guru Gobind Singh achieved by promulgating the Order of the Khalsa

W.H. McLEOD, *The Evolution of the Sikh Community*, in *SIKHS AND SIKHISM*, *supra* note 5, at 1, 4.

⁹ W.H. McLEOD, *Who is a Sikh?*, in *SIKHS AND SIKHISM*, *supra* note 5, at 1, 121 [hereinafter *Who is a Sikh?*]. According to one author, observant Sikhs refrain from cutting their hair to “affirm that the body, as divinely created, is sacrosanct in its completeness.” ELEANOR NESBITT, *SIKHISM: A VERY SHORT INTRODUCTION* 54 (2005).

¹⁰ Sardarni Premka Kaur, *Rahit Maryada*, in 3 *THE ENCYCLOPAEDIA OF SIKHISM* 424 (Harbans Singh ed., 1997).

¹¹ *Id.* See also MAX ARTHUR MACAULIFFE, 5 *THE SIKH RELIGION: ITS GURUS, SACRED WRITINGS AND AUTHORS* 89 (S. Chand & Co. 1963) (noting that Guru Gobind Singh “always held the

still regarded as Sikhs, “but only on the understanding that they are failing to discharge customary duties.”¹² In other words, to the extent that Sikhs decline to wear a turban and decline to keep their hair unshorn, they are not regarded as observant Sikhs.

Sikhs have earned recognition for martial prowess in the course of their history.¹³ An estimated 100,000 Sikhs served in the British armed forces during World War I, disproportionately forming around twenty percent of the total number of volunteers from India.¹⁴ Over 83,000 observant Sikh soldiers died and more than 109,000 were wounded in the cause of the Allies during both World Wars,¹⁵ and five observant Sikhs were awarded the Victoria Cross for gallantry in these conflicts.¹⁶ Observant Sikhs still serve in the armed forces of India¹⁷ and are presumptively permitted to serve in the armed forces of Canada¹⁸ and the United Kingdom.¹⁹

Unlike their coreligionists elsewhere in the world, and as explained in greater detail below, observant American Sikhs who wish to wear the uniform of their country do not presumptively enjoy this privilege.²⁰

belief that it would be proper and advantageous to his Sikhs to wear long hair . . .”).

¹² *Who is a Sikh*, *supra* note 9, at 121.

¹³ See MADRA & SINGH, *supra* note 7, at vii. Writer Pico Iyer partially summarized the military evolution of Sikhs as follows:

With his people being persecuted by Mogul warlords, [Guru] Gobind [Singh] formed a fierce fraternity of “warriors of God” known as the *Khalsa* (Pure). As the Sikhs cleaved to [Guru] Gobind [Singh’s] martial principles, the tales of their valor and ferocity became legend. They routed the Afghans at the Battle of Attock in 1813, and in 1849 they delivered a stinging defeat to the British at the Battle of Chillianwala. After they were forced to succumb to superior British firepower six weeks later, the Sikhs became among the sturdiest and trustiest men of the British army: during the great Indian Mutiny of 1857, the raj was kept alive by their support. After the British slaughtered nearly 400 civilians, many of them Sikhs, at Amritsar in 1919, the warriors changed allegiances and joined the crusade to bring down the raj. Sikh soldiers and policemen have, to this day, loyally protected their Hindu compatriots all over India.

Pico Iyer, *The Lions of Punjab*, TIME, Nov. 12 1984, at 53.

¹⁴ MADRA & SINGH, *supra* note 7, at 110.

¹⁵ *Id.* at 41 (quoting General Sir Frank Messervy, *Foreword* to F.T. BIRDWOOD, THE SIKH REGIMENT IN THE SECOND WORLD WAR. (1953)).

¹⁶ MADRA & SINGH, *supra* note 7, at 158.

¹⁷ See D.S. Sandhu, *The Sikh Regiment: Indian Army’s Most Decorated Regiment*, 3 BHARAT RAKSHAK MONITOR, May–June 2001, <http://www.bharat-rakshak.com/MONITOR/ISSUE3-6/sandhu.html> (last visited Sept. 14, 2007).

¹⁸ See CANADIAN FORCES GRIEVANCE BOARD, ANNUAL REPORT 2004, at 27 (2004), *available at* http://www.cfgb-cgfc.gc.ca/pdf/ar2004_revised-e.pdf.

¹⁹ See UNITED KINGDOM MINISTRY OF DEFENCE, GUIDE ON RELIGION AND BELIEF IN THE MOD AND ARMED FORCES 13 (2005). As detailed in subsequent portions of this essay, the right of English Sikhs to wear the uniform of their country is conditioned on the satisfaction of technical requirements, which might preclude observant Sikhs from serving in certain capacities in limited circumstances. *See id.* Even still, what English Sikhs enjoy—and what American Sikhs do not—is the right to be presumptively accommodated in the armed forces of their country.

²⁰ See U.S. DEP’T. OF DEF., ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES, DIRECTIVE NO. 1300.17, at 3 (1988) *available at* <http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf> [hereinafter DIRECTIVE NO. 1300.17] (effectively excluding Sikhs from the scope of religious apparel accommodations in the U.S. Armed Forces by excluding hair and grooming practices required or observed by religious groups from the class of exempt religious apparel.).

NOTES ON THE SCOPE OF THIS ESSAY

This essay argues for the accommodation of observant Sikh lawyers in the U.S. Army JAG Corps. This narrow focus is premised on two assumptions, the second of which qualifies the first. In the first place, there is institutional precedent and, accordingly, a greater practical possibility of accommodating observant Sikhs in the Army. Between 1958 and 1981, the Army specifically permitted observant Sikhs to enlist through a special exemption from its appearance regulations.²¹ After this exemption ended in 1981, prior grantees of the exemption were permitted to remain in uniform, provided that they were "otherwise eligible for continued service."²² In addition, prior grantees are subject to assignment restrictions.²³ Even still, the significance is that the Army is familiar with the religious commitments of observant Sikhs. Secondly, notwithstanding this history of accommodation, it is arguably the case that institutional change in the Army and other armed forces will face less opposition if such change is implemented in a piecemeal fashion. As discussed in greater detail below, opposition to the accommodation of Sikhs in the Army stems from concerns about operational requirements in the military.²⁴ Allaying these concerns may be easier if the question of accommodating observant Sikh lawyers is successfully addressed *before* the knottier issue of accommodating observant Sikhs who seek to serve primarily as combatants.

REASONS FOR APPEARANCE REGULATIONS IN THE MILITARY

The presumptive preclusion of observant Sikhs from the U.S. Army JAG Corps is based on the inability of observant Sikhs to satisfy the Army's current appearance regulations.²⁵ These regulations are based on the military's interests in uniformity²⁶ and safety.²⁷ In 1984, pursuant to a congressional amendment to that year's Department of Defense Authorization Bill,²⁸ the Department of Defense established a Joint Service Study Group on Religious Practice (Joint Study Group),²⁹ which was tasked with

21 Captain Thomas R. Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 MIL. L. REV. 53, 62 (1982). The exemption for observant Sikhs was codified in the Army's appearance regulations between 1972 until its rescission on August 20, 1981. *Id.* at 62 n.65.

22 *Religious Exceptions in Army Uniform End*, N.Y. TIMES, Aug. 22, 1981, at 13. In effect, the accommodation of observant Sikhs in the U.S. Army was downgraded from rule to exception.

23 U.S. DEP'T. OF ARMY, ARMY COMMAND POLICY, ARMY REG. 600-20, at 34 (2002) available at http://www.first.army.mil/ao/pdf/r600_20.pdf [hereinafter ARMY REG. 600-20] ("[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the Continental United States] due to health and safety considerations.").

24 *Religious Exceptions in Army Uniforms End*, *supra* note 22.

25 See DIRECTIVE NUMBER 1300.17, *supra* note 20.

26 JOINT SERVICE STUDY GROUP ON RELIGIOUS PRACTICE, JOINT SERVICE STUDY ON RELIGIOUS MATTERS MARCH 1985, at III-4 (1985) [hereinafter RELIGIOUS PRACTICE].

27 *Id.* at III-7.

28 Memorandum from Deputy Secretary Taft to Secretaries of the Military Departments (Oct. 12, 1984) [hereinafter Taft Memorandum], reprinted in RELIGIOUS PRACTICE, *supra* note 26, at A-4.

29 Dwight H. Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 MIL. L. REV. 125, 137 (1988).

studying the possibility of modifying appearance regulations to accommodate religious practices in the armed forces.³⁰ The Joint Study Group issued its report in March 1985,³¹ and its examination of the military's interests in uniformity and safety forms the basis for the following discussion.

A. The Army's Interest in Uniformity

According to the Joint Study Group, uniforms "act as a cohesive bond within the services by instilling a common identity, by providing visual evidence of shared experience, and by reinforcing a sense of tradition."³² These factors are said to play "an essential role in the development of unit cohesion and institutional esprit de corps, which in turn contribute to military effectiveness."³³ As well, "[u]niformity not only directly imposes the discipline of the group, but, more subtly, instills the self-discipline necessary for the military member to perform effectively."³⁴ Non-uniformity, on the other hand, may result in polarization, which "fractures the [military] unit along lines that are irrelevant to and destructive of military considerations."³⁵ In other words, because uniformity "induces the wearers to view themselves as part of a group larger than themselves,"³⁶ and because "the extent to which individuals retain old dress and appearance habits reduces their identity with and commitment to the new group,"³⁷ it is possible that non-uniformity can "create an impression that [an] individual is unwilling to subordinate personal desires to traditional military values and raise questions of ultimate dependability in a crisis."³⁸ Put another way, exceptions to appearance regulations may create "perceptions of favored treatment for some military members, or the feeling that some individuals were 'getting over' on the system, [and] would almost certainly be disruptive."³⁹ The foregoing arguments can be condensed into the proposition that uniformity has a psychological and behavioral impact on operational effectiveness.⁴⁰

In the course of suggesting a connection between uniformity and operational effectiveness, the Joint Study Group offered several additional reasons for preserving uniformity. First "[w]hen perceived favored treatment is linked to a potentially emotional issue such as religion, the possibil-

³⁰ Taft Memorandum, *supra* note 28, at A-4.

³¹ Sullivan, *supra* note 29, at 137.

³² RELIGIOUS PRACTICE, *supra* note 26, at III-5.

³³ *Id.*

³⁴ *Id.* at III-4.

³⁵ *Id.* at III-10.

³⁶ *Id.* at III-4.

³⁷ *Id.* at III-9.

³⁸ *Id.* at III-11. The Joint Study Group acknowledged, however, that "[s]uch impressions are most likely when the individual is not well-known to the other members of the group." *Id.* By implication, if observant Sikhs were presumptively permitted to join the U.S. military, these impressions might not be so strong.

³⁹ *Id.*

⁴⁰ See *id.* at III-4. ("In the course of this outward display of group membership, the individual servicemember develops a willingness to submit his or her individuality to the larger organization and thus thinks and acts differently.").

ity of prejudice exists.”⁴¹ One might argue that prejudice would disrupt esprit de corps and consequently have an adverse impact on operational effectiveness. Second, uniformity reinforces “the idea that military members are different from civilians,”⁴² and “remind[s] the men and women who wear them that they put aside certain personal freedoms when they joined the armed forces and that they have assumed special obligations inherent in the military’s responsibility for the nation’s defense.”⁴³ It is possible that non-uniformity undermines esprit de corps to the extent that it simultaneously accentuates civilian distinctions and undermines professional equality among military members.⁴⁴ Third, “permitting certain faith groups openly to display their religious preference and to identify with a particular religion (and in some cases ethnic group) might cause other groups to assert more vocally and visibly their commitment to their particular faith.”⁴⁵ In other words, it is feared that departures from uniformity will lead to a slippery slope situation and generate unwieldiness of a sort that would not only create “chao[s] in combat”⁴⁶ but also “discourage others from entering what they perceive as no longer a ‘sharp’ military organization.”⁴⁷ The Joint Study Group ultimately concluded that, as a matter of policy, “it would be unwise to permit visible exceptions to uniform dress and appearance standards”⁴⁸

B. The Army’s Interest in Safety

According to the Joint Study Group, safety standards not only “directly affect the individual’s health and well-being,”⁴⁹ but also “affect the ability of the individual to perform a task. This, in turn, influences the accomplishment of the unit’s mission in both peace and war.”⁵⁰ Of particular relevance to observant Sikhs is their ability (or inability, as the case may be) to wear protective equipment. For example, within the military, there is hesitation about permitting dress and grooming standards that would prevent the formation of “an effective seal on a protective mask or which would otherwise fail to ensure complete protection in a toxic environ-

⁴¹ *Id.* at III-12.

⁴² *Id.* at III-4.

⁴³ *Id.* at III-4–5.

⁴⁴ *Id.* at III-7.

⁴⁵ *Id.* at III-12.

⁴⁶ *See id.* at III-13.

⁴⁷ *See id.* at III-14.

⁴⁸ *Id.* at III-19. The Joint Study Group justified its conclusion as follows:

While uniformity will not, in itself, establish cohesion and military spirit in the absence of other factors, both sociological studies and historical experience clearly indicate it does play a very important role in creating and maintaining the spirit of a military force. The potential negative impacts on identification and discipline, on cohesion and esprit de corps, and on the public image of the military services would outweigh the possible benefits to the individuals involved or to the service of permitting visible religious expression within the military context.

Id.

⁴⁹ *Id.* at III-7–8.

⁵⁰ *Id.* at III-8.

ment.”⁵¹ As of 1985—the year in which the Joint Study Group released its report—“test results and testimony from experts in chemical protection . . . overwhelmingly concluded that an effective seal is not possible with a beard.”⁵²

To the extent that protective equipment cannot function on a bearded individual, one might argue that the individual should be free to subject himself to the risks that ordinarily compel the use of protective equipment.⁵³ Anticipating this argument, the Joint Study Group determined that it would not be feasible “to permit the individual to determine the risk to which he is willing to put himself,”⁵⁴ because, “[g]iven the interdependency of all activities within the military, what would be at stake would not be merely one individual, but the lives of others as well as the accomplishment of the mission.”⁵⁵ To the extent that protective equipment cannot function on a bearded individual, one might argue that the individual should be assigned roles not likely to require the use of protective equipment.⁵⁶ Anticipating this argument, the Joint Study Group suggested that assignment restrictions could harm military esprit de corps.⁵⁷ Finally, to the extent that protective equipment cannot function on a bearded individual, one might argue that the individual should be allowed to maintain a beard until its modification or removal is compelled by extenuating circumstances.⁵⁸ Anticipating this argument, the Joint Study Group rejected it on two grounds: (1) “it opens the possibility of individuals questioning . . . their commander’s judgment of what constitutes an emergency situation”⁵⁹ and (2) “there would be no way to ensure [that] the individual would live up to his commitment when circumstances did so dictate.”⁶⁰

⁵¹ *Id.*

⁵² *Id.* at III-15.

⁵³ *Id.* at III-16.

⁵⁴ *Id.*

⁵⁵ RELIGIOUS PRACTICE, *supra* note 26, at III-16.

⁵⁶ *Id.*

⁵⁷ *Id.* at III-17. The Joint Study Group explained the problem as follows:

[A]doption of assignment restrictions . . . would, in essence, create two classes within the military: the majority, subject to all the demands the military makes on its members (including worldwide assignment and the possibility of serving in a combat environment), and a visible minority, exempt from certain of the more onerous demands of the institution but eligible for all of its benefits. The impact of such an arrangement on the attitude of both groups can only be speculated, but it seems likely the overall effect would harm military esprit de corps.

Id. at 16–17. In practice, observant Sikhs in the U.S. Army are subject to assignment restrictions. ARMY REG. 600-20, *supra* note 23, at 34 (“[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the Continental United States] due to health and safety considerations.”).

⁵⁸ RELIGIOUS PRACTICE, *supra* note 26, at III-17. This is the approach taken by the British armed forces. UNITED KINGDOM MINISTRY OF DEFENCE, *supra* note 19, at 13.

⁵⁹ RELIGIOUS PRACTICE, *supra* note 26 at III-17.

⁶⁰ *Id.* Against this, one could argue that it is never possible to ensure that *any* individual will live up to his or her commitments. In a military context, there is always a danger that a soldier will fail to live up to his or her commitments to the detriment of operational effectiveness; accordingly, it is not clear why the military should recruit or train anyone at all.

THE LAW OF RELIGIOUS ACCOMMODATION IN THE U.S. MILITARY

A. *Goldman v. Weinberger*

The *Goldman* case concerned Dr. Simcha Goldman, an Orthodox Jew and ordained rabbi who actively served in the U.S. Air Force as a clinical psychologist between 1977 and 1981.⁶¹ Until 1981, Dr. Goldman was not prohibited from wearing his yarmulke on the base where he worked.⁶² Throughout his service, Dr. Goldman consistently received outstanding evaluations from his superiors, who even recognized him for professionalism in dress.⁶³ In April 1981, Dr. Goldman testified as a defense witness at a court-martial while wearing his yarmulke.⁶⁴ Opposing counsel subsequently complained about the yarmulke to the commander of the hospital where Dr. Goldman worked, noting that wearing it on duty constituted a violation of Air Force appearance regulations.⁶⁵ In response, the hospital commander ordered Dr. Goldman to refrain from wearing a yarmulke off base while on duty; when Dr. Goldman refused and protested through an attorney, the hospital commander enjoined Dr. Goldman from wearing a yarmulke at any time while on duty.⁶⁶ After receiving a reprimand and a threat of a court-martial, Dr. Goldman filed suit, claiming that the Air Force regulations at issue infringed upon his First Amendment right to practice his religion.⁶⁷ The case made its way to the U.S. Supreme Court, where a five-to-four majority of the Court upheld the preclusive appearance regulations.⁶⁸

The result in *Goldman* stemmed from a principle of judicial deference to military judgment.⁶⁹ Writing for the majority, Justice Rehnquist articu-

⁶¹ *Goldman v. Sec'y of Def.*, 734 F.2d 1531, 1532–33 (D.C. Cir. 1984), *aff'd*, 475 U.S. 503 (1986).

⁶² *Goldman v. Weinberger*, 475 U.S. 503, 505 (1986). According to the D.C. Court of Appeals, “[n]either before [Goldman’s] joining the Air Force nor during his first three and one-half years in the service was he informed that wearing a head covering in addition to his uniform was problematic, although he did explain its religious significance to several co-workers and patients who inquired.” *Sec’y of Def.*, 734 F.2d at 1533.

⁶³ *Id.*

⁶⁴ *Goldman*, 475 U.S. at 505. Until 1981, Goldman “avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors.” *Id.*

⁶⁵ *Id.* In a concurring opinion, Justice Stevens suggested that opposing counsel’s complaint may have had a retaliatory motive. *Id.* at 511 (Stevens, J., concurring).

⁶⁶ *Id.* at 505 (majority opinion).

⁶⁷ *Id.* at 505–506.

⁶⁸ *Id.* at 509–10.

⁶⁹ *Id.* at 507. This principle found expression in the Supreme Court’s 1974 decision in *Parker v. Levy*, which “[upheld] a service member’s conviction for making disloyal statements” Major John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 21 (2005). Writing for the majority in *Parker*, Justice Rehnquist observed that “the military is, by necessity, a specialized society separate from civilian society” and that it has, “by necessity, developed laws and traditions of its own during its long history.” *Parker v. Levy*, 417 U.S. 733, 743 (1974). The legal upshot of this observation is that “fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.” *Id.* at 758. In other words, “[w]hile members of

lated this principle as follows: “[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”⁷⁰ In other words, “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”⁷¹ This deference was motivated at least in part by the *Goldman* majority’s concern about being “ill-equipped” to determine the extent to which a religious accommodation would impact discipline in the military.⁷² According to Justice Rehnquist, “[t]he considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission.”⁷³ In other words, because “[u]niforms encourage a sense of hierarchical unity,”⁷⁴ and because “the necessary habits of discipline and unity must be developed in advance of trouble,”⁷⁵ the “Air Force considers them as vital during peacetime as during war. . . .”⁷⁶ Notwithstanding the preclusive impact of the appearance regulations at issue in *Goldman*, the majority in *Goldman* ultimately concluded that the regulations “reasonably and evenhandedly regulate[d] dress in the interest of the military’s perceived need for uniformity.”⁷⁷

the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community.” *Id.* at 751.

⁷⁰ *Goldman*, 475 U.S. at 507.

⁷¹ *Id.* As noted by Justice Blackmun in his dissent in *Goldman*, the then-prevailing “civilian” standard of constitutional review in free exercise cases required the state to justify an impairment of religious liberty by showing that the impairment was the least restrictive means of achieving a compelling state interest. *Id.* at 525 (Blackmun J., dissenting).

⁷² *Id.* at 507 (majority opinion).

⁷³ *Id.* at 508.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 510. The majority decision in *Goldman* drew strong dissents. Justices Brennan and Marshall lamented what they regarded as the majority’s adoption of “a sub-rational-basis standard—absolute, uncritical ‘deference to the professional judgment of military authorities.’” *Id.* at 515 (Brennan J., dissenting). According to Brennan and Marshall, “[w]hen a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest.” *Id.* at 516. Justice Blackmun applied this principle to the case at hand in a separate dissent, opining that “the Air Force . . . failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors.” *Id.* at 526 (Blackmun J., dissenting). Dissenting separately, Justice O’Connor criticized the majority for rejecting Goldman’s claim “without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital.” *Id.* at 528 (O’Connor J., dissenting). In general, Justices Brennan, Marshall, and O’Connor agreed that a military service can justify a contested regulation only by showing that it furthers a compelling state interest by the least restrictive means. *Id.* at 516 (Brennan J., dissenting); *Id.* at 530 (O’Connor J., dissenting).

B. The Congressional Response to *Goldman v. Weinberger*

The *Goldman* majority pointed out that “[j]udicial deference. . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”⁷⁸ Pursuant to this constitutionally-delegated authority,⁷⁹ several members of Congress responded to the *Goldman* decision by proposing legislation designed to permit members of the armed forces to wear “neat and conservative” religious apparel if such apparel does not interfere with military duties.⁸⁰ Rooted in efforts that began in response to Dr. Simcha Goldman’s 1984 loss in the U.S. Court of Appeals for the District of Columbia,⁸¹ the proposal was eventually approved in 1987 by Congress and signed into law by President Reagan⁸² before its codification as 10 U.S.C. § 774.⁸³ Under this statute, the general rule is that “a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force.”⁸⁴ The general rule does not apply, however, in two circumstances: (1) if it is determined “that the wearing of the item would interfere with the performance of the member’s military duties,”⁸⁵ or (2) if it is determined “that the item of apparel is not neat and conservative.”⁸⁶ The statute directs the armed forces to “prescribe regulations concerning the wearing of religious apparel by members of the armed forces. . . .”⁸⁷ Pursuant to this delegation of authority, the armed forces must not only determine whether religious apparel significantly interferes with military duties⁸⁸ but also develop criteria for determining whether religious apparel is neat and conservative.⁸⁹ These details found expression

⁷⁸ *Id.* at 508 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

⁷⁹ See U.S. CONST. art. I, § 8, cl. 14 (“The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces . . .”).

⁸⁰ 132 CONG. REC. 14, 19801 (1986) (statement of Sen. Lautenberg). For a comprehensive overview of the congressional response to *Goldman v. Weinberger*, see Sullivan, *supra* note 29, at 147.

⁸¹ *Id.* at 135.

⁸² *Id.* at 147. The proposal was tabled in 1986 by a 51–49 vote. *Id.* at 142.

⁸³ *Id.* at 147 n.144.

⁸⁴ 10 U.S.C. § 774(a) (2000).

⁸⁵ § 774(b)(1).

⁸⁶ § 774(b)(2).

⁸⁷ § 774(c). One commentator explained the significance of 10 U.S.C. § 774 as follows:

In adopting the religious apparel accommodation legislation, Congress indicated that it is more disposed to protect servicemembers’ religious apparel interests than is the Department of Defense. Yet both the legislative process and the statute which it produced demonstrate congressional caution when dealing with the military’s internal regulations. Congress took three years to adopt the accommodation statute. Before legislating its own solution, Congress called for the Department of Defense to study the issue, a clear but almost unheeded signal for the Department of Defense to adopt religious apparel accommodation regulations. When Congress did finally act, it chose not to legislate specific regulations. Instead, Congress relied on the Department of Defense to carry out a loosely defined policy of accommodation. Congress has thus shown itself to be sensitive to both servicemembers’ liberty interests and the military’s needs.

Sullivan, *supra* note 29, at 147.

⁸⁸ § 774(b)(1).

⁸⁹ § 774(b)(2).

in 1988 when the Department of Defense issued Directive Number 1300.17.⁹⁰

The Directive applies to all branches of the armed forces and governs the accommodation of religious practices within the military.⁹¹ In pertinent part, the Directive permits members of the armed forces to “wear visible items of religious apparel while in uniform, except under circumstances in which an item is not neat and conservative or its wearing shall interfere with the performance of the member’s military duties.”⁹² The Directive defines “religious apparel” as “articles of clothing worn as part of the doctrinal or traditional observance of the religious faith practiced by the member.”⁹³ To emphasize that “religious apparel” only includes “articles of clothing,” the Directive excludes “[h]air and grooming practices required or observed by religious groups” from its definition of “religious apparel.”⁹⁴ In doing so, the Directive prevents observant Sikhs from satisfying its requirements. Notwithstanding this, the Directive grants military commanders discretion to approve requests for religious accommodation in individual cases;⁹⁵ however, the Army almost categorically forbids religious accommodations for uncut hair.⁹⁶

It has been suggested that 10 U.S.C. § 774 “was specifically designed to allow Jewish servicemembers to wear yarmulkes and Sikh servicemembers to wear turbans.”⁹⁷ This proposition is based on statements in that statute’s legislative history that address the accommodation of Sikhs in

⁹⁰ DIRECTIVE NO. 1300.17, *supra* note 20, at 1.

⁹¹ *Id.*

⁹² *Id.* at 2.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

⁹⁵ *Id.* at 3–4. According to the Directive,

[M]ilitary commanders should consider the following factors along with any other factors deemed appropriate in determining whether to grant a request for accommodation of religious practices . . .

[1] The importance of military requirements in terms of individual and unit readiness, health and safety, discipline, morale, and cohesion.

[2] The religious importance of the accommodation to the requester.

[3] The cumulative impact of repeated accommodations of a similar nature.

[4] Alternative means available to meet the requested accommodation.

[5] Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons.

Id. at 4.

⁹⁶ U.S. DEP’T. OF ARMY, UNIFORM AND INSIGNIA: WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA, ARMY REG. 670-1 at 2-3 (2005) [hereinafter ARMY REG. 670.1]. The Army created an exception to this categorical rule as follows: “As an exception, policy exceptions based on religious practice given to soldiers in accordance with AR 600-20 on or prior to 1 January 1986 remain in effect as long as the soldier remains otherwise qualified for retention.” *Id.* Army Regulation 600-20, in turn, reads in pertinent part as follows: “[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the continental United States] due to health and safety considerations.” ARMY REG. 600-20 *supra* note 23, at 34.

⁹⁷ Sullivan, *supra* note 29, at 148–49.

the Army.⁹⁸ If the proposition is correct, then the Department of Defense and U.S. Army effected a significant departure from congressional intent by promulgating appearance regulations that effectively disqualify observant Sikhs from military service. Upon closer examination, however, the legislative history that eventuated in 10 U.S.C. § 774 reflects tentativeness about accommodating observant Sikhs in the military.⁹⁹ That Congress did not wholeheartedly intend to pursue the accommodation of observant Sikhs is evinced further by an unsuccessful attempt by Representative Dennis Hastert in 1990 to amend 10 U.S.C. § 774 to expressly allow for the accommodation of observant Sikhs in the U.S. Armed Forces.¹⁰⁰

THE RELIGIOUS FREEDOM RESTORATION ACT'S APPLICABILITY TO THE MILITARY

The Religious Freedom Restoration Act of 1993 (RFRA) sought to invalidate any state or federal law that substantially burdens a person's exercise of religion unless such a law furthers a compelling governmental interest by the least restrictive means.¹⁰¹ RFRA was enacted in response to the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, according to which "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest. . . ."¹⁰² Prior to *Smith*, the compelling interest test was an established means of resolving federal cases involving religious liberty and competing government interests.¹⁰³ RFRA effectively overturned *Smith* by codifying the compelling interest test and by expressly applying it to laws of general

⁹⁸ *Id.*

⁹⁹ For example, while addressing arguments that greater religious accommodation in the military would impair esprit de corps, Senator Frank Lautenberg—a leading proponent of the religious apparel amendment—observed that "[i]n the United Kingdom, Sikh members of the services are permitted to wear turbans, and to keep their hair long, if they choose" but then immediately clarified that "*we are not advocating that.*" 132 CONG. REC. 14, 19802 (1986) (statement of Sen. Lautenberg) (emphasis added). Senator Lautenberg made the same argument the following year but dropped the italicized language. 133 CONG. REC. 18, 25250 (1987) (statement of Sen. Lautenberg). Senator Arlen Specter expressed his views as follows: "If there were to be a head dress, if there were to be a turban, *that might not be so bad.* Certainly, when you consider what is meant by the yarmulke, a very small skullcap, that does not interfere with the ability of some of the military to perform their service." 132 CONG. REC. 14, 19803 (1986) (statement of Sen. Specter) (emphasis added).

¹⁰⁰ H.R. 5672, 101st Cong. (1990). In 1990, the bill was referred to the Subcommittee on Military Personnel and Compensation, a subsidiary of the House Committee on Armed Services, from which it never emerged. *See id.* If successful, the bill would have added the following provision to 10 U.S.C. § 774:

(d) HAIR, BEARDS, AND TURBANS OF SIKHS- The Secretary concerned may not regulate the length of hair, or the appearance of facial hair, of a member of the armed forces who is a Sikh if that regulation would abridge the exercise of the religious faith of that member under the tenets of the Sikh religion. The Secretary concerned may not determine under subsection (b)(2) that a turban worn as an item of religious apparel by a member who is a Sikh is not neat and conservative.

Id.

¹⁰¹ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2000).

¹⁰² *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990).

¹⁰³ 42 U.S.C. § 2000bb (2000).

applicability.¹⁰⁴ In 1997, the U.S. Supreme Court in *City of Boerne v. Flores* concluded that RFRA cannot constitutionally apply to state law.¹⁰⁵ Notwithstanding this, in 2006, the U.S. Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* ratified the settled judgments of numerous appellate courts¹⁰⁶ that RFRA still applies to federal law.¹⁰⁷ RFRA applies sweepingly to all federal law and implementations of federal law, “whether statutory or otherwise, and whether adopted before or after [RFRA].”¹⁰⁸

On its face, RFRA does not exempt the U.S. military from the compelling interest test.¹⁰⁹ In general, RFRA imposes limitations on the federal “government,” which encompasses any “branch, *department*, agency, instrumentality, and official (or other person acting under color of law) of the United States. . . .”¹¹⁰ This definition facially applies to the Department of Defense and, by implication, to the military branches—including the Army. Although RFRA’s legislative history expressly declares that RFRA applies to the military,¹¹¹ a closer examination is required to ascertain the scope of RFRA’s applicability to the military.

A. Ascertaining the Scope of RFRA’s Applicability to the Military

The Senate Judiciary Committee’s report on RFRA noted that “the [federal] courts have always extended to military authorities significant deference in effectuating . . . [military] interests.”¹¹² The Committee then declared its intention and expectation that “such deference” continue under RFRA.¹¹³ The House Judiciary Committee’s report on RFRA was not as categorical. After noting the importance of respecting the “expertise and authority” of military officials,¹¹⁴ the House report declared that, under RFRA, “[s]eemingly reasonable [military] regulations based upon speculation, exaggerated fears . . . [or] thoughtless policies cannot stand.”¹¹⁵ Sig-

¹⁰⁴ §§ 2000bb, 2000bb-1.

¹⁰⁵ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

¹⁰⁶ *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *In re Young*, 141 F.3d 854, 856 (8th Cir. 1998); *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002); *Kikumara v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001).

¹⁰⁷ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct 1211, 1216 (2006).

¹⁰⁸ 42 U.S.C. § 2000bb-3 (2000).

¹⁰⁹ See §§ 2000bb-1, 2000bb-2 (2000).

¹¹⁰ § 2000bb-2 (emphasis added).

¹¹¹ H.R. REP. NO. 103-88, at 8 (1993) (“Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of . . . military personnel under the compelling governmental interest test.”); S. REP. NO. 103-111, at 12 (1993) (“Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test.”).

¹¹² S. REP. NO. 103-111, at 12.

¹¹³ *Id.*

¹¹⁴ H.R. REP. NO. 103-88, at 8 (1993). According to the House report, applying the compelling interest test to military regulations “does not mean the expertise and authority of military . . . officials will be necessarily undermined.” *Id.* This is so, according to the House report, because “maintaining discipline in [the] armed forces, [has] been recognized as governmental interests of the highest order.” *Id.*

¹¹⁵ *Id.*

nificantly, the Senate Judiciary Committee's report on RFRA adopted a similar stance with respect to regulations based on "speculation, exaggerated fears, or post-hoc rationalizations," but only with respect to prison regulations.¹¹⁶ The notion that military regulations must be justified on the basis of something other than speculation, exaggerated fears, or thoughtless policies is not significant because, the Senate Judiciary Committee applied this justificatory standard only to prison regulations—it declined or neglected to apply the standard to military regulations. The consequent failure of the Senate and House reports to comport with each other with respect to the standard detracts from its significance.

Notwithstanding this divergence, both reports expressed an expectation that courts applying RFRA will construe the compelling interest test neither "more stringently [n]or more leniently than it was prior to *Smith*."¹¹⁷ The next section of this essay examines two pre-*Smith* cases that applied the compelling interest test to military appearance regulations.

B. Two Pre-*Smith* Applications of the Compelling Interest Test to Military Appearance Regulations

In *Bitterman v. Secretary of Defense*, the U.S. District Court for the District of Columbia addressed the constitutionality of Air Force regulations that prohibited an active duty air traffic controller from wearing a yarmulke in uniform.¹¹⁸ Sergeant Murray Bitterman—the complainant—filed suit after being denied permission to wear a yarmulke.¹¹⁹ Although the Air Force conceded that a yarmulke would not interfere with Bitterman's air traffic control duties,¹²⁰ and notwithstanding the testimony of a former Air Force physician, who wore a yarmulke during active duty,¹²¹ the District Court upheld the Air Force regulations after applying a compelling interest test.¹²² According to the District Court, the Air Force asserted two compelling interests: (1) a compelling interest in "the effective functioning and maintenance of the Air Force,"¹²³ and (2) a compelling interest in preserving "motivation, image, morale, discipline and esprit de corps,"

¹¹⁶ See S. REP. NO. 103-111, at 10 (1993).

¹¹⁷ H.R. REP. NO. 103-88, at 7 (1993); S. REP. NO. 103-111, at 9 (1993).

¹¹⁸ *Bitterman v. Sec'y of Def.*, 553 F. Supp. 719, 720 (D.D.C. 1982).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 721.

¹²² *Id.* at 724–26. The District Court articulated the test as follows:

[I]n order to withstand judicial review, the regulation in question, although presumptively valid, must protect a substantial governmental interest overshadowing the First Amendment right that is being circumscribed. Further, the regulation must regulate no more conduct than is reasonably necessary to protect the substantial governmental interest asserted; yet this strict standard of review is to be tempered by the substantial deference to be accorded military judgments as to the appropriate ways in which to further a compelling interest

Id. at 723–24. In its opinion, the District Court inconsistently characterized the governmental interest at issue as "a substantial governmental interest," a "substantial compelling governmental interest," a "compelling governmental interest," *id.* at 724, and "an important governmental interest." *Id.* at 726.

¹²³ *Id.* at 724.

which are “essential to the efficient functioning and operation of the Air Force.”¹²⁴ According to the District Court, permitting departures from Air Force appearance regulations would “adversely affect the promotion of teamwork, counteract pride and motivation, and undermine discipline and morale, all to the detriment of the substantial compelling governmental interest of maintaining an efficient Air Force.”¹²⁵

The District Court also concluded that the appearance regulations at issue were the least intrusive means of furthering the Air Force’s asserted interests.¹²⁶ This conclusion was motivated in part by the District Court’s assumption of the following analytic stance: in determining the intrusiveness of the challenged regulation, “[i]ts effect upon the religious practices of all Air Force personnel must be considered, not just its effect upon the wearing of a yarmulke” by a single individual.¹²⁷ After assuming this analytic stance, the District Court posed an extreme hypothetical, in which the Air Force promotes uniformity by requiring all personnel to adhere to the same religion or to no religion.¹²⁸ Because the actual regulations at issue sought to promote uniformity while permitting personnel to adhere to at least some form of religion, they were less restrictive than they hypothetically could have been.¹²⁹ The District Court went further than this, however, by concluding on the basis of its hypothetical that the actual regulations were the *least* restrictive means of promoting uniformity¹³⁰ and, derivatively, operational effectiveness in the Air Force.¹³¹

The District Court went even further in the course of upholding the contested regulations. Drawing on an interpretation of Jewish religious law,¹³² the District Court opined that Bitterman’s desire to wear a yarmulke was a “religious preference” instead of a religious requirement.¹³³ This, according to the District Court, supported the notion that the contested regulations constituted the least restrictive means of promoting uniformity and operational effectiveness in the Air Force.¹³⁴

In *Sherwood v. Brown*, the U.S. Court of Appeals for the Ninth Circuit addressed the constitutionality of Navy regulations that prohibited an enlistee from remaining in uniform after his adoption of Sikhism.¹³⁵ Ronald

¹²⁴ *Id.*

¹²⁵ *Id.* at 724–25.

¹²⁶ *Id.* at 725.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 724.

¹³² *Id.* at 725. In support of the notion that wearing a yarmulke constitutes a religious preference instead of a religious requirement, the District Court cited a footnote from *The Concise Code of Jewish Law*, according to which a Jew is permitted to go bareheaded, “especially where one’s livelihood is involved . . . inasmuch as covering the head is prescribed by custom but not demanded by law.” *Id.* (quoting 1 GERSHON, APPEL, *THE CONCISE CODE OF JEWISH LAW* 34 n.3 (1977)) (emphasis added).

¹³³ *Id.* at, 726.

¹³⁴ *Id.*

¹³⁵ *Sherwood v. Brown*, 619 F.2d 47, 48 (9th Cir. 1980).

Sherwood—the complainant—filed suit after being court-martialed and discharged from the Navy for refusing to remove his turban and wear a helmet in compliance with Navy appearance regulations.¹³⁶ In a short opinion, the court upheld the Navy regulations by affirming the lower court's application of a compelling interest test.¹³⁷ Both courts concluded that the Navy's interest in safety was a compelling interest.¹³⁸ Addressing the observant Sikh practice of wearing a turban, and drawing on an affidavit by a senior naval officer, both courts concluded that the "[a]bsence of a helmet poses serious safety problems both for the unprotected sailor and for the crew that depends on him" and that "[a] turban does not meet [the] safety requirement necessitated by both the ordinary and extraordinary activities of the modern, mechanized Navy."¹³⁹ Both courts also concluded that "because all naval personnel are subject to military duties which implicate the safety rationale, no less restrictive alternative [to naval appearance regulations] exists."¹⁴⁰

C. The Significance of *Bitterman* and *Sherwood* in the Context of RFRA's Legislative History

RFRA's legislative history uniformly contemplated that RFRA would reinstate the compelling interest test, as applied prior to *Smith*, in free exercise cases.¹⁴¹ RFRA's legislative history also contemplated deference to military judgment in RFRA challenges to military regulations.¹⁴² *Bitterman* and *Sherwood* were pre-*Smith* applications of the compelling interest test, and both courts upheld military appearance regulations against constitutional challenge.¹⁴³ The court in *Bitterman* expressly stated that its application of the compelling interest test was "tempered by the substantial deference to be accorded military judgments as to the appropriate ways in which to further a compelling interest."¹⁴⁴ All of this, without more, might support a conclusion that RFRA does not compel the accommodation of observant Sikh lawyers in the U.S. Army JAG Corps. The balance of this essay argues against the necessity of such a conclusion by applying RFRA to appearance regulations that presumptively prohibit observant Sikh lawyers from joining the U.S. Army JAG Corps.

¹³⁶ *Id.*

¹³⁷ *Id.* The Court of Appeals articulated the test as follows: "Government regulations which infringe protected religious practice are proscribed by the free exercise clause of the First Amendment unless the Government can demonstrate that the regulation is the least restrictive alternative to meet a compelling state need." *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ H.R. REP. NO. 103-88, at 6 (1993); S. REP. NO. 103-111, at 8-9 (1993).

¹⁴² S. REP. NO. 103-111, at 12.

¹⁴³ *Bitterman v. Sec'y. of Def.*, 553 F. Supp. 719, 726 (D.D.C. 1982); *Sherwood v. Brown*, 619 F.2d 47, 48 (9th Cir. 1980).

¹⁴⁴ *Bitterman*, 553 F. Supp. at 724.

THE APPLICABILITY OF THE RELIGIOUS FREEDOM RESTORATION ACT TO
 APPEARANCE REGULATIONS THAT PRESUMPTIVELY PROHIBIT OBSERVANT
 SIKH LAWYERS FROM JOINING THE U.S. ARMY JUDGE ADVOCATE
 GENERAL CORPS

The Religious Freedom Restoration Act of 1993 reads in pertinent part as follows: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability”¹⁴⁵ Notwithstanding this, “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁴⁶ The following discussion is organized around RFRA’s statutory language.

A. Do Army Appearance Regulations Substantially Burden an Observant Sikh’s Exercise of Religion?

Under RFRA, as under the First Amendment, “[r]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection.”¹⁴⁷ RFRA protects the “sincere exercise of religion.”¹⁴⁸ An observant Sikh who initiates a RFRA challenge of Army appearance regulations would accordingly have to demonstrate that *his* practice of Sikhism is sincere. As mentioned earlier in this essay, observant Sikhs wear turbans and refrain from cutting their hair in accordance with their religion.¹⁴⁹

Federal courts have offered multiple expressions of the requirement that contested regulations “substantially burden” a person’s exercise of religion; even still, several recurring principles emerge from these expressions.¹⁵⁰ As a threshold matter, “plaintiffs have the initial burden under RFRA to demonstrate that the policy in question substantially burdens the free exercise of their religion.”¹⁵¹ This initial evidentiary burden is a prerequisite to the government’s demonstration that its contested regulations further a compelling governmental interest by the least restrictive means.¹⁵² A “substantial burden” under RFRA “must be more than an inconve-

¹⁴⁵ 42 U.S.C. § 2000bb-1 (2000).

¹⁴⁶ *Id.*

¹⁴⁷ *United States v. DeWitt*, 95 F.3d 1374, 1374–75 (8th Cir. 1996) (quoting *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981)).

¹⁴⁸ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct 1211, 1220 (2006); see also *DeWitt*, 95 F.3d at 1375 (noting that RFRA “only protects sincerely held beliefs that are ‘rooted in religion.’” (quoting *Thomas*, 450 U.S. at 713)).

¹⁴⁹ See Sardarni Premka Kaur, *Rahit Maryada*, in 3 THE ENCYCLOPAEDIA OF SIKHISM 424 (Harbans Singh ed., 1997).

¹⁵⁰ Mary Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act (42 USCS §§ 2000bb et seq)*, 135 A.L.R. FED. 121, 144–48 (1996).

¹⁵¹ *Potter v. District of Columbia*, 382 F. Supp. 2d 35, 39 (D.D.C. 2005).

¹⁵² *Henderson v. Stanton*, 76 F. Supp. 2d 10, 14 (D.D.C. 1999).

nience.”¹⁵³ A RFRA plaintiff must show that a government regulation “pressur[es] him or her to commit an act forbidden by the religion or . . . [prevents] him or her from engaging in conduct or having a religious experience which the faith mandates.”¹⁵⁴ Although at least one court interpreted the substantial burden test as applying only to religious practices that are mandated rather than to those which are merely encouraged,¹⁵⁵ at least one other court has concluded that “a restriction on practices subjectively important to plaintiff’s sincerely held religious understanding is a substantial burden within the meaning of RFRA.”¹⁵⁶

Two aspects of the Army’s appearance regulations fail to comport with Sikh religious requirements: (1) rules regarding headgear, and (2) rules regarding hair. In pertinent part, the regulations permit religious headdress to be worn if it is “of a style and size which can be completely covered by standard military headgear” but categorically forbid personnel from wearing religious headgear in “circumstances when the wear of military headgear is required (for example, when the soldier is outside or required to wear headgear indoors for a special purpose).”¹⁵⁷ Religious headdress cannot be worn at all if it “interfere[s] with the wear or proper functioning of protective clothing or equipment.”¹⁵⁸ Although it is possible that an observant Sikh would consent to wearing a small head-covering¹⁵⁹ underneath a protective helmet as required by operational necessity, it is equally possible that an observant Sikh would categorically object to wearing a helmet if this required him to remove any form of traditional headgear; this is so because observant Sikhs regard their turbans as being inseparable parts of their religious identity.¹⁶⁰ With respect to such a Sikh—faced with a choice between removing his turban and being precluded from the U.S. Army JAG Corps—some courts might find a substantial burden on religious exercise in virtue of his subjective but sincere belief that a turban

¹⁵³ *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (citations omitted).

¹⁵⁴ *Id.*; *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002) (“A statute burdens the free exercise of religion if it ‘puts substantial pressure on an adherent to modify his behavior and to violate his beliefs. . . .’”).

¹⁵⁵ *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995) *See also* *Turner-Bey v. Lee*, 935 F. Supp. 702, 703 (D. Md. 1996) (noting the distinction between conduct mandated by a religion and conduct merely encouraged but declining to decide the issue on that basis). This approach accords with the approach taken in *Bitterman*, where a district court drew a distinction between religious preferences and religious requirements in the course of deciding whether contested appearance regulations unconstitutionally infringed upon an Air Force member’s right to wear a yarmulke. *Bitterman v. Sec’y. of Def.*, 553 F. Supp. 719, 726 (D.D.C. 1982).

¹⁵⁶ *Rouser v. White*, 944 F. Supp. 1447, 1455 (D.Cal. 1996).

¹⁵⁷ ARMY REG. 600-20, *supra* note 23, at 33.

¹⁵⁸ *Id.*

¹⁵⁹ One example of an alternative head-covering among Sikhs is a *patka*—a square cloth with four strings attached to each corner. The cloth is tightly wrapped around the head and tends to be more secure and compact than a traditional turban. Some Sikh athletes wear *patkas* underneath their helmets. About.com, <http://altreligion.about.com/library/glossary/bldefpatka.htm?terms=patka> (last visited Sept. 12, 2007).

¹⁶⁰ *Kaur*, *supra* note 149, at 424.

is an inseparable part of his religious identity.¹⁶¹ Even if a court requires that such an individual demonstrate that turbans are mandated rather than encouraged in Sikhism,¹⁶² there is ecclesiastical support for the proposition that turbans are required for Sikh males.¹⁶³ This would likely lead a court to conclude that an observant Sikh's exercise of religion is substantially burdened by a rule that requires him to remove his turban and replace it with a helmet.

Observant Sikhs do not cut their hair.¹⁶⁴ Emphasizing cleanliness, observant Sikhs keep their uncut hair combed and tied in a knot underneath their turbans.¹⁶⁵ Although many observant Sikhs maintain flowing beards, others keep their uncut beards secured with hair gel, an elastic band, or a combination of both. As with turbans, although an individual Sikh may have subjective religious reasons for wanting to preserve his hair in the face of opposition from military authorities, there is ecclesiastical support for the proposition that hair-cutting is prohibited in Sikhism.¹⁶⁶ Several courts have, in the context of particular cases, concluded that forcing individuals to cut their hair in violation of religious requirements constitutes a substantial burden on the exercise of religion.¹⁶⁷ For the foregoing reasons, it is likely that a court would conclude that giving a Sikh a choice between preserving his hair and being able to join the U.S. Army JAG Corps constitutes a substantial burden on his exercise of religion.

¹⁶¹ *Rouser*, 944 F. Supp. at 1455.

¹⁶² *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995).

¹⁶³ SHIROMANI GURDWARA PARBANDHAK COMMITTEE SIKH REHT MARYADA (CODE OF SIKH CONDUCT AND CONVENTIONS) § 4, ch. 10, art. XVI, cl. t http://www.sgpc.net/rehat_maryada/section_four.html (last visited Sept. 12, 2007) [hereinafter SIKH REHT MARYADA] (“For a Sikh, there is no restriction or requirement as to dress except that he must wear Kachhehra . . . [a] drawer type garment fastened by a fitted string round the waist, very often worn as an underwear. . . . and turban.”) (emphasis added). The *Sikh Reht Maryada* was first approved in 1945 by the Advisory Committee on Religious Matters, a constituent of the Shiromani Gurdwara Parbandhak Committee (SGPC). *Preface to SIKH REHT MARYADA, CODE OF SIKH CONDUCT AND CONVENTIONS*, http://www.sgpc.net/sikhism/code_of_conduct.html (last visited Sept. 12, 2007). The SGPC was organized in 1925 after orthodox Sikh reformers secured the legal right to manage historic Sikh shrines. NESBITT, *supra* note 9, at 78–79. Described as “the mini parliament of Sikhs,” the SGPC promotes religious and educational activities for Sikhs throughout India. *SGPC Budget for 2006–07 Presented*, PRESS TRUST OF INDIA, Mar. 30, 2006, available at http://www.accessmylibrary.com/com2/summary_0286-14293491_ITM. The *Rehat Maryada* was not the first codification of Sikh discipline; the earliest versions appeared in the 18th century following the death of Guru Gobind Singh. NESBITT, *supra* note 9, at 62–63.

¹⁶⁴ *Who is a Sikh?*, *supra* note 9, at 121.

¹⁶⁵ NESBITT, *supra* note 9, at 51–54.

¹⁶⁶ SIKH REHT MARYADA *supra* note 163, at § 4, ch. 10, art. XVI, cl. i (“A Sikh should, in no way, harbour any antipathy to the hair of the head with which his child is born. He should not temper [sic] with the hair with which the child is born. . . . A Sikh should keep the hair of his sons and daughters intact.”).

¹⁶⁷ See, e.g., *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (“The court will assume for the purpose of this opinion that [a Hasidic Jewish inmate’s] religious convictions are authentic and [that] cutting his earlocks substantially burdens his faith.”); *Luckette v. Lewis*, 883 F. Supp. 471, 479 (D. Ariz. 1995) (“Prison policies do substantially burden Plaintiff’s attempts to maintain a Kosher diet, keep his hair at a certain length, and wear a headcovering of a particular color.”) (emphasis added).

B. Do Army Appearance Regulations Further Compelling Governmental Interests by the Least Restrictive Means?

The foregoing section of this essay argued that, with respect to an observant Sikh aspirant to military service in the U.S. Army JAG Corps, certain preclusive provisions of the Army's appearance regulations constitute a substantial burden on said individual's exercise of religion. Under RFRA, the Army can justify such a burden only by demonstrating that its appearance regulations (1) further a compelling governmental interest, and (2) are the least restrictive means of furthering that interest.¹⁶⁸ As suggested by the Supreme Court in *Gonzales*,¹⁶⁹ the plain language of RFRA indicates that passing the compelling interest test is a prerequisite to reaching the least restrictive means test.¹⁷⁰ The Army's appearance regulations are designed to promote two governmental interests: uniformity¹⁷¹ and safety¹⁷² among Army personnel. The following subsections treat each interest in turn.

1. Does the Army Have a Compelling Interest in Uniformity?

As noted earlier, RFRA's legislative history uniformly contemplated that the compelling interest test would be applied neither "more stringently [n]or more leniently than it was prior to *Smith*."¹⁷³ Before *Smith*, the U.S. District Court for the District of Columbia in *Bitterman* applied a compelling interest test to appearance regulations that precluded an observant Jewish member of the Air Force from wearing a yarmulke.¹⁷⁴ In the course of upholding the contested regulations, the District Court presaged RFRA's legislative history¹⁷⁵ by observing that its own application of the compelling interest test was "tempered by the substantial deference to be accorded military judgments as to the appropriate ways in which to further a compelling interest."¹⁷⁶ According to the District Court, creating exceptions to uniformity in the Air Force would adversely impact the efficiency of the Air Force,¹⁷⁷ a compelling interest which depends on the preservation of other similarly compelling interests, such as discipline and esprit de corps.¹⁷⁸ This reasoning tracked that of the Joint Service Study Group on Religious Practice, which ultimately counseled against visible departures from un-

¹⁶⁸ 42 U.S.C. § 2000bb-1 (2000).

¹⁶⁹ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1219 (2006) ("[H]ere, the government failed on the first prong of the compelling interest test, and did not reach the least restrictive means prong . . .") (emphasis added).

¹⁷⁰ § 2000bb-1.

¹⁷¹ RELIGIOUS PRACTICE, *supra* note 26, at III-4.

¹⁷² *Id.* at III-7.

¹⁷³ H.R. REP. NO. 103-88, at 7 (1993); S. REP. NO. 103-111, at 9 (1993).

¹⁷⁴ *Bitterman v. Sec'y of Def.*, 553 F. Supp. 719, 720, 723-724 (D.D.C. 1982).

¹⁷⁵ S. REP. NO. 103-111 ("[T]he courts have always extended to military authorities significant deference in effectuating [military] interests. The [Senate Judiciary] [C]ommittee intends and expects that such deference will continue under this bill.").

¹⁷⁶ *Bitterman*, 553 F. Supp. at 724.

¹⁷⁷ *Id.* at 724-25.

¹⁷⁸ *Id.* at 724.

iformity in the military.¹⁷⁹ Without more, one might conclude that the Army could overcome a RFRA challenge to its appearance regulations by heeding the instruction of RFRA's legislative history and adopting the reasoning of *Bitterman*; however, as argued below, there is reason to doubt the Army's claim that its interest in uniformity is compelling under RFRA.

In the face of a RFRA challenge to Army appearance regulations, the Army must begin by asserting not merely an interest but a compelling interest in preserving uniformity within its ranks. In other words, the Army must assert a compelling interest in the uniform application of its appearance standards—in disallowing appearance exceptions to appearance regulations within its ranks. Although the U.S. Supreme Court has acknowledged “that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA,”¹⁸⁰ the Army must affirmatively “demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.”¹⁸¹ As discussed above, the Joint Study Group concluded on the basis of extensive research that uniformity has a psychological and behavioral impact on operational effectiveness within the military.¹⁸² This research formed the basis for the Joint Study Group's ultimate conclusion that “it would be unwise to permit visible exceptions to uniform dress and appearance standards.”¹⁸³ By implication, this research forms the basis for an argument against the accommodation of observant Sikhs in the Army JAG Corps. Without more, and to the extent that the Army adopts the reasoning of the Joint Study Group, it is conceivable that the Army would carry its burden of demonstrating a compelling interest in preserving uniformity in the face of a challenge by an observant Sikh aspirant to JAG Corps service. Notwithstanding this, *Gonzales* offers a roadmap for demonstrating that the Army's asserted interest in preserving uniformity is not compelling.

In *Gonzales*, the U.S. Supreme Court applied RFRA to the federal government's application of the Controlled Substances Act to a religious sect whose beliefs require the consumption of a regulated hallucinogen.¹⁸⁴ The government asserted “a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen [could] be made to accommodate the sect's sincere religious practice.”¹⁸⁵ In response, the Court noted that the government itself had previously recognized an exception to the Controlled Substances Act

¹⁷⁹ RELIGIOUS PRACTICE, *supra* note 26, at III-19.

¹⁸⁰ *Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1224 (2006).

¹⁸¹ *Id.* at 1223.

¹⁸² RELIGIOUS PRACTICE, *supra* note 26, at III-4.

¹⁸³ *Id.* at III-19.

¹⁸⁴ *Gonzales*, 126 S. Ct. at 1216.

¹⁸⁵ *Id.*

for religion-based peyote use among Native Americans.¹⁸⁶ The peyote exception, according to the Court, “fatally undermine[d] the government’s broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA.”¹⁸⁷ Furthermore, according to the Court, “the [g]overnment’s argument for uniformity . . . rest[ed] not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law.”¹⁸⁸ On these grounds, the Court ultimately concluded that the government failed to demonstrate a compelling interest in barring the sect’s religious use of the hallucinogen at issue.¹⁸⁹

With respect to the issue of uniformity, what *Gonzales* teaches is that an asserted interest in uniformity is not compelling to the extent that exceptions are made to the asserted interest. In other words, if the Army asserts a compelling interest in preserving uniformity through uniform application of its appearance standards, its assertion is undercut to the extent it can be shown that exceptions are being made to the uniform application of its appearance standards. There are, in fact, several such exceptions. Most pertinently, the U.S. Army has accommodated observant Sikhs, even after the implementation of preclusive appearance regulations.¹⁹⁰ This directly undermines the Army’s argument that it has a compelling interest in disallowing exceptions to its appearance standards. Military authorities have suggested that uniformity has a psychological and behavioral impact on operational effectiveness within the military.¹⁹¹ If the presence of observant Sikhs in the Army has not already undermined its operational effectiveness, it is not obvious why admitting additional Sikhs would do so in the future; an argument to the contrary would be in the nature of a slippery-slope, which was rejected by the U.S. Supreme Court in *Gonzales* as a legitimate foundation for demonstrating a compelling governmental interest.¹⁹² The Army’s dress regulations aim to “maintain uniformity” within the Army and ensure that personnel “avoid an extreme or unmilitary appear-

¹⁸⁶ *Id.* at 1222.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1223. Put another way, “[t]he [g]overnment’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.” *Id.*

¹⁸⁹ *Id.* at 1225.

¹⁹⁰ Manbir Singh Chowdhary, *Interview with Colonel G.B. Singh*, 17 SIKHSPECTRUM.COM Q. (2004), http://www.sikhspectrum.com/082004/gbsingh_int.htm. The author communicated with Col. G.B. Singh (retired), an observant Sikh who served in the U.S. Army after the implementation of preclusive appearance regulations, and learned that he retired on August 1, 2007. Email from Colonel G.B. Singh to Rajdeep Singh Jolly (Oct. 3, 2007, 08:46:08 PST) (on file with author). Although the Army has generally ruled out religion-based exceptions to its appearance regulations for uncut hair, Army Regulations provide that “policy exceptions based on religious practice given to soldiers . . . on or prior to 1 January 1986 remain in effect as long as the soldier remains otherwise qualified for retention.” ARMY REG. 670.1, *supra* note 96, at 2–3.

¹⁹¹ RELIGIOUS PRACTICE, *supra* note 26, at 4.

¹⁹² See *Gonzales*, 126 S. Ct. at 1223.

ance.”¹⁹³ The presence of observant Sikhs in the Army suggests that they have successfully avoided “an extreme or unmilitary appearance,” and it is not clear why additional Sikh could not do the same.

Apart from the presence of at least some observant Sikhs in the U.S. Army, the Army’s own appearance standards admit of additional exceptions with respect to facial hair, which is an integral part of an observant Sikh’s religious identity. Although Army regulations require males to “keep their face[s] clean-shaven when in uniform or in civilian clothes on duty,” an exception is provided when “appropriate medical authority prescribes beard growth.”¹⁹⁴ As well, males are allowed to keep mustaches.¹⁹⁵ If non-Sikh Army personnel can maintain facial hair without undermining uniformity to the detriment of operational effectiveness, it is not clear why Sikh personnel would do so by maintaining facial hair in accordance with their religious beliefs.

For the foregoing reasons, the Army does not have a compelling interest in preserving uniformity by excluding observant Sikhs from its ranks. If, as this essay suggests, the Army cannot demonstrate that its appearance regulations further a *compelling* governmental interest in preserving uniformity, it is neither necessary nor even possible to determine whether those regulations satisfy RFRA’s least restrictive means test. According to RFRA, “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering *that compelling governmental interest*.”¹⁹⁶ The plain language of RFRA implies that passing the compelling interest test is a prerequisite to reaching the least restrictive means test,¹⁹⁷ and it is demonstrably the case that the Army has not asserted a compelling interest in disallowing appearance exceptions to its appearance regulations.

2. Does the Army Have a Compelling Interest in Safety?

As noted earlier, RFRA’s legislative history uniformly contemplated that the compelling interest test would be applied neither “more stringently [n]or more leniently than it was prior to *Smith*.”¹⁹⁸ Before *Smith*, the U.S. Court of Appeals for the Ninth Circuit in *Sherwood* applied the compelling interest test to Navy appearance regulations that formed the basis for the discharge of an observant Sikh who refused to wear a safety helmet in compliance with said regulations.¹⁹⁹ The court in *Sherwood* noted that safety helmets are designed to protect sailors from violent impacts and that

¹⁹³ ARMY REG. 670.1, *supra* note 96, at 5.

¹⁹⁴ *Id.* at 3.

¹⁹⁵ *Id.* at 3.

¹⁹⁶ 42 U.S.C. § 2000bb-1 (2000) (emphasis added).

¹⁹⁷ *Id.*

¹⁹⁸ H.R. REP. NO. 103-88 (1993); S. REP. NO. 103-111(1993).

¹⁹⁹ *Sherwood v. Brown*, 619 F.2d 47, 48 (9th Cir. 1980).

turbans do not afford such protection.²⁰⁰ On this ground, the court in *Sherwood* concluded that the Navy's interest in promoting safety within its ranks was compelling.²⁰¹ This essay does not argue against this conclusion. Neither does this essay argue against the importance of requiring the use of other protective equipment, particularly gas masks. As noted by the Joint Service Study Group on Religious Practice, safety standards not only "directly affect the individual's health and well-being,"²⁰² but also "affect the ability of the individual to perform a task. This, in turn, influences the accomplishment of the unit's mission in both peace and war."²⁰³ What this essay argues against, however, is the proposition that the Army's appearance regulations constitute the least restrictive means of promoting the Army's concededly compelling interest in promoting safety.

3. Do Army Appearance Regulations Constitute the Least Restrictive Means of Promoting Safety?

One court explained the least restrictive means inquiry as follows: "[i]f the compelling state [interest] can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest."²⁰⁴ The court in *Sherwood* concluded that the helmet requirement at issue in that case was the least restrictive means of promoting safety among Navy personnel because allowing an observant Sikh to wear a turban in place of a protective helmet "poses serious safety problems both for the unprotected sailor and for the crew that depends on him."²⁰⁵ In other words, in the view of the court in *Sherwood*, it would have been impossible for the Navy to assure the safety of an observant Sikh sailor—or even the safety of his colleagues—if he were allowed to wear a turban in place of a protective helmet while on duty.²⁰⁶ This essay agrees that the Army has a compelling interest in promoting safety among its personnel, including JAG Corps officers, who have been deployed in such dangerous settings as Vietnam and Iraq.²⁰⁷ This essay also agrees with the result in *Sherwood*; however, as explained below, the result in *Sherwood* need not be replicated in every case in which an observant Sikh insists on wearing a turban in uniform. The complainant in *Sherwood* refused to wear any helmet, but it is conceivable that observant Sikhs will wear helmets as safety requires, as long as they can also wear some form of turban.

As indicated earlier, at least some observant Sikh officers have served

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² RELIGIOUS PRACTICE, *supra* note 26, at III-7-8.

²⁰³ *Id.* at III-8.

²⁰⁴ Callahan v. Woods, 736 F.2d 1269, 1272-73 (9th Cir. 1984).

²⁰⁵ *Sherwood*, 619 F.2d at 48.

²⁰⁶ *Id.*

²⁰⁷ See Christopher W. Behan, Book Note, 174 MIL. L. REV. 180 (2002) (reviewing FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001)).

in the U.S. Army after the implementation of preclusive appearance regulations.²⁰⁸ Their presence in the Army is evidence that religious requirements are compatible with safety requirements. By law, members of the U.S. military are allowed to wear religious apparel if wearing it does not “interfere with the performance of the member’s military duties. . . .”²⁰⁹ For example, according to the Department of Defense, “[a] yarmulke may be worn with the uniform whenever a military cap, hat, or other headgear is not prescribed.”²¹⁰ Even when other headgear is prescribed, “[a] yarmulke may also be worn underneath military headgear as long as it does not interfere with the proper wearing . . . [or] functioning . . . of the prescribed headgear.”²¹¹ As mentioned earlier, observant Sikhs keep their uncut hair combed and tied underneath a turban, which can range in style, size, and fit. In situations where safety helmets are required, it is possible for an observant Sikh to wear a helmet over a smaller and tighter headdress; this practice can be observed among Sikh athletes and would be analogous to that of an observant Jew who wears a yarmulke underneath a helmet.²¹² If turbans can be worn underneath helmets without subjecting their wearers to more danger than normal, then the Army cannot justifiably argue that disallowing any form of turban constitutes the least restrictive means of promoting its interest in safety.

Although the Department of Defense allows military members to wear religious apparel in certain circumstances, it officially excludes hair from its definition of “religious apparel.”²¹³ This exclusion may have been motivated by concerns about the ability of bearded individuals to properly wear protective gas masks. According to the Joint Service Study Group on Religious Practice, it is not possible for a bearded individual to properly wear a gas mask.²¹⁴ Accordingly, even if an observant Sikh demonstrates that he can properly wear a safety helmet over a turban, it is not obvious that he can properly wear a gas mask over his uncut beard.²¹⁵ In order to succeed

²⁰⁸ See *supra* note 190.

²⁰⁹ 10 U.S.C. § 774(b)(1) (2000).

²¹⁰ DIRECTIVE NO. 1300.17, *supra* note 20, at 3.

²¹¹ *Id.* at 3.

²¹² Many Sikh men can be observed wearing *patkas*. A *patka* is a square cloth with four strings attached to each corner. The cloth is tightly wrapped around the head and tends to be more secure and compact than a traditional turban. Some Sikh athletes wear *patkas* underneath their helmets. See *supra* note 159.

²¹³ DIRECTIVE NO. 1300.17, *supra* note 20, at 3.

²¹⁴ RELIGIOUS PRACTICE, *supra* note 26, at 15. This observation might explain the following provision of the Army’s appearance regulations: “[S]oldiers previously granted authority to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent change of station or temporary duty out of [the continental United States] *due to health and safety considerations*.” ARMY REG. 600-20, *supra* note 23, at 34 (emphasis added). This provision appears to assume that military personnel deployed outside the Continental United States are in greater danger of being subjected to attacks that imperil their health and safety. This assumption might appropriately be questioned in the aftermath of the terrorist attacks of September 11, 2001.

²¹⁵ *Potter v. District of Columbia*, No. 01-1189, 2007 WL 2892685 (D.D.C. Sept. 28, 2007). In *Potter*, the U.S. District Court for the District of Columbia concluded that local fire department regulations requiring religiously bearded individuals to shave violated RFRA. *Id.* at *1. In the course of doing so, the court noted that some religiously bearded plaintiffs repeatedly passed safety tests for gas

under RFRA, the U.S. Army would have to demonstrate that an observant Sikh cannot wear a gas mask without imperiling himself or those around him; if such a demonstration fails, this failure could prove that the Army can promote safety without impairing the exercise of Sikhism.

As indicated earlier, many observant Sikhs secure their uncut beards with hair gel, elastic cords, or a combination of both; the effect is to fix a beard closely to the contours of the face. It is accordingly possible that an observant Sikh could modify his beard in such a way as to enable the formation of a protective seal for the purpose of properly wearing a gas mask. Additionally, as mentioned earlier, the Army allows personnel to maintain beards when “appropriate medical authority prescribes beard growth.”²¹⁶ If Army personnel are permitted to maintain beards for medical reasons, and if such personnel can properly wear gas masks, then it might be possible for observant Sikhs to do so. That there already are observant Sikhs in the U.S. Army might constitute additional evidence that Sikh religious requirements are compatible with safety requirements. Significantly, however, these Sikhs are “not [to] be assigned permanent change of station or temporary duty out of . . . [the continental United States] *due to health and safety considerations*.”²¹⁷ This assignment restriction may have been motivated by concerns about exposing observant Sikhs to environments in which the use of gas masks would be more than a remote possibility. Because JAG Corps officers are deployed around the world,²¹⁸ observant Sikh members of the JAG Corps could find themselves in environments of the sort that military officials determined would be unsafe for observant Sikhs. This determination argues against the accommodation of observant Sikhs in the U.S. Army JAG Corps; however, as explained below, the foregoing argument need not be regarded as fatal to a case for accommodation.

The United Kingdom’s Ministry of Defense has adopted a more inclusive approach to religious accommodation than the United States, and this approach provides useful guidance in regard to facial hair and gas masks.²¹⁹ This approach also poses potential obstacles to observant Sikh aspirants to military service in the United States. According to the Ministry of Defense’s *Guide on Religion and Belief in the MOD and Armed Forces*, Sikhs in the United Kingdom are permitted to serve in their nation’s armed forces and are permitted to maintain uncut hair.²²⁰ Notwithstanding this, Sikhs must maintain “short neatly trimmed beards” that must be modified or removed “to such an extent as to enable the correct wearing of a respira-

masks, *id.* at *10, and that clean shaven individuals fail such tests with regularity, *id.* at *7. The court also observed that certain gas masks can safely be worn by bearded individuals. *Id.* at *9.

²¹⁶ ARMY REG. 670-1, *supra* note 96, at 3.

²¹⁷ ARMY REG. 600-20, *supra* note 23, at 34 (emphasis added).

²¹⁸ Behan, *supra* note 207.

²¹⁹ This essay assumes that the British military is fairly comparable to the U.S. military in terms of operational sophistication.

²²⁰ UNITED KINGDOM MINISTRY OF DEFENCE, *supra* note 19.

tor or breathing apparatus.”²²¹ According to the Ministry of Defense, “[a]n effective seal on a respirator can only be achieved when the skin is clean shaven. In an operational environment (including training in preparation for operational deployment) where there is a [nuclear, biological, or chemical] threat Muslims, Sikhs and indeed all personnel with beards, would need to shave.”²²²

The *Guide* requires Sikhs to trim their beards and also asserts that an effective respiratory seal can only be achieved on clean-shaven skin; however, the requirement appears to be motivated by the assertion.²²³ The *Guide* might plausibly be read to suggest that an effective respiratory seal can only be achieved when facial hair does not “come[] between the sealing surface of the facepiece and the face. . . .”²²⁴ If an observant Sikh can modify his beard—and do so without trimming it—to such an extent as to prevent facial hair from interrupting the formation of a respiratory seal, then the *Guide* itself might have gone too far in prescribing that observant Sikhs trim their beards. In other words, Sikh aspirants to military service should not be presumed to be incapable of safely wearing gas masks without being given an opportunity to demonstrate such capability.

If the *Guide* does not go too far—if it is plainly impossible for a bearded individual to properly wear a gas mask *without* shaving his beard to some extent—then, at best, the *Guide* embodies an approach to safety that enables observant Sikhs to undertake military service without sacrificing all of their visible religious commitments, as they presumptively must in order to join the U.S. Army JAG Corps. If the U.S. Army adopted the British approach to religious accommodation, then observant Sikh personnel would likely be able to wear turbans, maintain uncut hair, and maintain at least some facial hair. Whether this concession would be acceptable to an observant Sikh is a matter for his own conscience; however, to the extent that the British approach enables a Sikh to observe his religious traditions *and* safely wear a gas mask, it appears to demonstrate that existing Army regulations regarding facial hair and gas masks are not the least restrictive means of promoting safety among Army personnel.

CONCLUSION

Observant Sikh lawyers do not presumptively enjoy the right to join the U.S. Army Judge Advocate General (JAG) Corps because Sikh religious requirements do not comport with the Army’s appearance regulations. This essay argued that the Army’s appearance regulations violate the Religious Freedom Restoration Act (RFRA). Under RFRA, government

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Potter v. District of Columbia*, 382 F. Supp. 2d 35, 38 (D.D.C. 2005) (quoting Occupational Health and Safety Administration, Occupational Health and Safety Standards, Personal Protective Equipment, 29 CFR 1910.134).

may substantially burden an individual's exercise of religion only if it demonstrates that its application of the burden furthers a compelling governmental interest by the least restrictive means.²²⁵ The Army's appearance regulations aim to promote two interests—uniformity and safety. In the course of furthering those interests, the Army's appearance regulations also prevent observant Sikhs from joining the U.S. Army JAG Corps. Observant Sikh males wear turbans and refrain from cutting their hair. Both requirements purportedly interfere with the Army's interests in uniformity and safety. This essay argued to the contrary by demonstrating (1) that, under RFRA, the Army does not have a compelling interest in disallowing appearance exceptions to its appearance regulations, and (2) that, under RFRA, the Army's appearance regulations do not constitute the least restrictive means of promoting safety. With respect to uniformity, the presence of observant Sikhs in the Army and the Army's own flexible approach to its appearance regulations undercut the notion that the Army has a compelling interest in disallowing exceptions to its appearance regulations. With respect to safety, observant Sikhs should be permitted to demonstrate that they can safely wear smaller turbans underneath their helmets when helmets must be worn and should be permitted to demonstrate that they can safely wear gas masks when gas masks must be worn. Because the Army's appearance regulations violate RFRA, they must be amended to allow for the accommodation of observant Sikhs in the U.S. Army JAG Corps.

²²⁵ 42 U.S.C. § 2000bb-1 (2000).