Exceptions Clause

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."

I. Introduction

Anglo-American law has long recognized both the necessity of having military law and the need to keep that law cabined to members of the military. The Exceptions Clause recognizes that the ordinary modes of common-law criminal procedure do not apply in cases arising in the military. The constitutional issues under this clause have concerned the persons against whom military law may be applied, whether military law may extend to traditional civilian crimes, and which constitutional criminal procedure rights, if any, apply to military members.

II. History Before 1787

A. British Precedent

In England, the history of military law begins with the application of martial law.[1] Here, "martial law" means "a summary form of criminal justice, exercised under direct or delegated royal authority by the military or police forces of the Crown, which is independent of the established processes of the common law courts, the ecclesiastical courts, and the courts which administered the civil law in England."[2] Matthew Hale famously remarked that martial law "in truth and reality . . . is not a law, but something indulged, rather than allowed, as a law."[3]

Before the seventeenth century, England subjected many individuals to martial law. These included members of the armed forces, rebels, rioters, thieves, and some other criminals.[4] But in the Petition of Right, the Crown renounced all commissions to subject individuals to martial law, except for soldiers in the field during war and for rebellion within England.[5] In justifying the continued application of martial law to members of the military, Hale explained, "[t]he necessity of government, order, and discipline in an army is that only which can give those laws a countenance."[6]

At the time of the Petition of Right, England had no standing army. That would come nearly two generations later.[7] When the standing army became an established institution, England quickly discovered that "[i]t was impossible to maintain a permanent force in time of peace so long as desertion could only be punished by a civil court and insubordination was an offence unrecognized by the law."[8] Martial law and military law began to separate in the seventeenth century (although the term "martial law" would still be used as a synonym for military law well into the eighteenth century). In 1689, Parliament passed annual Mutiny Acts for the discipline of the army.[9] A few decades earlier, Parliament had also passed Articles of War to govern the British navy.[10]

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[1] J.V. Capua, *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 CAMBRIDGE L.J. 152, 153 (1977).
[2] *Id.* at 152.
[3] Matthew Hale 42; *see also* Capua, *supra* note 2, at 152 (providing quotation).
[4] Capua, *supra* note 2, at 153.
[5] *Id.* at 172–73; *see* Petition of Right, 1628, 3 Car., c. 10 (Eng.).
[6] HALE, *supra* note 2, at 42.
[7] CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 115 (1970).
[8] H. ST. CLAIR FEILDEN, A SHORT CONSTITUTIONAL HISTORY OF ENGLAND 316 (3d ed., BOS., Ginn & Co. 1897).
[9] Capua, *supra* note 2, at 153.
[10] 2 WM. LAIRD CLOWES, THE ROYAL NAVY 102–03 (1898).

The legal regime governing the military not only aimed to make the military more efficient, but it also sought to control the danger of professional troops.[11] In part, Britain accomplished this by providing that members of the military were subject to *both* civilian law and military law.[12] With respect to civilian law, "[t]he fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen."[13] Thus, for example, soldiers could not plead that they were following military orders as a defense to criminal prosecution.[14] But in addition, a person "on entering the army becomes liable to special duties as being 'a person subject to military law.'"[15] This meant that a person could be punished severely for acts that, in the civilian world, would either not be criminal or would be a slight offense (e.g., insulting or committing a minor battery of a superior officer).[16] And a soldier could be punished by court-martial rather than by a jury of his peers, as would be guaranteed at common law.[17] Because of these military law duties, a soldier, by virtue of his employment, does not have "the same freedom" and "occupies a position totally different from that of a civilian."[18]

The militiaman occupied a status in between the status of the soldier (or sailor) and a civilian. Militiamen were the able-bodied citizens who could be called into temporary military service.[19] British law took a functional approach to military justice for militiamen. Militiamen were subjected to military law "only when in training or when the force is embodied."[20] And British law heavily limited when the militia could be embodied to defensive military conflicts only.[21] So citizens called into temporary military service were subjected to miliary law when acting as soldiers; when living their civilian life, they were only subject to the duties of civilian law.

Although these British rules were clear in theory, there were some difficult cases. In the eighteenth century, Britain began to keep some army officers in a half-pay status.[22] It was debatable whether this half pay was compensation for retired status or a retainer for the possibility of future recall into service.[23] Britain debated whether these half-pay officers could be court-martialed for acts done when not called into active service. Between 1749 and 1751, Parliament extended the Mutiny Act to half-pay officers. But this action met with a firestorm of controversy on policy and constitutional grounds, and Parliament abandoned the application of military law to half-pay officers in 1751.[24]

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[11] Dan Maurer, *A Logic of Military Justice*, 53 TEX. TECH L. REV. 669 (2021).

[12] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 276 (3d ed. 1889).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 282.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] See Article I, § 8 entries on the Calling Forth Clause and the Militia Organization Clause.

[20] DICEY, *supra* note 12, at 285.

[21] See Calling Forth Clause.

[22] *See* Larrabee v. Del Toro, 45 F.4d 81, 92 (D.C. Cir. 2022).

[23] N.A.M. Rodger, *Commissioned Officers' Careers in the Royal Navy, 1690–1815*, 3 J. FOR MAR. RSCH. 85, 90–91 (2001).

[24] *See, e.g.,* 1 JOHN MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS MARTIAL 186–201 (1813); 3 TOBIAS SMOLLETT, THE HISTORY OF ENGLAND 41, 43–44 (1836 ed.); 14 THE PARLIAMENTARY HISTORY OF ENGLAND 397, 462, 469, 473–74 484–490, 974 (1813); 2 THE HISTORY, DEBATES, AND PROCEEDINGS OF BOTH HOUSES OF PARLIAMENT OF GREAT BRITAIN 307 (1792); 22 THE PARLIAMENTARY REGISTER OR HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS 121–22 (1787).

B. American Precedent

In America, traditional British law applied. Thus, professional soldiers were subjected to military law while in service. For example, Virginia passed a Mutiny Act in 1757 that applied to officers who were "mustered, or in pay" and to those who were "[e]nlisted or in pay as a soldier."[25] And Pennsylvania passed a Mutiny Act in 1756 that applied to officers "commissioned and in pay" and to soldiers "regularly enlisted . . . [who are] paid and maintained by the Crown."[26]

Upon separation from Britain, many states adopted the traditional British limits for military jurisdiction. In 1776, Maryland placed in its Declaration of Rights that "no person, except regular soldiers, mariners, and marines in the service of this State, or militia when in actual service, ought in any case to be subject to or punishable by martial law.[27] Similarly, the Massachusetts Constitution of 1780 guaranteed in its Declaration of Rights that "[n]o person can in any case be subjected to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature."[28]

But as in Britain, civilian law applied to the military. Or at least it was supposed to. In the Declaration of Independence, the United States listed among its grievances that Britain had protected soldiers "by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States."[29]

During the Revolutionary War, Congress adopted Articles of War to govern the Army and Navy. The Articles of Confederation also authorized Congress to "have the sole and exclusive right and power of . . . making rules for the government and regulation of the . . . land and naval forces."[30] For a brief history, see the entry on the Rules and Regulations Clause.

III. The Ratification of the Constitution, the Scope of Military Law, and the Adopted Constitutional Amendments

The Constitution separately authorized Congress to make "Rules for the Government and Regulation of the land and naval Forces" and to "provide for . . . disciplining[] the Militia." The clause authorizing Congress to make rules for the military received little attention. As Justice Story explained, "This is a natural incident to the preceding powers to make war, to raise armies, and to provide and maintain a navy. Its propriety, therefore, scarcely could be, and never has been denied . . . ."[31]

The Anti-Federalists, however, fiercely objected to the militia provision. Because all able-bodied men were technically in the militia, the Anti-Federalist argued that Congress could impose

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[25] An Act for Preventing Mutiny and Desertion, ch. 2, *in* 7 THE STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 87, 87 (William Waller Hening, ed. 1820).

[26] An Act for Regulating the Officers and Soldiers Commissioned and Raised by the Governor for the Defense of this Province, § 1, *in* THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 219, 220 (James T. Mitchell & Henry Flanders, eds. 1898).

[27] MARYLAND CONSTITUTION OF 1776, Decl. of Rights, art. XXIX.

[28] MASSACHUSETTS CONSTITUTION OF 1780, Decl. of Rights, art. XXVIII.

[29] THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[30] ARTICLES OF CONFEDERATION OF 1781, art. IX.

[31] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1192 (1833).

military law on all men of military age.[32] Federalists responded that the federal government's power to govern the militia was limited to times when the militia was an actual federal service.[33]

The Anti-Federalists nevertheless wanted additional assurances. In their proposed declarations of rights and amendments to the Constitution, the Anti-Federalists sought a general guarantee that civilian law and common-law criminal procedure rights would apply to all citizens. Their proposed amendments recognized two exceptions. The first was cases involving "the government of the land and naval forces" (or some equivalent language),[34] sometimes with the added qualifier that the case arise in "time of actual War, Invasion, or Rebellion."[35] The second was a prohibition against applying military law (still referred to as "martial law") against militiamen, except "when in actual service in time of war, invasion, or rebellion."[36]

The proposals, thus, tracked traditional British practice. For members of the army and navy, most proposals recognized status-based jurisdiction: these soldiers could be subjected to military law by virtue of their status as soldiers. For members of the militia, the proposals authorized a functional military jurisdiction: military law applied in active service and civilian law applied when they lived as civilians.

In Congress, the initial House passed version of the Bill of Rights provided that "[t]he trial of all crimes (except . . . in cases arising in the land or naval forces, or in the militia, in time of war or public danger) shall be by an impartial jury."[37] The Senate, however, amended the House's proposal by adding the exception to (what is now) the Fifth Amendment's Grand Jury provision.[38] Following a Conference Committee, the House accepted the change on the Fifth Amendment but insisted on revised language for what is now the Sixth Amendment; that language omitted any reference to exceptions for the military.[39]

IV. Subsequent Practice and Open Questions

Despite its drafting, the Exceptions Clause has never been applied solely to the Fifth Amendment's grand jury provision. Instead, the provision has been understood to stand for the broader proposition that traditional common-law criminal procedure protections do not apply to proper

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[32] *See, e.g.*, Maryland Ratifying Convention (1788), *reprinted in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 729, 734 (Bernard Schwartz ed., 1971; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, Phila. Packet & Daily Advertiser, Dec. 18, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 164 (Herbert J. Storing ed., 1981); Foreign Spectator, *Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Caroline, with the Minorities of Pennsylvania and Maryland, by a Foreign Spectator: Number VIII*, Phila. Fed. Gazette, Nov. 14, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 567, 569–70 (David E. Young ed., 1991).

[33] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1280, 1288, 1294, 1301 (John P. Kaminski et al. eds., 2000).

[34] For these proposals, see THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 32, at 359 para. 13 (Maryland minority), 389 para. 8 (Richmond Antifederal Committee), 458 para. 8 (Virginia Convention), 481 (New York Convention), 504 para. 8 (North Carolina Convention), 734 para. 8 (Rhode Island Convention).

[35] *Id.* at 389 para. 8.

[36] *Id.* at 359 para. 13 (Maryland minority), 460 para. 11 (Virginia Convention), 481 (New York Convention) (limitation to militia phrased "when in actual service"), 507 para. 11 (North Carolina Convention), 735 para. 17 (Rhode Island Convention).

[37] H. Journ., 1st Cong., 1st sess., at 85 para. 14 (Aug. 21, 1789).

[38] S. Journ., 1st Cong., 1st sess., at 77 (Sept. 8, 1789).

[39] H. Journ., 1st Cong., 1st sess., at 121 (Sept. 24, 1789).

proceedings under military jurisdiction.[40] Thus, for example, members of the military may be tried by courts-martial and are not entitled to a petit jury of their peers.[41]

Under an originalist understanding, which Fifth and Sixth Amendment rights, if any, should apply in military law cases remains an unsettled question.[42] Courts have applied some of the Fifth and Sixth Amendments in military law cases. The Supreme Court has applied the Double Jeopardy Clause (or assumed it applies) to bar successive prosecutions by the same sovereign, whether civilian or military.[43] Whether those cases are correct as an original matter is uncertain. Under British law, a civilian acquittal would bar a military prosecution, but a military acquittal would not bar a civilian prosecution.[44] The rule perhaps prevented the military from protecting its own for misconduct committed in the civilian realm. Others have assumed that due process and the right to counsel apply, although the Supreme court characterized the latter as "much debated and never squarely resolved."[45] And there has been dicta to the effect that none of the provisions apply.[46]

Today, some of the most difficult questions are about how to understand Framing-era rules in light of changed circumstances. For example, the bureaucratic structure of the Armed Forces has changed beyond the Framers' imagination. At the Framing, there was a sharp distinction between the army and navy (which were regular forces) and the militia, which was the nonprofessional force.[47] Yet, the military now has large categories of servicemen who maintain a military affiliation but who are not full-time troops. These include military reservists (both actively drilling and inactive) and military retirees of both the regular and reserve components.

Congress's expansion of the Armed Forces to include nonprofessional forces raises difficult questions about how far Congress may extend military jurisdiction. Consistent with the original understanding, the Court has held that members of the army and navy (i.e., the regular forces) are subject to military law at all times,[48] while militiamen are subject to military law only while on duty[49] and civilians are not amenable to military law.[50] (These cases are more fully discussed in the entry on the Military Regulations Clause.) But what about military retirees, who remain affiliated with the Armed Forces and draw retired pay but who have no active-duty service obligations? May Congress subject

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[40] Reid v. Covert, 354 U.S. 1, 37 n.68 (1957).

[41] Ex parte Quirin, 317 U.S. 1, 40 (1942); Kneedler v. Lane, 45 Pa. 238, 261 (Woodward, J., concurring); *see also* Gregory E. Maggs, *Judicial Review of the Manual for Courts Martial*, 160 MIL. L. REV. 96, 147-155 (1999) (listing and discussing the leading cases that address the issue of whether the numerous clauses of the Fourth, Fifth, Sixth and Eighth Amendments and the Ex Post Facto Clause apply in courts-martial).

[42] *Compare*, e.g., Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958) [hereinafter "Wiener, *Original Practice I*"], and Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958), *with* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. (1957).

[43] Wade v. Hunter, 336 U.S. 684 (1949); Grafton v. United States, 206 U.S. 333 (1907).

[44] Dicey, *supra* note X, at 277–78.

[45] Middendorf v. Henry, 425 U.S. 25, 34 (1976) (footnote omitted); Weiss v. United States, 510 U.S. 163, 176 (1994) ("Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings.").

[46] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) ("We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment.").

[47] *See* Robert Leider, *Deciphering the "Armed Forces of the United States*," 57 WAKE FOREST L. REV. 1195 (2022).

[48] *E.g.*, Johnson v. Sayre, 158 U.S. 109, 114–15 (1895).

[49] *Id.*

[50] *E.g.*, Ex parte Milligan, 71 U.S. (4 Wall.) 2; Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246 (1960).

them to military law for conduct that occurs in their civilian life? Among originalists, the constitutionality of such actions have been heavily debated.[51]

Similar disputes have not arisen over the nonprofessional troops in the reserve forces. But that is because Congress has statutorily treated reservists as though they were militiamen and limited military jurisdiction to when they are on active duty or in training.[52] It is not clear whether Congress could constitutionally apply status-based jurisdiction to reservists and subject them to military law for conduct that occurred in their civilian life.

Finally, questions have also arisen about the extent to which Congress may subject servicemembers to military jurisdiction for traditionally civilian offenses. Until 1969, the Supreme Court did not require that an offense cognizable by court-martial have any connection to the military. Instead, the Supreme Court has generally policed only personal jurisdiction, holding that members of the army and navy (i.e., the regular forces) are subject to military law at all times,[53] while militiamen are subject to military law while on duty,[54] and civilians are not amenable to military law.[55] Beginning in 1969, however, the Court required that the offense be service connected to qualify as "arising" in the Armed Forces.[56] But doubts persisted whether the service-connected rule was correct, and the rule proved difficult to enforce. As a result, the Supreme Court abandoned that rule only eighteen years later.[57] (See the Military Regulations Clause for more detail.)

This, too, has been a contested issue because of changed circumstances. At the Founding, military law generally applied only to military offenses. But in more recent history, Congress has vastly expanded the range of offenses cognizable in military courts to include traditionally civilian conduct.[58] Originalist debates over whether the Constitution imposes any subject-matter limits on the crimes for which servicemembers may be prosecuted in military courts involve legal questions of constitutional meaning, factual disputes about Framing-era practices, and the legal effect, if any, of past practices and arguably changed circumstances.

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[51] *Compare* Larrabee v. Del Toro, 45 F.4d 81, 83–94 (D.C. Cir. 2022), *and* United States v. Begani, N81 M.J. 273., 282 (C.A.A.F. 2021) (Maggs, J., concurring), *with* Leider, *supra* note 47, at 1274–1277, Robert Leider, *Three Statuses, not Two: Why* Larrabee *Is the Wrong Rule for Nonprofessional Soldiers*, CAAFlog (Aug. 8, 2022, https://www.nimj.org/caaflog/leider-on-larrabees-flawed-originalism, and Robert Leider, *Half a Precedent Is No Precedent At All*, CAAFlog (Aug. 9, 2022), https://www.nimj.org/caaflog/leider-contd.

[52] 10 U.S.C. § 802(a)(1), (3).

[53] *E.g.*, Johnson v. Sayre, 158 U.S. 109, 114–15 (1895).

[54] *Id.*

[55] *E.g.*, Ex parte Milligan, 71 U.S. (4 Wall.) 2; Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246 (1960).

[56] O'Callahan v. Parker, 395 U.S. 258, 272 (1969).

[57] Solorio v. United States, 483 U.S. 435, 436 (1987).

[58] Wiener, *Original Practice I*, *supra* note 42, at 10–12 (providing the history of expansion).