Military Regulations

The Congress shall have Power...To make Rules for the Government and Regulation of the land and naval Forces....

(Article I, Section 8, Clause 14)

Introduction

Article I, Section 8, Clause 14—the "Military Regulations" clause—grants Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." In his *Commentaries on the Constitution of the United States* (1833), Justice Joseph Story described this power as "a natural incident to the . . . powers to make war, to raise armies, and to provide and maintain a navy."[1] Congress has exercised this power in enacting nearly all of the laws now codified in Title 10 of the United States Code. These laws organize the Department of Defense, Army, Navy, Marine Corps, Air Force, and Space Force. They regulate military pay grades, enlistments, commissions, promotions, and retirements. They further address military training, education, recruiting, decorations, and many additional subjects concerning the Armed Forces. And very importantly the laws establish a military justice system consisting of courts-martial and appellate courts—a subject that the Supreme Court has addressed in numerous important cases, as discussed below.

History before 1787

The need for rules and regulations for the Army and the Navy arose at the very start of the Revolutionary War. Shortly after the battles of Lexington and Concord in April 1775, representatives from the various colonies met in Philadelphia as the Second Continental Congress. On June 14,

[1] Joseph Story, Commentaries on the Constitution of the United States § 1192 (1833).

1775, the Congress created the Continental Army.[2] The same day, the Congress also formed a committee to prepare "a dra't of Rules and regulations for the government of the army."[3] This committee, whose members included John Adams, George Washington, and two others, soon afterward proposed sixty-nine "Articles of War." The Articles of War, which were based on British and colonial military laws, established a military justice system for the Continental Army. The Congress approved the Articles of War on June 30, 1775, arguably creating the first national law.[4] In November 1775, Congress approved a similar set of "Rules for the Regulation of the Navy of the United Colonies."[5] In 1781, consistent with these previous actions, Article IX of the Articles of Confederation expressly provided that "[t]he united states, in congress assembled, shall also have the sole and exclusive right and power of . . . making rules for the government and regulation of the . . . land and naval forces" in service of the United States.[6] During the Revolution, although Congress made George Washington commander-in-chief of the Continental Army, Congress still heavily directed his activities.[7]

The Constitutional Convention

On August 18, 1787, with no recorded debate, the Constitutional Convention approved a proposal to include a clause giving Congress the power to "make rules for the government and regulation of the land and naval forces."[8] In his notes, James Madison observed that this clause was

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[2] 2 Journals of the Continental Congress 1774–1789, at 90 (1775) (Worthington Chauncey Ford ed., 1904).

[3] *Id.*

[4] *Id.* at 112-123.

[5] 3 Journals of the Continental Congress 1774–1789, at 378.

[6] Articles of Confederation Article IX.

[7] Saikrishna Prakash, *Deciphering the Commander in Chief Clause*, *forthcoming* ___YALE L.J. ___ (unpublished manuscript at 19).

[8] 2 The Records of the Federal Convention of 1787 at 330 (Max Farrand ed., 1911) (Madison's Notes, Aug. 18, 1787).

"added from the existing Articles of Confederation,"[9] which as shown above contained nearly identical language. The Committee of Style made no significant changes.[10]

The Ratification Debates

Granting Congress power to make rules and regulations for the Army and the Navy appears to have been uncontroversial because neither supporters nor opponents of the Constitution said much about it during the ratification debates. In Federalist No. 69, Hamilton mentioned this power during a broader discussion of how the Constitution divided military authority between the President and Congress. Hamilton observed that while the President is the "commander-in-chief of the army and navy," his power is inferior to that of the "British king" whose power "extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration would appertain to the legislature." Addressing the same point, Joseph Story later wrote: "The whole power is far more safe in the hands of congress, than of the executive; since otherwise the most summary and severe punishments might be inflicted at the mere will of the executive."[11]

Early Practice

In 1789, the first Congress under the Constitution exercised its power under the Military Regulations Clause by passing a law that expressly continued the Articles of War in force.[12] The Articles of War, as revised from time to time, provided the military justice system for the United States Army until after World War II, when all the Armed Forces came under the Uniform Code of Military Justice of 1950.

Judicial Precedent

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[9] *id.*

[10] *id.* at 570

[11] Joseph Story, *supra* note 1, at § 1192.

[12] Act of Sept. 29, 1789, § 4, *reprinted* in 1 **Error! Main Document Only.***United States Statutes at Large* at 95-96 (Richard Peters, ed. 1845).

The leading Supreme Court cases interpreting the Military Regulations clause have involved challenges to the Uniform Code of Military Justice and its predecessors. These challenges primarily have concerned the personal and subject matter jurisdiction of courts-martial. In 1857, in *Dynes v. Hoover*, the Supreme Court held that the Military Regulations clause empowers Congress to subject persons actually in the Armed Forces to trial by court-martial for military and naval offenses.[13] Nearly a century later in 1955, the Supreme Court held in *United States ex rel. Toth v. Quarles* that the clause did not give Congress power to subject civilian former service members to trial by court-martial for crimes committed when they were on active duty.[14] The Court explained that "the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."[15] In 1957, in *Reid v. Covert*, the Supreme Court held that Congress could not use the Military Regulations clause to subject the wife of a service member to trial by court-martial for a *capital offense*.[16] The plurality opinion explained that "if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians—even though they may be dependents living with servicemen on a military base."[17] In 1960, the Supreme Court held in *Kinsella v. U.S. ex rel. Singleton* that the clause also does not allow Congress to subject a dependent to trial by court-martial for a *non-capital* offense.[18] The Court reasoned that "civilian dependents" are not "included in the term 'land and naval Forces' at all."[19]

Until the Civil War, the Articles of War primarily covered offenses of a military character. Since then, military law has expanded to bring more traditional civilian crimes within the scope of the

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[13] 61 U.S. 65, 79 (1857).
[14] 350 U.S. 11, 23 (1955).
[15] *Id.*
[16] 354 U.S. 1 (1957).
[17] 354 U.S. 1, 19 (1957) (plurality opinion) (footnote omitted),
[18] 361 U.S. 234, 246 (1960).
[19] *Id.*

military justice system. The Supreme Court has waffled in deciding how much discretion the Military Regulations clause gives Congress over the subject matter of courts-martial. In 1969, in *O'Callahan v. Parker*, the Supreme Court broke with longstanding practice and held that Congress could not use the clause to subject a member of the Armed Forces to trial by court-martial for an offense unless the offense was "service- connected."[20] Applying this new rule, the Court held a court-martial could not try a soldier for an assault and an attempted rape of a civilian off-post and after duty hours because these crimes were not connected in any way to the soldier's duties. The holding was short-lived. In 1987, in *Solorio v. United States*, the Supreme Court overruled *Parker* and held that no service connection was required if the accused has a military status.[21] Broadly interpreting the Military Regulations clause, the Supreme Court reasoned that "determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen [is] a matter reserved for Congress."[22]

In 1996, in *Loving v. United States*, the Supreme Court held that Congress could authorize the President to determine the "aggravating factors" that a court-martial must find in order to subject an accused to the death penalty.[23] In so doing, the Court rejected the accused's argument that "Congress lacks power to allow the President to prescribe aggravating factors in military capital cases because any delegation would be inconsistent with the Framers' decision to vest in Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces.' "[24] The Court justified its decision partly on grounds of historical practice, explaining that "[f]rom the

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[20] 395 U.S. 258, 272 (1969).
[21] 483 U.S. 435, 436 (1987).
[22] *Id.*
[23] 517 U.S. 748 (1996).
[24] *Id.* at 759.

early days of the Republic, the President has had congressional authorization to intervene in cases where courts-martial decreed death."[25]

Open Questions

Although the Supreme Court has held that Congress cannot use the Military Regulations clause to subject civilians to trial by court-martial, questions remain open about whether Congress may subject certain classes of military reservists and military retirees to trial by court-martial. Lower courts are currently struggling with these issues.[26]

There are also significant questions about the boundary between Congress's power to regulate the Armed Forces and the President's power as Commander-in-Chief to command. Congress, at times, has placed substantive limits on the President's power over the Armed Forces (e.g., in the selection of officers and the treatment of detainees). When signing some of these laws, presidents have issued statements objecting to the binding nature of these provisions.[27] There is a significant academic debate about the point at which Congress's power to regulate the Armed Forces would run afoul of the President's power as Commander-in-Chief.[28]

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See Also

Article I, Section 8, Clause 11 (Declare War)

Article I, Section 8, Clause 12 (Army Clause)

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[25] *Id.* at 752.

[26] *See, e.g.*, Larrabee v. Del Toro, 45 F.4th 81, 83 (D.C. Cir. 2022) (holding that Congress may subject a member of the Fleet Marine Corps Reserve to trial by court-martial).

[27] *See, e.g.*, President's Statement on Signing of H.R. 2863, Dec. 30, 2005, https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051230-8.html.

[28] *See, e.g.*, Prakash, *supra* note 7; Zachary S. Price, *Congress's Power over Military Offices*, 99 Tex. L. Rev. 491 (2021); John Yoo, *Transferring Terrorists*, 79 N.D. L. REV. 1183, 1202 (2004).

Article I, Section 8, Clause 15 (Militia Clause)

Article I, Section 8, Clause 16 (Organizing the Militia)

Article II, Section 2, Clause 1 (Commander in Chief)

Amendment V (Grand Jury Requirement)

Amendment VI (Jury Trial)

Suggestions for Further Research

Ronald D. Rotunda*, The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV.1 (2006)

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Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866)

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Duncan v. Kahanamoku, 327 U.S. 304 (1946)

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Burns v. Wilson, 346 U.S. 137 (1953)

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Grisham v. Hagan, 361 U.S. 278 (1960)

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United States v. Jacoby, 29 C.M.R. 244 (1960)

United States v. Tempia, 37 C.M.R. 249 (1967)

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