The Bill of Rights' Application in the Military Justice System

"[T]here has been substantial scholarly debate on applicability of the Bill of Rights to the American servicemember." *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992), *cert. denied*, 510 U.S. 1085 (1994); *see*, *e.g.*, Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Frederick B. Wiener, *Courts-Martial and the Constitution: The Original Practice pts. 1 & 2*, 72 HARV. L. REV. 1, 266 (1958). The Bill of Rights itself includes one exception for military justice cases: the Fifth Amendment's grand jury provision does not apply to "cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger." The Supreme Court has held that the Sixth Amendment's right to trial by jury is similarly inapplicable to courts-martial. The Supreme Court has recognized the applicability of some other portions of the Bill of Rights to the military justice system, though that application is often different than that in a civilian context. It has reserved judgment on the applicability of some other Bill of Rights provisions.

The Court of Appeals for the Armed Forces' case law recognizes the general applicability of the Bill of Rights to the military justice system:

> Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable. In general, the Bill of Rights applies to members of the military absent a specific exemption or certain overriding demands of discipline and duty. Though we have consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite[,] these constitutional rights may apply differently to members of the armed forces than they do to civilians. The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule.

United States v. Easton, 71 M.J. 168, 174-75 (C.A.A.F. 2012) (internal citations, quotation marks, ellipses, and brackets omitted).

First Amendment

Establishment Clause: A military appellate court has applied the *Lemon* test to an Establishment Clause challenge to a Uniform Code of Military Justice article. *United States v. Boie*, 70 M.J. 585, 592 (A.F. Ct. Crim. App.) (applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971)), *petition denied*, 70 M.J. 416 (C.A.A.F. 2011).

Free Exercise Clause: The Supreme Court, in a non-military justice case, held that "[o]ur 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." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Since Congress's adoption of the Religious Freedom Restoration Act of 1993 (RFRA), *codified at* 42 U.S.C. § 2000bb, military appellate courts have applied that statute's compelling interest standard to review free exercise of religion claims. *See*, *e.g.*, *United States v. Webster*, 65 M.J. 936, 946-48 (A. Ct. Crim. App.), *petition denied*, 67 M.J. 9 (C.A.A.F. 2008). The Court of Appeals for the Armed Forces has expressly observed that RFRA "applies in the

military context." *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016), *cert. denied*, 137 S. Ct. 2212 (2017); *see generally id*. at 415-20.

Free Speech Clause: The Supreme Court has held that "while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'" *Brown v. Glines*, 444 U.S. 348, 354 (1980) (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)). The courts have recognized considerable limitations on the freedom of speech in a military context. For example, the Supreme Court has held that there is "no generalized constitutional right to make political speeches or distribute leaflets" on military bases, even if they are generally open to the public. *United States v. Albertini*, 472 U.S. 675, 685 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 838 (1976)). The Court of Military Appeals rejected a constitutional challenge to a statute criminalizing an officer's use of contemptuous language about the President. *United States v. Howe*, 17 C.M.A. 165, 37 C.M.R. 429 (1967).

Free Press Clause: The military courts apply civilian Free Press Clause jurisprudence. *See*, *e.g*., *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.), *appeal dismissed*, 68 M.J. 404 (C.A.A.F. 2009); *ABC v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

Peaceably Assemble Clause: There does not appear to be any military justice case law construing or applying the Peaceably Assemble Clause.

Petition for Redress of Grievances Clause: The Supreme Court has recognized restrictions on the right of military personnel to petition for redress of grievances. *Brown v. Glines*, 444 U.S. 348 (1980). However, Congress has statutorily recognized service members' right "to petition Congress for redress of grievances." 10 U.S.C. § 976(g)(5).

Second Amendment

Military appellate courts have applied civilian Second Amendment jurisprudence. *See*, *e.g*., *United States v. Smith*, 56 M.J. 711 (A.F. Ct. Crim. App. 2001), *petition denied*, 56 M.J. 477 (C.A.A.F. 2002). One military appellate decision includes a cursory discussion of *District of Columbia v. Heller*, 554 U.S. 570 (2008). *United States v. Hooper*, No. ACM 38307, 2014 CCA LEXIS 685, *10-*11 (A.F. Ct. Crim. App. Sept. 24, 2014).

Third Amendment

There does not appear to be any military justice case law addressing the Third Amendment.

Fourth Amendment

Right to be Free from Unreasonable Searches and Seizures: While the military appellate courts have held that the Fourth Amendment right to be free from unreasonable searches and seizures applies to service members, those courts have also held that the reasonable expectation of privacy that informs that right is sometimes different in a military versus a

civilian context. For example, "a solider has less of an expectation of privacy in his shared barracks room than a civilian does in his home." *United States v. Bowersox*, 72 M.J. 71, 76 (C.A.A.F. 2013).

Warrant Requirement: The military justice system departs from the Fourth Amendment's warrant requirement. The President has authorized military commanders to issue search authorizations over areas within their control upon a showing of probable cause. Mil. R. Evid. 315(d)(1). Military case law has recognized the validity of such command-directed search authorizations. *See*, *e.g.*, *United States v. Huntzinger*, 69 M.J. 1, 5 (C.A.A.F. 2010). Military inspections may be conducted without a warrant or search authorization. *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981).

Oath or Affirmation Requirement: A command-issued search authorization need not be supported by oath or affirmation. *United States v. Stuckey*, 10 M.J. 347, 361 (C.M.A. 1981).

Fifth Amendment

Grand Jury Right: The Fifth Amendment's grand jury provision includes an express exception for "cases arising in the land or naval forces, or in the Militia, when in actual Service in time of War or public danger." U.S. Const., amend. V.

Double Jeopardy Clause: Military appellate courts have held that service members are entitled to the Double Jeopardy Clause's protection. *See*, *e.g.*, *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). The courts have recognized that the Double Jeopardy Clause applies somewhat differently in a military context, however. For example, the Court of Appeals for the Armed Forces held that the point at which jeopardy attaches is different in a military rather than civilian context. *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012).

Self-Incrimination Clause: The Supreme Court has declined to definitively resolve the applicability of the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, to the military justice system. *See Davis v. United States*, 512 U.S. 452, 457 n.* (1994). The Court found resolution of that issue unnecessary in *Davis* due to certain UCMJ and Military Rules of Evidence provisions establishing rights warnings requirements and an exclusionary rule where those requirements are violated. *See* Art. 31, UCMJ, 10 U.S.C. § 831; Mil. R. Evid. 304(a), (c)(3). While the issue has not been resolved by the Supreme Court, military justice case law holds that Supreme Court cases construing the Fifth Amendment right against self-incrimination apply to the military justice system. *See, e.g.*, *United States v. McLaren*, 38 M.J. 112, 115 (C.M.A. 1993).

Due Process Clause: The Supreme Court has recognized that the Due Process Clause applies to the military justice system. *Weiss v. United States*, 510 U.S. 163, 177 (1994). However, it applies differently than when evaluating due process challenges to civilian criminal justice procedures. The due process test in the military context asks whether the "factors militating in favor of" the challenged practice "are so extraordinarily weighty as to overcome the balance struck by Congress." *Id*. at 177-78.

Equal Protection Guarantee: The Supreme Court has held that the Fifth Amendment's Due Process Clause provides a right to equal protection of law enforceable against the Federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Court applied that equal protection guarantee to invalidate a statute treating male and female service members differently for military allowance purposes. *Frontiero v. Richardson*, 411 U.S. 677 (1973). Military courts apply civilian equal protection case law. *See e.g.*, *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

Eminent Domain Clause: There does not appear to be any military justice case law addressing the Eminent Domain Clause.

SixthAmendment

Speedy Trial Clause: Military courts apply civilian Sixth Amendment Speedy Trial Clause case law. *See*, *e.g.*, *United States v. Berrey*, 28 M.J. 714 (N.M.C.M.R. 1989). However, Article 10 of the UCMJ and Rule for Courts-Martial 707 provide additional speedy trial guarantees that are generally more protective of the accused than the Sixth Amendment speedy trial right.

Public Trial Clause: Military appellate courts apply civilian Public Trial Clause case law. *See*, *e.g.*, *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977).

Petit Jury Clause: The Supreme Court has stated that the Sixth Amendment's jury right does not apply to military trials. *See*, *e.g.*, *Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957).

Notice Clause: Military courts apply the Sixth Amendment's Notice Clause without any limitations. *See*, *e.g.*, *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013).

Confrontation Clause: The Sixth Amendment's Confrontation Clause applies to courts-martial. *See*, *e.g.*, *United States v. Stombaugh*, 40 M.J. 208, 212 (C.M.A. 1994).

Compulsory Process Clause: The Sixth Amendment's Compulsory Process Clause applies to courts-martial. *See*, *e.g.*, *United States v. Blazier*, 69 M.J. 218, 225 n.6 (C.A.A.F. 2010).

Right to Counsel: The Supreme Court has held that a service member has no Sixth Amendment right to counsel at a summary court-martial. *Middendorf v. Henry*, 425 U.S. 25 (1976). Military courts apply Sixth Amendment right to counsel case law for purposes of general and special courts-martial. *See*, *e.g.*, *United States v. Annis*, 5 M.J. 351, 353 (C.M.A. 1978).

Seventh Amendment

There does not appear to be any military justice case law addressing the Seventh Amendment's application to the military justice system.

Eighth Amendment

Excessive Bail Clause: Military appellate courts have observed that bail does not exist in the military justice system. *See*, *e.g.*, *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976).

Excessive Fines Clause: Military courts apply civilian Excessive Fines Clause jurisprudence. *See*, *e.g.*, *United States v. Stebbins*, 61 M.J. 366, 373 (2005).

Cruel and Unusual Punishment Clause: The Supreme Court has noted that it has not decided whether its Eighth Amendment jurisprudence applies to the military justice system. *Loving v. United States*, 517 U.S. 748, 755 (1996). Military courts generally apply civilian Eighth Amendment case law but have noted that there may be circumstances, such as where offenses were "committed under combat conditions," justifying a different application. *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983). The Uniform Code of Military Justice expressly precludes, in addition to certain specifically mentioned punishments, "any other cruel or unusual punishment." Uniform Code of Military Justice art. 55, 10 U.S.C. § 855 (2012). Despite Article 55's use of the disjunctive "or" in lieu of the Eighth Amendment's conjunctive "and," military courts "apply the Supreme Court's Eighth Amendment jurisprudence 'in the absence of legislative intent to create greater protections in the UCMJ.'" *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007) (quoting *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006)).

Ninth Amendment

The military appellate courts have applied civilian Ninth Amendment jurisprudence. *See*, *e.g.*, *United States v. Henderson*, 34 M.J. 174 (1992).

Tenth Amendment

The military appellate courts have applied civilian Tenth Amendment jurisprudence. *See*, *e.g.*, *United States v. Disney*, 62 M.J. 46 (C.A.A.F. 2005), *cert. denied*, 546 U.S. 1175 (2006). A Tenth Amendment analysis in a military justice context may be informed by Congress's express authority to "make Rules for the Government and Regulation of the land and naval Forces." *See*, *e.g.*, *United States v. Loving*, 34 M.J. 956, 967 (A.C.M.R. 1992), *reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992), *aff'd*, 41 M.J. 213 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996).