

## ANCIENT HEBREW MILITIA LAW

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The American Founders were assiduous students of history. While the well-educated among them read Roman and Greek history in the original languages, some history was well-known by almost everyone, namely the Bible. New Englanders intensely self-identified with ancient Israel—from the first days of settlement in early 17th century (Israel in the wilderness) to the days of the American Revolution, when New England’s “black regiment” of clergymen incited the Revolution as a religious duty, and described the thirteen American colonies as the modern version of the twelve confederate tribes of Israel.<sup>1</sup> Thus, ancient Hebrew militia law is part of the intellectual background of the American militia system, and of the Second Amendment.

The twelve tribes of Israel were first “numbered” and organized into military units as they left slavery in Egypt. Because the census was for military purposes, it counted every male “from the age of twenty years up, all those in Israel who are able to bear arms.”<sup>2</sup> All able-bodied men aged twenty and over were obliged to fight,<sup>3</sup> to go forth “armed to battle.”<sup>4</sup> Men who failed this duty “sinned against the Lord.”<sup>5</sup>

The *Book of Deuteronomy* (the second law) is the last book of the *Torah* (also known as the Pentateuch). *Deuteronomy* provided generous exemptions from militia service: anyone who had built a new house but not yet dedicated it, or who had planted a vineyard but not eaten of it, or who was betrothed but who had not consummated his marriage, or who had been married for less than one year.<sup>6</sup>

A modern Conservative Jewish version of the Pentateuch with commentary, the *Etz Hayim*, observes that the exemptions protected

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1. See David B. Kopel, *The Religious Roots of the American Revolution and the Right to Keep and Bear Arms*, 17 J. ON FIREARMS & PUB. POL’Y 167 (2005).

2. *Numbers* 1:2–4. The translation is from ETZ HAYIM: TORAH AND COMMENTARY 82 (David L. Lieber sr. ed., 2001). The King James Version, the most popular Protestant translation, less elegantly refers to men “able to go forth to war.”

3. *Numbers* 26:2–4.

4. *Id.* at 32:29.

5. *Id.* at 32:23. Hebrew law was pervasively concerned about limiting contact with dead bodies, and about temporarily isolating persons who have had such contact. This included enemies slain in battle. See *Numbers* 31:19–24 (persons killed in battle); 9:6–10 (touching a dead body), 19:11–16 (dead person); *Leviticus* 5:2 (carcass of an unclean animal), 11:24–40 (carcass of any animal); *Deuteronomy* 14:8 (dead carcass); *Haggai* 2:13 (clothing and food of a person who has touched a dead body are unclean).

6. *Deuteronomy* 20:5–9, 24:5.

anyone whose death in battle would be especially unfortunate. But why do they not rely on God to prevent tragic death? Although God may work miracles, protecting the righteous from harm, we may never force God's hand by demanding a miracle—putting good people in danger and expecting God to protect them. We cannot ignore our obligations to make the world a safer and more just place by depending on God to set things right.<sup>7</sup>

The “fearful and fainthearted” were also excused, lest they depress the morale of the willing.<sup>8</sup> This last exemption was militarily sound: a few faint-hearted people who fled might set off a panic causing the whole army to flee. A broken army, fleeing away in fear, would likely be slaughtered by its pursuing foes.

The exemption pre-figures James Madison's proposal that the Second Amendment include a clause allowing conscientious objectors to pay a fee in lieu of service. The Senate removed the clause, under the theory that excuse from militia service ought to be a matter of legislative grace, rather than constitutional right.<sup>9</sup> Even so, American militia laws, like draft laws for the standing army, have often included provisions for conscientious objectors.<sup>10</sup>

Israel's military system was “based on the duty of every able-bodied male to bear arms and serve.”<sup>11</sup> Israel relied on a militia, in which citizen soldiers would spend most of their time cultivating their farms, or engaged in other economic production, and would fight only for limited periods (ideally, after the harvest), and only when necessary.<sup>12</sup>

Similarly, during the American Revolution, most men served in their state militias, rather than the Continental Army. Thus, they were most able to keep their farms in production, and other economic activity

7. ETZ HAYIM, *supra* note 2, at 1102–03 (commentary on *Deuteronomy* 20:5–9). Conservative Judaism is one of the three major Jewish sects. It stands in-between Orthodox Judaism and Reform Judaism in its adherence to tradition.

8. *Deuteronomy* 20:8; *Judges* 7:2–3; 1 *Maccabees* 3:56. See also PHILO OF ALEXANDRIA, *On the Virtues*, in THE WORKS OF PHILO, 642 (C.D. Yonge trans., Hendrickson Pub. 1993) (“And, above all, he exempts all those who are alarmed or cowardly, as they would be likely to be taken prisoners by reasons of their innate effeminacy, and to cause fear to rest who were fighting alongside of them . . .”).

9. STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 275 (2008).

10. See, e.g., Michael S. Satow, *Conscientious Objectors: Their Status, the Law and its Development*, 3 *GEO. MASON U. C.R. L.J.* 113 (1992).

11. CHAIM HERZOG & MORDECHAI GICHON, *BATTLES OF THE BIBLE* 37 (London, Greenhill Books 2002) (1978).

12. E.g., T.R. HOBBS, *A TIME FOR WAR: A STUDY OF WARFARE IN THE OLD TESTAMENT* 71–72 (Wilmington, Del.: Michael Glazier, 1989). See also ETZ HAYIM, *supra* note 2, at 1101 (commentary on *Deuteronomy* 20:1–9); NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 164–65 (2012).

in progress. This was an important reason why the United States was able to economically sustain a war that lasted eight years.<sup>13</sup>

Another purpose of the Hebrew militia system was the decentralization of power, for the preservation of liberty. The *Etz Hayim* explains:

*Deuteronomy* does not intend that the Israelites maintain a standing army, at least not one of any significant size. Instead, they are to have a civilian army, or militia, mobilized at times of need and commanded by officers appointed for the occasion. Reliance on a militia rather than a standing army for military needs is another example of *Deuteronomy's* dispersal of power among different officials.<sup>14</sup>

In *Battles of the Bible*, Chaim Herzog (a former President of Israel) and Mordechai Gichon (a professor of military history at Tel Aviv University) summarized how the militia system preserved popular participation in the government:

[T]he people in arms formed the national assembly of initially sovereign peoples . . . . [A]ncient Jewish society, even in the heyday of monarchy, never gave way to absolutism. The “people” always remained, directly and indirectly, a body with influence on the affairs of state. This fact was instrumental not only in the preservation of the people in arms as the mainstay of the Israelite armed forces until the destruction of the First Temple [586 B.C.] . . . but also in the apparent readiness of the Israelites to bear the constant burden of military preparedness.<sup>15</sup>

Similar concerns are pervasive in the ideology of the American right to arms, including the Second Amendment, and its many state constitution analogues: No government should have a monopoly of force; a well-regulated militia can deter or fight either foreign or domestic tyrants.<sup>16</sup>

The Old Testament (which is the entire Jewish Bible, or *Tanakh*) specified the proper and lawful conduct of war in great detail. Before battle, the priest must exhort the militia, “Hear, O Israel, you are approaching the battle against your enemies today. Do not be fainthearted. Do not be afraid, or panic, or tremble before them, for the Lord your God is the one who goes with you, to fight against your enemies, to save you.”<sup>17</sup>

The *Book of Deuteronomy* detailed how sieges were to be conducted. During the period covered by the Old Testament, war anywhere in the Middle East was fought to the death. The Old Testament required

13. JOHNSON ET AL., *supra* note 12.

14. ETZ HAYIM, *supra* note 2, at 1101 (commentary on *Deuteronomy* 20:1–9).

15. HERZOG & GICHON, *supra* note 11 at 37.

16. *E.g.*, THE FEDERALIST NO. 46 (James Madison).

17. *Deuteronomy* 20:3–4 (New American Standard Bible) (internal quotations omitted).

that a besieged city be offered a chance to surrender. If the city refused, and if the attackers took the city, then all the city's men would be slain, in some cases, all the women and children too.<sup>18</sup> Likewise specified was how to divide the spoils of war.<sup>19</sup> There were even instructions for military hygiene.<sup>20</sup>

Centuries later, Greek influences made the conduct of war more humane. For example, the original text of *Deuteronomy* did not specify the causes for which the Israelites might war against a city, but the Jewish legal scholar Philo of Alexandria added an interpretive gloss, requiring that that the city must first be offered an opportunity to ally with the Israelites. *Deuteronomy* had forbidden the Israelites to cut down fruit trees near the besieged city in order to build siege engines; Philo added a rule against ravaging cropland.<sup>21</sup>

If Western Civilization can be said to be founded on two pillars of "Athens and Jerusalem,"<sup>22</sup> the Jewish pillar matches the Greek pillar in recognizing the importance of an armed people in preserving liberty through service in a militia of all free and able-bodied men.<sup>23</sup>

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18. *Deuteronomy* 20:10–14; *Numbers* 31:6–18; *Joshua* 6:17–25; 8:25–26; 11:14.

19. *Numbers* 31:53; *Joshua* 6:17–19, 7:21–25; 1 *Samuel* 30:20–25 (first formal law on the subject; allowing soldiers who guard the base camp to share equally in the spoils).

20. *Deuteronomy* 23:9–14. See also MOSES MAIMONIDES, MISHNEH TORAH: HILCHOT YESODEI HATORAH 53–54 (Eliyahu Touger trans., 1989) (Positive Commandments 186–93) (oral law).

21. PHILO OF ALEXANDRIA, *supra* note 8, paras. 219–29, at 638. See also *The Special Laws, IV (De Specialibus Legibus, IV)*, in THE WORKS OF PHILO, 638.

22. See LEO STRAUSS, JERUSALEM AND ATHENS: SOME PRELIMINARY REFLECTIONS, in JEWISH PHILOSOPHY AND THE CRISIS OF MODERNITY, 377–405 (Kenneth Hart Green ed., Albany State Univ. of N.Y. Press, 1997).

23. JOHNSON ET AL., *supra* note 13, at 48–52.