

## MILITARY LAW IN THE CONTINENTAL ARMY

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## I

"Any of four days in June, 1775, or perhaps the fourth of July of the same year, might be considered the birthday of the army that became that of the United States. The date generally accepted is June 14, when the Continental Congress first authorized the muster of troops under its own sponsorship."<sup>1</sup> Barely two weeks later, on June 30, Congress adopted "Rules and Articles [to] be attended to and observed by such forces as are or may hereafter be raised."<sup>2</sup> These first American Articles of War followed in spirit, and to a degree in the letter, the British Military Code.<sup>3</sup> This was, of course, not surprising: not only had many of the leaders of Congress and of the new army (George Washington included) experienced military service under the British flag but most of them also believed in the basic worth of British institutions, attributing the conflict between the colonies and the mother country to the personal arbitrariness of the King and his advisors.

The Articles of War adopted in June 1775 consisted of 69 articles, arranged seriatim without captions or subheads. In addition to the officers and soldiers, "all settlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted [*sic*] soldiers" were to be subject to its provisions.<sup>4</sup>

There were to be two kinds of military courts: general court-martials consisting of 13 or more officers and, for lesser offenses, regimental court-martials, with at least five commissioned members.<sup>5</sup> The substantive articles closely followed the British model except that punishments were far less severe.<sup>6</sup>

The need for military courts was obvious. The new army had little concept of the meaning of discipline and was totally without discipline training. Washington believed that, in addition to decent food and clothing, fear of punishment would contribute most to the building of a disciplined army. Thus, when he joined the New England troops before Boston, he saw to it that pending court-martial cases were quickly brought to trial,<sup>7</sup> with their sentences well publicized.

At the same time, the organizational structure of the army was still so loose that punishment had to be assessed in measures that would not provoke open mutiny. Thus, on September 10, 1775, when there was a riot of Pennsylvania riflemen in response to the arrest of one of their sergeants, the general court-martial's sentence was only a fine of 20 shillings for each participant, with an additional six

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<sup>1</sup> R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 29 (1967); 1 J. CONG. SEPT. 5, 1774-JAN. 1, 1776, at 110-11 (Gov't Printing Office ed. 1934).

<sup>2</sup> W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 21, 953 (2d ed. 1920).

<sup>3</sup> For a summary description of the British Military Code, see *id.* at 18-20.

<sup>4</sup> 1775 ARTICLES OF WAR, art. XXXII, *id.* at 956.

<sup>5</sup> 1775 ARTICLES OF WAR, art. XXXIII, XXXVIII, *id.*

<sup>6</sup> Whipping was to be limited to 39 lashes, fines to no more than two months' pay, imprisonment to a maximum of one month. Art. LI, *id.* at 957. The limit of 39 lashes appears to have been derived from the Bible, 2 Cor. 11:24: "Five times received I forty stripes save one." B. KNOLLENBERG, *WASHINGTON AND THE REVOLUTION* 216n. 1 (1941).

<sup>7</sup> 3 D. FREEMAN, *GEORGE WASHINGTON* 490-91 (1951).

days' confinement for the ringleader. "[T]he culprits," writes Washington's biographer Douglas Freeman, "probably would have staged a real mutiny had they been given the usual punishment of lashes 'on the bare back.'"<sup>8</sup>

The limitations on punishments established by the Articles soon presented a problem. In late September 1775, Dr. Benjamin Church, director general of the hospitals, was found to have engaged in conduct suggesting intercourse with the enemy. Washington was certain of his guilt as were his generals whom he consulted. The offense was not one for which a death penalty could be imposed, however, and 39 lashes or two months' pay seemed an incongruously mild punishment for the offense. Washington had no alternative but to refer the case to Congress, asking at the same time that the Articles be amended to cover the case.<sup>9</sup>

Congress responded promptly. On November 7, 1775, it approved 16 additions and amendments to the Articles of War, the first of which provided that "[a]ll persons convicted of holding a treacherous correspondence with, or giving intelligence to the enemy, shall suffer death, or such other punishment as a general court-martial shall think proper."<sup>10</sup> Other sections in the amendments also reflected Washington's expressed need to add to the deterrent value of the court-martial system. Mutiny, sedition, desertion, cowardice in the face of the enemy, and "shamefully" abandoning one's post were all made punishable by death. If an officer were cashiered for cowardice or fraud, his name and offense would be published in the newspapers, both in the vicinity of the camp and in his home colony. The penalty for drunkenness on duty was set at cashiering for officers and 20 to 39 lashes for noncommissioned officers and privates. The same penalties were set for sleeping on or leaving one's post as a sentinel, for plundering, and for the embezzlement of supplies or provisions.<sup>11</sup>

Even with these amendments the court-martial system continued to fall short of Washington's needs and expectations. Time and again, he found it necessary to write to Congress to resolve points not covered by the Articles or to urge strengthening their punitive provisions. Freeman, for example, relates the case of Lieutenant Thomas Grover who, when the command of his company became vacant, considered himself promoted to captain and refused to yield when the duly appointed captain sought to assume command. A court-martial convicted Grover, but the sentence was only the forfeiture of one half a month's pay. In effect, as Washington saw it, the court had, by its leniency, implied approval of Grover's contention that there was a right to automatic succession. In the absence of a defined promotions policy, were not junior officers entitled to count on automatic succession? Washington thought not and urged Congress to rule accordingly. He also talked to Grover and prevailed on him to see the error of his ways, and then eventually released him from arrest.<sup>12</sup>

The Grover case illustrates a pervading problem of the Continental Army in its early years: how far could discipline be enforced in the face of the almost constant threat of disaffection and disintegration? The court-martial's imposition of a minimal sentence for Grover's offense was indicative of a continuing spirit of

<sup>8</sup> *Id.* at 525-26.

<sup>9</sup> *Id.* at 544-52.

<sup>10</sup> W. WINTHROP, *supra* note 2, at 959.

<sup>11</sup> *Id.* at 959-60.

<sup>12</sup> 4 D. FREEMAN, *supra* note 7, at 86-87.

assertive autonomy within the army and of a resistance to Washington's efforts to transform the volunteers and local levies into a national army.

When adversity struck, as after the retreat from Long Island in August 1776, Washington recognized that it would be prudent not to exact the full measure of military law. In the face of large-scale desertions, Washington threatened prompt trials by court-martial, including the use of the death penalty, but he sensed the temper of the troops and had some flogging sentences carried out without the public view that was the custom.<sup>13</sup>

A major problem was the weakness of the officer corps. Writing to his cousin, Lund Washington, in the same fall of 1776, the general scathingly charged that he "never had officers, except in a few instances, worth the bread they eat."<sup>14</sup> The deficiencies of the officer corps were highlighted when the Provost Marshal, who was charged with the responsibility to prepare for the execution by hanging of a soldier found guilty of desertion and mutiny, was discovered to be absent without leave.<sup>15</sup>

In the fall of 1776, Washington's pleas to Congress to provide for long-term enlistments and to raise the pay of the army were—albeit somewhat reluctantly—answered.<sup>16</sup> To his persistent complaints about the inadequacy of the Articles of War for the enforcement of discipline, Congress responded by adopting, on September 20, a complete revision of the Articles.<sup>17</sup>

## II

The new Articles of War, which would remain to guide commanders and court-martials for the remainder of the war, consisted of 103 articles, organized in 18 sections. Three changes stand out in a comparison with the 1775 Articles: the Judge Advocate General<sup>18</sup> of the Army, a position not mentioned in the 1775 Articles, was explicitly charged with the responsibility for the prosecution of offenses before general court-martials;<sup>19</sup> the death sentence was authorized for a range of offenses;<sup>20</sup> and the limit on the number of lashes that could be inflicted by a court-martial was raised from 39 to 100.<sup>21</sup>

Both George Washington and Judge Advocate General William Tudor had complained to Congress that the restriction of flogging sentences to 39 lashes deprived that punishment of much of its deterrent potential.<sup>22</sup> British practice, however, had taught the Americans that, if the whip was to be used, there had to be a limit.

<sup>13</sup> *Id.* at 180-81.

<sup>14</sup> 6 THE WRITINGS OF GEORGE WASHINGTON 138-39 (Fitzpatrick ed. 1932) [hereinafter cited as G. WASHINGTON, WRITINGS].

<sup>15</sup> 4 D. FREEMAN, *supra* note 7, at 208.

<sup>16</sup> *Id.* at 209.

<sup>17</sup> W. WINTHROP, *supra* note 2, at 22. The text appears at *id.* at 961.

<sup>18</sup> Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 4 MILITARY L. REV. 89 (1959).

<sup>19</sup> 1776 ARTICLES OF WAR, § XIV, art. 3, W. WINTHROP, *supra* note 2, at 967.

<sup>20</sup> See section 2 of articles 3, 4, and 5, and section 13 of articles 6, 9, 11, 13-15, and 17-19, *id.* at 961, 966-67.

<sup>21</sup> 1776 ARTICLES OF WAR, § 18, art. 3, *id.* at 970.

<sup>22</sup> Washington wrote two long letters to Congress urging the adoption of new Articles of War. 6 G. WASHINGTON, WRITINGS, *supra* note 14, at 91, 106. Tudor had written even earlier, asserting that nine-tenths of the officers considered the increase to 100 lashes "absolutely necessary" if discipline was to be maintained. 3 AM. ARCHIVES 1164 (4th ser. 1840).

Gilbert, who has studied British court-martial practice in the eighteenth century,<sup>23</sup> reports that the *average* number of lashes to which British general court-martials sentenced offenders “[b]efore the Seven Years War . . . was below 700 per sentence[,] . . . rose to 800 [during that war] and remained at over 700 in both war and peace into the period of the American Revolution.”<sup>24</sup> Sentences in excess of 1000 lashes were not uncommon: Gilbert found two cases in which a court-martial board in Quebec sentenced men to receive 2000 lashes each; the offenses involved were, in one case, theft, and, in the other, receiving stolen goods.<sup>25</sup>

To be sure, such extreme sentences were often not fully carried out—either because the King or the Judge Advocate General intervened to reduce the sentence or because the surgeon who was normally in attendance halted the proceedings before the man suffered death and permanent impairment—or the infliction of the punishment was spread over several separate occasions.<sup>26</sup> Still, lashing sentences were so frequent and of such severity<sup>27</sup> that Americans referred to British soldiers as “bloody backs.”<sup>28</sup>

Flogging had never been popular in the Colonies. Many of the colonists had experienced the severity of British law and viewed the lash as one of the symbols of the tyranny they sought to escape. This undoubtedly explains the initial desire to restrict the use of the lash. Even after the limit was raised to 100, sentences often specified that the punishment should be spread over two or three separate occasions rather than inflicted all at once.<sup>29</sup>

There was still a wide gap between 100 lashes and the death penalty. Thus, court-martial would occasionally impose the maximum 100 lashes for each of several counts on which an accused was convicted. An example is the case of James Gordon who was charged with desertion, forging a discharge, and then fraudulently reenlisting. Desertion, of course, was punishable by death. But Gordon had not attempted to escape service; the essence of his offense was that he had tried to supplement his meager (or non-existent) pay with an enlistment bonus. That ruse had become rather troublesome.<sup>30</sup> The court-martial’s thinking obviously was that, while such conduct did not warrant the death penalty, it deserved more than 100 lashes. The sentence assessed was 300 lashes, 100 for each count, to be administered on three different occasions.<sup>31</sup> Washington continued to ask Congress for authority to impose lashing sentences of up to 500 stripes or to remove the limitation altogether, but Congress refused to do so.<sup>32</sup> The gap between the 100 lash limit and the death penalty continued throughout the war.

Imprisonment would, of course, have provided a middleground between these

<sup>23</sup> A. Gilbert, *Military and Civilian Justice in Eighteenth Century England: An Assessment*, Nov. 7, 1975 (unpublished paper for the Conference of Legal Historians, Atlanta, Ga.).

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 16.

<sup>27</sup> Until 1812, when the maximum allowable sentence was set at 300 lashes, there was no limit to the number of lashes a British court-martial could assess as punishment. *Id.* at 13-14.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> See, e.g., the case of Thomas Coshel, *General Orders, March 25, 1778*, in 11 G. WASHINGTON, WRITINGS, *supra* note 14, at 143.

<sup>30</sup> 4 D. FREEMAN, *supra* note 7, at 406. See the case of Aaron Williams, S. TALLMADGE, ORDERLY BOOKS OF THE FOURTH NEW YORK REGIMENT, 1778-1780, THE SECOND NEW YORK REGIMENT, 1780-1783, at 50 (A. Lauber ed. 1932).

<sup>31</sup> *General Orders, April 16, 1778*, in 11 G. WASHINGTON, WRITINGS, *supra* note 14, at 266.

<sup>32</sup> Letter from George Washington to President of Congress, February 3, 1781, in 21 *id.* at 178-81.

two extremes. It was practically ruled out, though used later. The army possessed no prison facilities of its own; more importantly, the strength of the army was at all times so precariously low that it would have been counterproductive to send men to prison who could still fight. The latter consideration also affected the use of the death penalty. Time and again Washington reprieved convicted offenders, often at the last minute: he needed every man he could get and used the death penalty only to set examples. The handling of the mutinous Pennsylvania and New Jersey troops in January 1781 provides a good illustration.<sup>33</sup>

### III

In December 1780, the Pennsylvania troops had moved into winter quarters near Morristown, New Jersey. Their condition was abysmal. Their commander, General Anthony Wayne, wrote to the Supreme Executive Council of Pennsylvania: "We are reduced to dry bread and beef for our food, and to cold water for our drink . . . . This, together with the old worn-out coats and tattered linen overalls and what was once a poor substitute for a blanket (now divided among three soldiers), is but very wretched living and shelter against the winter's piercing cold, drifting snow, and chilling sleets."<sup>34</sup> In addition, the soldiers had not been paid for nearly a year.<sup>35</sup>

Many of the Pennsylvanians erroneously believed that they had signed up for three years and their time was up, when in fact, most of them had enlisted for three years or during the war. New recruits who had recently joined them came with bounty money far in excess of any money the veterans had ever seen.<sup>36</sup> Resentment and disaffection ran high.

On New Year's Day 1781, the troops at Morristown mutinied. They broke into the magazine and removed four of the cannons. "The pistols, swords and spontoons (half-pikes) of the officers were of little use against muskets and field pieces."<sup>37</sup> About half of General Wayne's command left the camp, taking with them horses, wagons, tents, and ammunition. Two days later the mutineers arrived at Princeton.<sup>38</sup> There they received offers from the British and negotiated with Wayne, his superior, Major General Arthur St. Clair, and Joseph Reed, the President of the Supreme Executive Council of Pennsylvania. Eventually they delivered the British emissaries to St. Clair, thus demonstrating that their mutiny was free of any intent to go over to the enemy.<sup>39</sup>

On January 20, the New Jersey troops, encamped at Pompton, followed the example of the Pennsylvanians. The New Jersey mutineers were weaker than the Pennsylvanians, whose numerical strength was greater than that of any force that could have been marshalled against them. Washington determined that, if the army was not to disintegrate, the insurrection had to be suppressed and the ring-leaders punished. He dispatched Major General Robert Howe to Pompton. A court-martial convened, apparently in full view of the mutineers who had been

<sup>33</sup> The story of the mutiny is described in exhaustive detail in C. VAN DOREN, *MUTINY IN JANUARY* (1943). I have drawn heavily on this account. See also 5 D. FREEMAN, *supra* note 7, at 235-50.

<sup>34</sup> C. VAN DOREN, *supra* note 33, at 32-33.

<sup>35</sup> *Id.* at 33.

<sup>36</sup> *Id.* at 35-36.

<sup>37</sup> *Id.* at 47.

<sup>38</sup> *Id.* at 44-60.

<sup>39</sup> *Id.* chs. 8-18.

surrounded by Howe's troops, and three men identified as principal offenders were quickly tried and sentenced to be shot at once. Only two were executed, however, and the third was pardoned and lived to fight at Yorktown.<sup>40</sup>

The Pennsylvanians went entirely unpunished. About 1250 of them were discharged under the terms of a settlement negotiated by Reed and Wayne,<sup>41</sup> leaving Wayne with only about 1000 men whom he led toward Virginia. On the march, at York, Pennsylvania, the mutinous spirit rose again, but Wayne brought six men to immediate trial and four of them were promptly executed, the other two receiving last-minute pardons.<sup>42</sup>

Thus, even when faced with the most serious offense known to military law, the practice of limiting the execution of the death penalty to only a portion of those found guilty was applied. In the precarious balance which Washington and his generals had to strike to keep together the heterogeneous forces at their command, this tempering of the strict letter of the law was obviously a necessity.

#### IV

The flavor of the administration of military law in the Continental Army is, however, not fully reflected if one looks only at general court-martials and the perspective of the Commander-in-Chief. In addition to general court-martials, the Articles of War authorized regimental commanders to convene court-martials.<sup>43</sup> Regimental orderly books permit some insight into military justice activity at the regimental level. During the Revolutionary War, unit adjutants had as one of their duties the recording of the commanding officer's orders. This was done in orderly books which thus provide a skeletal view of each unit's activities.<sup>44</sup> One of the most comprehensive collections of orderly books is that preserved by Lieutenant Samuel Tallmadge who served with the Fourth, and later the Second, New York Regiments.

The collection opens with a report of the outcome of a brigade court-martial held on October 13, 1778. Brigadiers, being generals, had the authority to convene general court-martials and to review and approve their sentences. A Corporal Johnston was found guilty of desertion, and Private Michael Havilash was found guilty of drunkenness, disturbing the camp, and attempting to escape from the guard. Both were sentenced to receive 100 lashes. Sergeant Samuel Hull, who had been charged with neglect of duty and sleeping on post, was found "guilty of part of the charge and sentenced to be reduced to the ranks and appear the first day of exercise with the brigade under arms with his coat turned."<sup>45</sup>

At the same court-martial, a Lieutenant Livingston was acquitted of a charge of being absent from "exercises" (*i.e.*, training) without his commanding officer's approval. Two days later the orderly book records the following:

The general is sorry to find by a sentence of the late brigade court-martial a

<sup>40</sup> *Id.* at 206-23.

<sup>41</sup> *Id.* at 232.

<sup>42</sup> *Id.* at 234-36.

<sup>43</sup> 1775 ARTICLES OF WAR, art. XXXVII, W. WINTHROP, *supra* note 2, at 956; 1776 ARTICLES OF WAR, § XIV, art. 10, *id.* at 968.

<sup>44</sup> Flick, *Introduction to S. TALLMADGE*, *supra* note 30, at 21.

<sup>45</sup> *Id.* at 28. In all quotations from the Tallmadge orderly books, spelling and capitalization have been modernized and proper names appear as verified by the editor.

custom so glaringly abused in itself and so utterly destructive of all military discipline [that] has so long countenanced in the brigade.

The impropriety of officers being exempt from parade or exercise or parade the day subsequent to their being on duty is too evident to need an illustration. Any officer who is ignorant of it and would wish to inform himself of it may consult the 4th article of the 13th section of the Articles of War.

That the eldest of officers of a regiment while in camp is actually the commanding officer of the regiment is also too plain to admit a doubt unto his superior officer quartered but one half quarter of a mile from camp. Lt. Livingston's conduct was therefore highly culpable because he had no right to leave the limits of the camp without first consulting the commanding officer for the time being. The general finds himself under the necessity of being thus explicit to prevent in future the plea of ignorance being advanced in defense of a crime which he conceives to be of the most destructive consequences to military order and discipline.<sup>46</sup>

Exhortations of this kind by the reviewing authority were not uncommon.<sup>47</sup> What in later years came to be known as "command influence" or "command control," and as such was one of the principal targets of the reform of the military justice system after World War II,<sup>48</sup> was clearly very much in evidence in the Continental Army.

Subsequent entries in the orderly book show that most of the cases brought before the regimental court-martial related to pilferage and theft:

At a regimental court martial held this morning [January 29, 1779] in the fort, whereof Captain Titus was president, was tried John Holmes, a private soldier belonging to Lt. Marvin's company, for stealing fowls from the barn of the widow Young. [He] was found guilty and sentenced to receive a hundred lashes on his bare back. The sentence is approved and ordered to be put into execution this evening in the fort at roll call. . . .<sup>49</sup>

Jeremiah V. Scancklin, soldier in the 4th New York regiment, [was tried] for stealing a pewter teapot from Mr. Isaac Warmesley's house. . . . [He is] sentence[d] . . . to receive one hundred lashes on his bare back well laid on. . . . [The sentence is] to be put into execution this evening at roll call. . . .<sup>50</sup>

[For] stealing seventy dollars . . . [a sentence of] one hundred lashes [is imposed]. . . .<sup>51</sup>

[For] stealing mutton from an inhabitant of this place . . . [a sentence of] one hundred lashes [is imposed]. . . .<sup>52</sup>

[For] stealing Lt. Froelich's shirt . . . [a sentence of] one hundred lashes [is imposed].<sup>53</sup>

A pervading characteristic of all entries is the speed with which court-martial action occurred and execution of sentences took place. The policy embedded in the Articles of War clearly envisaged prompt proceedings by stipulating that pre-trial

<sup>46</sup> *Id.* at 29-30.

<sup>47</sup> See, e.g., Washington's language criticizing (while approving) sentences he regarded as unduly lenient. *General Orders, April 2, 1778*, in 11 G. WASHINGTON, WRITINGS, *supra* note 14, at 199, 200-01; *General Orders, June 11, 1778*, in 12 *id.* at 46, 48.

<sup>48</sup> Farmer & Wels, *Command Control—or Military Justice*, 24 N.Y.U.L. REV. 263 (1949); Wallstein, *The Revision of the Army Court-Martial System*, 48 COLUM. L. REV. 219, 221-24 (1948).

<sup>49</sup> S. TALLMADGE, *supra* note 44, at 56-57.

<sup>50</sup> *Id.* at 118.

<sup>51</sup> *Id.* at 119.

<sup>52</sup> *Id.* at 231.

<sup>53</sup> *Id.* at 256.

confinement should not exceed eight days.<sup>54</sup> It is evident from the records that, whenever possible, trial was held within a day or two of the offense or of the apprehension of the offender. The convening authority's review, more often than not, took place at once and the sentence was often given on the same day, death sentences within the week.

This emphasis on speedy adjudication is indicative of the strong ingredient of military necessity that ran through both the spirit of the Articles of War and their practical application. The need to infuse discipline into the army is expressed over and over again in Washington's letters to Congress and in his other statements.<sup>55</sup> Narratives of the war and biographies of Washington are replete with the difficulties encountered in trying to keep the army together.<sup>56</sup> To the very end, there was stubborn resistance to Washington's efforts (ably aided in the later years by Baron von Steuben) to imbue the troops with a sense of professionalism.

Whether the use of the court-martial system served to advance this effort would require a far more extensive examination than the limits of this Article permit. The sampling presented here suggests that the military justice system in the Continental Army was rather unsophisticated. The product of necessity rather than planning, it had to bend with the fortunes of war, allowing tolerance at times of stress and accommodating itself to the need to harness the limited manpower available.

At the same time, however, the system was subjected to full testing immediately upon its creation, a condition which permitted minor amendments to be made after the war which could take into account what wartime experience had taught. No major revision then was necessary until the Civil War produced new experiences that led to the first major revision in 1874.<sup>57</sup>

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<sup>54</sup> "No officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled." 1775 ARTICLES OF WAR, art. XLII, W. WINTHROP, *supra* note 2, at 956; 1776 ARTICLES OF WAR, § XIV, art. 16, *id.* at 969.

<sup>55</sup> See notes 7, 8 and accompanying text *supra*.

<sup>56</sup> See D. FREEMAN, *supra* note 7, *passim*; C. WARD, THE WAR OF THE REVOLUTION, *passim* (Alden ed. 1952).

<sup>57</sup> W. WINTHROP, *supra* note 2, at 23.