

“For the Good of the King’s Service”: The British Legal-Military State, 1715-1781

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ABBREVIATIONS USED IN FOOTNOTES

BL	British Library, London
CO	Colonial Office, The National Archives, Kew
GD	General Deposit, National Archives of Scotland,
HL	House of Lords Record Office, Westminster
NA	The National Archives, Kew
NAS	National Archives of Scotland, Edinburgh
WO	War Office, The National Archives, Kew

INTRODUCTION

On February 25, 1689 the Convention Parliament, which had gathered in Westminster to settle the succession of the crown following James II's flight to the continent, received the first reports from civilian officials in the West Country of soldiers loyal to the deposed monarch forcibly preventing civilians from celebrating the revolution. While the Declaration of Rights had effectively bestowed the crown on William and Mary, their coronation would not occur until April, leaving an uncomfortable window in which the army, customarily only beholden to the monarch, was left leaderless. The situation reached a climax on March 15, when the Earl of Dumbarton's Regiment mutinied, seized a train of artillery at Ipswich, and declared for James II. The Regiment of Fusiliers at nearby Harwich, a heavily-fortified coastal port, was poised to join the uprising.¹ The civil government was quickly losing its control over the military. While William's Dutch Guards effectively suppressed the military threat, the Convention Parliament nevertheless acted to reinforce civilian authority over the army by passing the first Mutiny Act. This dissertation will examine how this new legislation gave

¹ Anchitell Grey, *Debates of the House of Commons: From the Year 1667 to the Year 1694* (London: Printed for D. Henry and R. Cave, at St. John's Gate ; And J. Emenson, in St. John's Square, 1763), 110–113, 131, 164–165.

rise to a new military justice system that would solidify civilian control over the military in Britain.

The passage of the Mutiny Act represented a turning point in England's relationship with standing armies, which would be transmitted subsequently to the British Empire. As Historian J. G. A. Pocock has shown, seventeenth-century political theorist James Harrington reflected the contemporary standard narrative on maintaining regular military forces during peacetime in his volume *Oceana*. Drawing on classical perspectives filtered through renaissance republican theorists including Machiavelli, Harrington portrayed military professionals as a dangerous threat to civic virtue, an "army of servants" in the style of Italian *Condottiere*.² Subsequent critics of the army would refine Harrington's ideas into a Neo-Harringtonian platform, discarding certain elements of the complicated underpinnings of his political philosophy but retaining the focus on the standing army as a tool for corrupting Parliament and re-establishing a level of monarchical authority stymied by the Glorious Revolution.³ Lois Schwoerer documented the overall standing army debate during the seventeenth century, focus on anti-standing army rhetoric. Lawrence Cress built upon Schwoerer's work to chronicle the remaining standing army debates in the eighteenth century, focusing attention on pro-

² James Harrington, *The Political Works of James Harrington*, ed. J. G. A. Pocock (Cambridge; New York: Cambridge University Press, 1977), 60. Pocock notes that Harrington's theory as expressed in *Oceana* drew on a complicated pseudo-history of gothic military organization and that Harrington could not conceive of a permanent standing army in the modern sense due to the fiscal limitations of state-level governments as they existed during his time.

³ J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, N.J.: Princeton University Press, 1975), 414–420.

army writers including renown economist Adam Smith.⁴ Cress, in company with other historians including Caroline Robbins, John Reid, Bernard Bailyn, and Charles Drummond, traced the transmission of anti-army ideology and the standing army debate across the Atlantic Ocean to America.⁵ While this historiographical arc has traced the political process of the standing army's acceptance as a permanent component of the British state and of the subsequent United States' government apparatus, the existing scholarship has not explained how civilian authorities established their control over that standing army, aside from vague insinuations of financial controls.⁶

These financial controls appeared in the form of the Army Estimates Act, which Parliament reviewed and passed annually, before proceeding to debate the annual Mutiny Act in the following months. Serious investigation of the intersection between state funding and the growing permanent military apparatus began with John Brewer's *The*

⁴ Lois G Schwoerer, "*No Standing Armies!*": *The Antiarmy Ideology in Seventeenth-Century England* (Baltimore: Johns Hopkins University Press, 1974), 164, 184–186; Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill: University of North Carolina Press, 1982), 26, 28–32. Cress in particular added to Pocock's analysis by stressing the pro-army platform's philosophical underpinning, as expressed most eloquently by Adam Smith, that a standing army fit in with the modern specialization in the labor force. Smith's points, as Cress expressed them, roughly matched up with several of Defoe's and Somers' arguments from the height of the standing army debate in 1697-99.

⁵ John Phillip Reid, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 1981); Charles R. Drummond IV, "Political Thinking, Military Power, and Arms Bearing in the British Atlantic World," in *The Atlantic World*, ed. D'Maris Coffman, Adrian Leonard, and William O'Reilly (London: Routledge/Taylor & Francis Group, 2015), 281–299; Caroline Robbins, *The Eighteenth Century Commonwealth Man: Studies in the Transmission, Development, and Circumstances of English Liberal Thought from the Testoration of Charles II until the War with the Thirteen Colonies*. (Cambridge: Harvard University Press, 1959); Bernard Bailyn, *The Ideological Origins of the American Revolution*, Enlarged Edition. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1992).

⁶ Schwoerer, *No Standing Armies!*, 184. Schwoerer has emphasized the financial controls exercised through Parliament's annual review of military funding.

Sinews of Power. Brewer traced the institutional developments in the British state that circumvented those funding problems that had stymied sixteenth- and seventeenth-century attempts to support standing armies, a problem first identified by the scholarship on the military revolution debate.⁷ In contrast to Michael Roberts, Geoffrey Parker, and Jeremy Black, Brewer approached the funding issue from a distinctly civilian perspective, focusing on the growth of civilian bureaucracy that generated and collected the capital necessary to support these military projects. Lawrence Stone's edited volume, *An Imperial State at War*, built upon Brewer's work by expanding both the geographical coverage and thematic engagement of *Sinews of Power*.⁸ In these essays, Brewer expanded his original focus on tax collection to examining state structure and power in more general terms, while the other contributors traced how Brewer's ideas impacted areas ranging from domestic policy to mass armament, naval strategy, and imperial relations. The wider adoption of the fiscal-military state framework as the primary explanatory device for the army's growing role in state formation during the early modern era is evident from its adoption in larger thematic treatments of the period.⁹ While this scholarship has done much to increase historical knowledge on state structure

⁷ John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (New York: Knopf, 1989); Clifford J Rogers, ed., *The Military Revolution Debate: Readings on the Military Transformation of Early Modern Europe* (Boulder: Westview Press, 1995). The military revolution scholarship has established the extreme expense of investing both in the rapidly-developing technology and the trained soldiers who could operate it effectively, a financial investment that bankrupted many attempts to support a permanent standing force.

⁸ Lawrence Stone, *An Imperial State at War: Britain from 1689 to 1815* (New York: Routledge, 1994).

⁹ M. J Braddick, *State Formation in Early Modern England, C. 1550-1700* (New York: Cambridge University Press, 2000); Christopher Storrs, ed., *The Fiscal-Military State in Eighteenth-Century Europe: Essays in Honour of P.G.M. Dickson* (Burlington, VT: Ashgate, 2009).

and policy driven by the objective of sustaining the standing army, this work does not effectively address how the civilian government ensured that the force it labored so hard to pay and equip would remain obedient to its directives.

The military justice system connects the standing army controversy and the fiscal-military state literature by explaining how the civilian government maintained control over its army. The study of military justice, however, remains largely underdeveloped, despite having been opened in the mid-nineteenth century. Charles M. Clode, legal secretary to the War Office, was the first scholar to identify the passage of the first Mutiny Act as a watershed moment in the history of military justice and traced out the system over the course of three books published between 1869 and 1880.¹⁰ Over the course of his works, Clode offered a constitutional history of the standing army—its legal relationship to the crown and Parliament—along with detailed investigations of courts martial and the statutes relating to their function. While providing a broad base for subsequent work, Clode’s volumes were more documentaries than analytical histories. The field languished until the 1960s, when Frederick Wiener published his *Civilians under Military Justice*, a pioneering work analyzing “the development of legal doctrines governing the exercise of British court-martial jurisdiction.”¹¹ Wiener’s primary focus lay on trials of civilians by court martial, the procedures involved in these trials, and the trials

¹⁰ Charles M Clode, *The Military Forces of the Crown: Their Administration and Government*, 2 vols. (London: J. Murray, 1869); Charles M Clode, *The Administration of Justice under Military and Martial Law: As Applicable to the Army, Navy, Marines, and Auxiliary Forces*, 2nd ed. (London: J. Murray, 1874); Charles M Clode, *The Statutes Relating to the War Office and to the Army* (London: HM’s Stationary Office, 1880).

¹¹ Frederick Bernays Wiener, *Civilians under Military Justice: The British Practice since 1689, Especially in North America* (University of Chicago Press, 1967).

that took place in North America. From 1976 through 1985, Arthur Gilbert wrote six articles on British military justice, ranging in topic from the operations of regimental courts martial to explanations for desertion to courts martial as honor courts. He additionally provided assessments of change over time in the system's operations and the scope of military judicial proceedings during the American Revolution.¹² Sylvia Frey and Glenn Steppler each entered the fray with articles of their own, touching on changes in the severity of punishment and the conduct of regimental courts martial.¹³ Frey's article re-appeared as a chapter in her subsequent book, *The British Soldier in America*, while Steppler drew his article from his unpublished doctoral dissertation.¹⁴ Both Fred Anderson and Stephen Brumwell have included treatments of military justice contextualizing the experience of American Provincial troops and British regulars who faced courts martial in America during the French and Indian War.¹⁵ Don Hagist has recently offered a similar treatment of military justice while investigating the experience

¹² Arthur N. Gilbert, "Law and Honour among Eighteenth-Century British Army Officers," *The Historical Journal* 19, no. 1 (1976): 75–87; Arthur N. Gilbert, "The Regimental Courts Martial in the Eighteenth Century British Army," *Albion: A Quarterly Journal Concerned with British Studies* 8, no. 1 (1976): 50–66; Arthur N. Gilbert, "Military and Civilian Justice in Eighteenth-Century England: An Assessment," *Journal of British Studies* 17, no. 2 (1978): 41–65; Arthur N. Gilbert, "British Military Justice during the American Revolution," *The Eighteenth Century* 20, no. 1 (1979): 24–38; Arthur N. Gilbert, "Why Men Deserted from the Eighteenth-Century British Army," *Armed Forces & Society* 6, no. 4 (July 1, 1980): 553–567; Arthur N. Gilbert, "The Changing Face of British Military Justice, 1757-1783," *Military Affairs* 49, no. 2 (1985): 80–84.

¹³ G. A. Steppler, "British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century," *The English Historical Review* 102, no. 405 (1987): 859–886.

¹⁴ Sylvia R Frey, *The British Soldier in America: A Social History of Military Life in the Revolutionary Period* (Austin: University of Texas Press, 1981); Glenn A. Steppler, "The Common Soldier in the Reign of George III, 1760-1793." (Ph.D. dissertation, Oxford, 1984).

¹⁵ Fred Anderson, *A People's Army: Massachusetts Soldiers and Society in the Seven Years' War* (Chapel Hill: Published for the Institute of Early American History and Culture, Williamsburg, Va., by the University of North Carolina Press, 1984); Stephen Brumwell, *Redcoats: The British Soldier and War in the Americas, 1755-1763* (Cambridge: Cambridge University Press, 2002).

of British soldiers in America during the Revolution through surviving soldiers' narratives.¹⁶

Like contemporary critics of military justice, these scholars have predominantly focused on issues relating to judicial process and punishment.¹⁷ Wiener's volume is entirely focused on procedural elements, while both Gilbert and Steppeler have examined regimental courts martial proceedings in detail.¹⁸ While practically every author has mentioned the army's extensive use of flogging, Gilbert and Frey have argued that variations in the punishment regimen can be used to chart change over time.¹⁹ Stephen Conway, Paul Kopperman, and Peter Way have engaged with these themes through investigating various manifestations of military crime.²⁰ In general, these scholars have focused on providing a qualitative judgment of courts martial and punishment practices,

¹⁶ Don N Hagist, *British Soldiers, American War: Voices of the American Revolution* (Yardley, PA: Westholme, 2012).

¹⁷ *Seasonable and affecting observations on the Mutiny-Bill, articles of war, and use and abuse of a standing army: in a letter from a Member of Parliament to a Noble Lord.* (London: W. Owen, 1750); Charles Lucas, *A Mirror for Courts-Martial: in which the complaints, trial, sentence and punishment, of David Blakeney, are examined.* (London, 1768).

¹⁸ Gilbert, "The Regimental Courts Martial in the Eighteenth Century British Army"; Steppeler, "British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century"; Wiener, *Civilians under Military Justice*.

¹⁹ Sylvia R. Frey, "Courts and Cats: British Military Justice In the Eighteenth Century," *Military Affairs* 43, no. 1 (1979): 5–11; Gilbert, "The Changing Face of British Military Justice, 1757-1783."

²⁰ Peter Way, "Rebellion of the Regulars: Working Soldiers and the Mutiny of 1763-1764," *The William and Mary Quarterly* 57, no. 4 (2000): 761–792; Paul E. Kopperman, "'The Cheapest Pay': Alcohol Abuse in the Eighteenth-Century British Army," *The Journal of Military History* 60, no. 3 (1996): 445–470; Stephen Conway, "'The Great Mischief Complain'd of': Reflections on the Misconduct of British Soldiers in the Revolutionary War," *The William and Mary Quarterly* 47, no. 3 (1990): 370–390; Stephen Conway, "To Subdue America: British Army Officers and the Conduct of the Revolutionary War," *The William and Mary Quarterly* 43, no. 3 (1986): 381–407; Stephen Conway, "British Army Officers and the American War for Independence," *The William and Mary Quarterly* 41, no. 2 (1984): 265–276.

with a variety of results ranging from wholesale condemnation to grudging acceptance validated by the nature of military life.²¹

In sum total, this body of work has established several key structural facts that frame any further investigation of military justice. First, military courts operated in a significantly different fashion from their civilian counterparts, characterized by vague guidance from official regulations and a general lack of legal training in the officers who staffed them. Second, officers exercised significant discretion in leveling criminal charges and assigning punishments, which were generally severe and varied widely across the same criminal categories, due to vague regulations and a lack of precedent or other standard-establishing mechanism. Third, change over time as measured by punishment patterns (lash averages, executions, acquittals and pardons) follow the same general trajectory charted for civilian justice, with a hardening of punishment in the latter eighteenth century following a mid-century decline in severity. Fourth, significant differences can be observed in the operation of military justice between cases occurring in Britain and abroad. Finally, the historians of military crime have established the limits of the military justice system's effectiveness in controlling military disorder, especially

²¹ Gilbert, "The Regimental Courts Martial in the Eighteenth Century British Army," 52; Gilbert, "Military and Civilian Justice in Eighteenth-Century England," 42. Gilbert represents the extremes of these perspectives in these two articles. He condemned regimental courts martial as offering "a thin veneer of legality" to officers' otherwise arbitrary proceedings, while in the latter article he emphasized the need to evaluate justice systems within the context of their operational environment.

abroad, and documented instances of common soldiers engaging with or circumventing the military justice system to achieve their own ends.²²

The existing historiography suffers on several accounts, however, including a lack of comprehensive coverage and issues with charting change over time, periodization, and overall historical perspective. The examination of regimental courts martial, for example, have not been accompanied by a comparable investigation of general courts martial, while summary justice has been dismissed entirely.²³ These key operational elements of military justice have not been evaluated in relation to one another, nor has there been an attempt to analyze the military justice system as an integrated whole or when the system itself began. The way in which historians have accepted court martial proceedings at face value, without attempting a deeper interrogation of the processes and attitudes that drove these trials and created these sources, is symptomatic of this neglect and calls the existing statistical analyses into question. In examining change over time, historians have focused exclusively on verdict and sentencing patterns without regard to other metrics for measuring change, such as procedural innovation. The majority of scholarly attention has focused narrowly on the army in America during the American Revolutionary War (1775-1783), although also that of the Seven Years War (1754-1763 in America) to a lesser extent. In effect, these historians have taken a historical perspective that is American-centric, facing back across the eighteenth century from the American

²² Way, "Rebellion of the Regulars"; Frey, *The British Soldier in America*. Way's work, interpreting the great Mutiny of 1764 in North America through a labor history lens, is an essential stepping-off point for correcting Frey's overall implication that soldiers had no agency within the army.

²³ Steppler, "British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century"; Gilbert, "Military and Civilian Justice in Eighteenth-Century England."

Revolution and eastwards across the Atlantic from America. As a result, these historians, while picking up on important evidence charting procedural changes, have failed to recognize its significance.²⁴ In addition, this geographical focus inevitably conflates imperial issues with state formation issues, which has negatively impacted the ability of these historians to fully appreciate the difference between the military justice system as it operated in Britain and abroad, though they make reference to observable differences in the data.²⁵ Partly as a result of these shortcomings, no attempts have been made to investigate the role of military justice in the development of the eighteenth-century British state or in the civil-military relationship. This dissertation will address these larger issues while bridging the historiographical gap between the standing army debate and the fiscal-military state.

This dissertation intersects two further fields tangentially: the history of civilian crime and justice and the history of Jacobitism. Gilbert has undertaken the inevitable comparison between the military and civilian justice systems, using the latter as a standard by which to evaluate the former. In attempting to provide a more balanced perspective, he engaged with the core work of Leon Radzinowicz, John Beattie, Douglas Hay, and E. P. Thompson on the structure and processes of civilian courts, along with the

²⁴ Frey, "Courts and Cats"; Gilbert, "The Regimental Courts Martial in the Eighteenth Century British Army"; Gilbert, "The Changing Face of British Military Justice, 1757-1783." Specifically, Frey and Gilbert have uncovered correspondence from Judge Advocate General Edward Hughes during the 1715-1730 that speaks to many key developmental issues for process and structure.

²⁵ Gilbert, "Why Men Deserted from the Eighteenth-Century British Army," 559. Gilbert particularly notes that punishments tended to be milder in Great Britain, attributing this fact to a lack of civilian tolerance for military extremes.

role of crime and justice in social relations.²⁶ This dissertation more closely engages studies by Peter King, Jeanine Hurl-Eamon, and David Lemmings in seeing the legal apparatus as the site of clashes between contrasting concepts of crime and justice as well as an instrument for adapting the formal requirements of the law to fit the realities of contemporary lived experience.²⁷ As the opening anecdote of this introduction demonstrates, the development of military justice was closely linked to the threats posed by the Jacobite Risings. Rather than considering the questions of identity, central government control over peripheral areas of Great Britain, and the dynastic political complications investigated in the existing literature, this dissertation will plumb the manner in which Jacobitism led the civilian government to tighten its control over and review of the army, as expressed through military justice.²⁸

²⁶ Gilbert, "Military and Civilian Justice in Eighteenth-Century England"; Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay (New York: Pantheon Books, 1975), 17–64; E. P. Thompson, "Eighteenth-Century English Society: Class Struggle without Class?," *Social History* 3, no. 2 (1978): 133–165; J. M. Beattie, "The Pattern of Crime in England 1660–1800," *Past & Present*, no. 62 (1974): 47–95; Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (London: Stevens, 1948).

²⁷ Peter King, *Crime, Justice, and Discretion in England, 1740–1820* (New York: Oxford University Press, 2000); Peter King, *Crime and Law in England, 1750–1840: Remaking Justice from the Margins* (Cambridge, UK; New York: Cambridge University Press, 2006); Jennine Hurl-Eamon, *Gender and Petty Violence in London, 1680–1720* (Columbus: Ohio State University Press, 2005); David Lemmings, *Law and Government in England during the Long Eighteenth Century: From Consent to Command* (Houndmills, Basingstoke Hampshire; New York, NY: Palgrave Macmillan, 2011).

²⁸ Eveline Cruickshanks, *Political Untouchables: The Tories and the '45* (New York: Holmes & Meier, 1979); Bruce Lenman, *The Jacobite Risings in Britain, 1689–1746* (London: Eyre Methuen, 1980); Paul Kléber Monod, *Jacobitism and the English People, 1688–1788* (Cambridge; New York: Cambridge University Press, 1989); Daniel Szechi, *1715: The Great Jacobite Rebellion* (New Haven: Yale University Press, 2006); Margaret D Sankey, *Jacobite Prisoners of the 1715 Rebellion: Preventing and Punishing Insurrection in Early Hanoverian Britain* (Burlington, VT: Ashgate, 2005).

The creation of a new military justice system provides an explanation for how the standing army became an accepted part of the British state in the eighteenth century and how the British government secured its financial investment in that force. This system can best be understood through the idea of a legal-military state, whereby a formerly nebulous concept of military justice became systematized and institutionalized as a key organ of the British state and the cornerstone for the civil-military relationship. This legal-military state construct addresses both contemporary understandings of the state and military justice, as well as long-standing historiographical concerns over the idea of a British state in the eighteenth century. The construct enables us to see military justice as a dynamic environment within which Parliament, Whitehall-based civilian administrators of the Judge Advocate General's Office and the War Office, army officers, and common soldiers interacted as part of a larger process of professionalization that frames the army's institutional history across the eighteenth century.

As John Brewer has observed, the idea of a British state in the eighteenth century is controversial. There was no contemporary unified theory of the state in Britain, no separately defined area of state interest versus private interest, and no large group of civil servants and administrators loyal specifically to the state. Rather, the British government "comprised a series of attenuated institutions" dependent for staff upon individuals and groups "whose social identity lay outside the corridors of power."²⁹ The ideological critique has been overstated: as Brewer demonstrates through Edmund Burke's writings, contemporaries understood the British government to be more than its domestic

²⁹ John Brewer, "The Eighteenth-Century British State: Contexts and Issues," in *An Imperial State at War: Britain from 1689-1815*, ed. Lawrence Stone (London: Routledge, 1994), 55.

arrangements and to be part of larger international system of states. Brewer's emphasis on the need to understand the linkages between the government's external and internal functions, to chart an interpretive course between weak and strong models of the state, and to ground analysis of the state within contemporary understandings of its apparatus provide the primary point of departure for this dissertation from other work on the fiscal-military state and subsequent examinations of state formation in general.³⁰

The concept of the legal-military state promulgated in this study is based on the proven usefulness of analysis of justice systems as a means of revealing core elements of both power structures and social relations in the state and on the contemporary legal vision of a military state proposed by William Blackstone. As Brewer acknowledged while framing the fiscal-military state apparatus, scholars of civilian crime and law were among the first to provide "a general characterization of the English/British state and its workings," particularly Douglas Hay and E. P. Thompson.³¹ This dissertation proceeds on Hay's and Thompson's assumptions, leavened with more recent work by King and

³⁰ Ibid., 56; Brewer, *The Sinews of Power*; Linda Colley, *Britons: Forging the Nation, 1707-1837* (New Haven: Yale University Press, 1992); Kathleen Wilson, *The Island Race: Englishness, Empire, and Gender in the Eighteenth Century* (London; New York: Routledge, 2003); Kathleen Wilson, *A New Imperial History: Culture, Identity, and Modernity in Britain and the Empire, 1660-1840* (Cambridge, UK; New York: Cambridge University Press, 2004); Braddick, *State Formation in Early Modern England, c. 1550-1700*. As Brewer notes in his essay, the German school of history personified in Otto Hintze emphasized the linkages between the external and internal functions of the state that have become a hallmark of the fiscal-military state studies and other investigations of state formation. Braddick exemplifies investigations of state formation processes delving deep into the early modern period, Colley explores state formation through the lens of militarism and national identity, while Wilson offers both maritime and gender-themed studies of state formation, along with a new imperial history that explores the larger issues of the state's domestic and foreign functions.

³¹ Brewer, "The Eighteenth-Century British State: Contexts and Issues," 53; Hay, "Property, Authority and the Criminal Law"; Thompson, "Eighteenth-Century English Society."

Lemmings, that judicial structures and processes, along with attitudes towards crime, reveal fundamental elements of state structure and provide a means of understanding the state within a social history context. Much as Brewer relies on Burke for a grounding in eighteenth-century perspectives on the state, this dissertation relies on the preeminent legal authority of William Blackstone who, in Chapter Thirteen of the first volume of his *Commentaries on the Laws of England*, discusses the “military state.” To Blackstone, the military state comprised “the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm” and was defined by martial law as based on the Mutiny Act.³² While other historians of military justice have employed Blackstone before, they have invariably stopped at his initial characterization of martial law as “built upon no settled principles, but is entirely arbitrary in its decisions” without reading on to his discussion of the Mutiny Act.³³ The legal-military state expands the contextual boundaries of Blackstone’s military state to include the staff of the War Office and Judge Advocate General’s Office in Whitehall, MPs and Lords in Parliament, and other civilians who engaged with and impacted the military justice system.

To better grasp the dynamic environment of military justice and the multitude of players involved in its development, this dissertation will advance several key assertions regarding the legal-military state. First, the creation of the modern system of military

³² William Blackstone, *Commentaries on the Laws of England*, 4th ed., vol. I (Oxford: Clarendon Press, 1770), 407–417.

³³ Steppler, “British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century”; Gilbert, “Military and Civilian Justice in Eighteenth-Century England.”

justice begins in 1715 and was consolidated into written manuals for the conduct of courts martial beginning in 1769.³⁴ Prior to 1715, military justice existed in the form of Articles of War that commanding generals designed and published on the crown's behalf on a campaign-by-campaign basis. Officers were left without formal guidance or any procedure beyond what was contained in these written Articles of War, even during the reigns of the later Stuart, as John Childs has shown.³⁵ While the Mutiny Act provided the means for developing a new system, the political will to institute effective change did not exist prior to the Hanoverian accession. Secondly, this dissertation locates the geographical center of the legal-military state in the Judge Advocate General's Office in the Horse Guards at Whitehall, with its limits largely bound by the geography of Great Britain. The judge advocate general and his deputies were the civilian administrators responsible for managing the legal-military state and insuring the army's compliance with new regulations. This dissertation therefore proceeds from the perspective of the Judge Advocate General's Office looking outward from Whitehall. Finally, analysis will be chronologically forward-facing, beginning with the efforts to consolidate civilian control over military justice in 1715 and ending with the publication of Williamson's *Elements of Military Arrangement* in 1781.³⁶ In so doing, the analysis will emphasize the

³⁴ Stephen Payne Adye, *A Treatise on Courts Martial* (New-York: Printed by H. Gaine, 1769).

³⁵ John Childs, *The Army of Charles II* (London; Buffalo: Routledge & K. Paul ; University of Toronto Press, 1976); John Childs, *The Army, James II, and the Glorious Revolution* (New York: St. Martin's Press, 1980); John Childs, *The British Army of William III, 1689-1702* (Wolfeboro, NH: Manchester University Press, 1987).

³⁶ John Williamson, *The Elements of Military Arrangement Comprehending the Tactick, Exercise, Manoeuvres, and Discipline of the British Infantry, with an Appendix, Containing the Substance of the Principal Standing Orders and Regulations for the Army* (London: Printed for the author, 1781), 195–207.

degree to which change occurred at a more intense rate in the first half of the eighteenth century, as a result of the system's newness and the complex interactions between the many groups enmeshed within the legal-military state.

This study takes place against the backdrop of the larger group of studies charting the British Army's institutional development across the eighteenth century. The scholars involved in this historiographical arc have traced a general trend towards increasing professionalization and institutional sophistication over time. Key studies in the field have covered topics including training, administration and management, changes in the composition of the officer corps and the rank and file, the civil authority's power over the army, and the role of instructional manuals and other books in professional development. The results of this work have established several significant facts for the current study. First, troops numbers, disposition of forces across Great Britain and the globe, experience and training levels amongst the officer corps and common soldiers, and financial support varied widely, normally expanding during years of active hostilities and sharply contracting at peace settlements. The army's developmental track, rather than being a smooth curve increasing in size, professionalism, and capacity, would instead be most accurately charted as a series of peaks and troughs, with significant troughs of numerical strength and the concomitant loss of experienced personnel following the close of hostilities. Officers and soldiers alike were forced to learn the basic mechanics of military life, including the operations of military justice, in the course of their active service. Thus the amateur spirit that other historians have identified in the conduct of military business

Williamson effectively plagiarized Adye's work on military justice, signaling the wider recognition of the need to understand how the military justice system functioned.

from finance to actual fighting is equally applicable to military justice.³⁷ Second, scholars have established the social origins of officers as coming predominantly from the middling sort and of soldiers as coming from the bottom and middle rungs of the laboring classes. Social origins are particularly important for understanding that the military justice process was not a simple matter of aristocratic officers judging soldiers recruited from the slums and jails of the British Empire. The more likely scenario would be borderline-gentry officers judging soldiers drawn from the ranks of agricultural laborers and a cross-section of the skilled trades practiced throughout Britain.³⁸ Finally, it is clear that the War Office routinely issued orders directly to military units to aid the local civil power, attesting to a functional interface between civilian administrators and army officers.³⁹

The standing army became politically acceptable because the military justice system enabled the civilian government to manipulate the army's social dynamics to guarantee its loyalty. As the following chapters will demonstrate, however, this

³⁷ Alan J Guy, *Oeconomy and Discipline: Officership and Administration in the British Army, 1714-63* (Manchester, U.K.; Dover, N.H., U.S.A.: Manchester University Press, 1985); J. A Houlding, *Fit for Service: The Training of the British Army, 1715-1795* (Oxford; New York: Clarendon Press ; Oxford University Press, 1981); Ira D Gruber, *Books and the British Army in the Age of the American Revolution* (Chapel Hill; [Washington, D.C.]: University of North Carolina Press ; Copublished with the Society of the Cincinnati, 2010); Stepler, "The Common Soldier in the Reign of George III, 1760-1793."

³⁸ Mark Frederick Odintz, "The British Officer Corps, 1754-1783" (Ph.D. dissertation, University of Michigan, 1988); Stana Nenadic, "The Impact of the Military Profession on Highland Gentry Families, C. 1730 - 1830," *The Scottish Historical Review* 85, no. 219 (2006): 75-99; Frey, *The British Soldier in America*; Stepler, "The Common Soldier in the Reign of George III, 1760-1793." Nenadic's analysis is particularly vital for understanding how sons of middling-sort merchantile or professional (lawyer, doctor) families used military service to rise in social status to the official level of gentleman. Odintz has tracked the long-term social origins of British officers across a significant number of regiments, establishing this overall trend of social origins.

³⁹ Tony Hayter, *The Army and the Crowd in Mid-Georgian England* (Totowa, N.J.: Rowman and Littlefield, 1978).

manipulation of the new military justice system was not a one-sided affair. Civilian control over the military justice system was far from complete, with officers retaining significant discretionary powers that they employed partly to frustrate civilian aims. Common soldiers were also able to use the military justice system to achieve their own ends on occasion. Thus the legal-military state in eighteenth-century Britain was far from a total institution—rather it was a system in the first stages of formation, one that would still be undergoing significant refinement in the late nineteenth century when Clode began his studies. The first three chapters will investigate these limiting factors on actual civilian control over military justice, plumbing the system to find where the limits of governmental authority lay. Chapter Four will focus on change over time, while Chapter Five will chart the geographical limits of the legal-military state in the imperial context.

Chapter One will begin the process of charting the limits of civilian oversight of military justice by examining issues of jurisdiction and definitions of military crime. Parliament and the crown adopted contrasting approaches to establishing jurisdictional limits for military courts in the Mutiny Act and the Articles of War, respectively. While the majority of the Mutiny Act focused on military crimes against civilians, such as quartering, mustering, and impressment of carriages, the Articles of War focused almost exclusively on crimes within the army: mutiny and desertion constituted the major point of common ground between the two. Neither code closely defined military crime, essentially permitting officers to level charges as they saw fit at the summary and regimental court martial levels. Officers were nevertheless limited by a requirement to include the Article of War violated where charging officers and soldiers of capital crimes in order to proceed to trial at a general court martial.

Chapter Two examines the military justice process in its entirety, from summary justice through general courts martial and punishment, both to reconstruct how these institutional elements interacted with one another and where civilian oversight of the process effectively ended. Evaluating courts martial in context reveals that they were far less arbitrary than has been suggested, both by contemporary critics and subsequent historians. In a manner similar to the situation of defining military crime, civilian oversight covered only the highest level of courts, the general courts martial, which were the only tribunals authorized to hand down capital sentences. While officers were relatively free to proceed as they saw fit at the regimental and summary levels, civilian review of the most serious cases constituted a significant brake on the potential for extreme miscarriages of justice.

Chapter Three investigates the ways in which common soldiers engaged with the legal-military state, using the institution to achieve their own purposes. Scholars have generally focused on resistance as the key method of engagement for soldiers, generally portraying those who did not resist as beaten down and without agency.⁴⁰ This chapter will reconsider the issue of resistance and will demonstrate that soldiers engaged with the military justice system through collaboration and negotiation. Specifically, it will be argued that without soldiers' active cooperation, the military justice system would not have been able to function as intended, since soldiers served vital, though easily overlooked, roles in the military justice process. Soldiers, like officers, comprised an

⁴⁰ Frey, *The British Soldier in America*, 71–93; Gilbert, “Why Men Deserted from the Eighteenth-Century British Army”; Way, “Rebellion of the Regulars.”

important part of the legal-military state, one with which civilian administrators were forced to contend seriously.

Chapter Four shifts to examine change over time, deviating from previous investigations of this topic by focusing on institutional change as expressed through procedural innovation. As this chapter will demonstrate, the Judge Advocate General's Office was the driving force for these changes, acting at the crown's direction largely in response to the Jacobite threat, which peaked with the rebellions of 1715 and 1745. Faced with a rival dynastic claimant to the throne, the Hanoverian monarchs directed the Judge Advocate General's Office to expand reporting protocols, insuring that the crown received sufficient information to review all capital cases properly. These new reporting protocols also enabled the judge advocate general's office to insure that officers followed the directives of the Mutiny Act and Articles of War. While the exigencies of domestic rebellion fueled a sense of urgency for implementing institutional development and growth, the influence of Germanic military culture, with its preference for a highly regulated and centralized military force, should not be underestimated as an influencing factor. The most significant era of change lasted until 1751, followed by a lengthy period of consolidation leading up to the publication of the first manual for courts martial in 1769.

Chapter Five examines the limits of the legal-military state in the first British Empire, with particular focus on the thirteen Atlantic coast colonies in America. The Mutiny Act's provisions, while nominally applicable beyond Great Britain, were significantly weakened in the wider empire due to a patchwork quilt of different legal jurisdictions. The Articles of War granted officers the authority to try soldiers for crimes

against civilian law, such as theft and murder, in areas where no English civilian courts were in operation. As a result, for most of the century, military justice existed in the empire without the same immediate civilian oversight exercised in Britain. When military and civilian legal enclaves came into increasing contact from the Seven Years War onwards, the immediate ramifications for the legal-military state were unclear. While initially attempting to follow the standard procedures governing military justice in Britain, by the 1760s the army found itself facing an increasingly hostile civilian populace that increasingly used the Mutiny Act against the military, in ways unconceived of in Britain. This inversion of the legal-military state effectively spelled its demise in the empire, as colonial resistance shaded into outright rebellion, resulting in an overall declaration of martial law that eliminated all government jurisdictions to which the legal-military state could be tied in the colonies.

The source base for this dissertation is primarily drawn from the unpublished manuscript records of the War Office and the Judge Advocate General's Office. These records include general courts martial proceedings, in-letters, and out-letters.⁴¹ Supplemental unpublished manuscript material drawn from correspondence, diaries, and books recording daily orders at the regimental, brigade, garrison, and army levels have also been employed where applicable. This latter grouping of sources, however, is extremely fragmentary, with the orderly books being the most useful. In general, contemporary army officers did not record their thoughts and feelings on the military

⁴¹ Judge Advocate General's Office: Courts Martial Proceedings and Board of General Officers' Minutes, NA WO71; Judge Advocate General's Office: Courts Martial Correspondence and Papers, NA WO72; Judge Advocate General's Office: Letter Books, NA WO81.

justice system in their private correspondence or diaries, while common soldiers' narratives remain few in number.

Three quantitative sets drawn from this material will be employed throughout the dissertation. The first is a sample of general court martial trials, drawn from the Judge Advocate General's records. The trials in general are organized into large folio volumes but are not divided by year or any other discernable theme. Thus cases from the same years and areas are spread across multiple volumes. Since this study is focused on the perspective of military justice from the Judge Advocate General's Office, courts martial volumes have been selected across the spread of the 1715-1782 period without attempting to assemble all the cases from a given year or series of years. This approach provides data that stays within the gathering and filing system originally applied by the judge advocate general's staff. This data set contains 891 cases from Canada, America, the Caribbean, India, Africa, and Great Britain.⁴² The second data set is drawn from an abstract of regimental courts martial held by regiments stationed in Ireland, compiled in early 1778. On December 5, 1777, the House of Lords presented a request to King George III for records of all courts martial held in the British Empire since August 1, 1774, "specifying the charges and the punishments that have been ordered by the said Courts martial, and those which have been inflicted." The regimental courts martial data from Ireland comprises the surviving records from this request. In total, the data set includes 1400 trials from thirteen regiments over the period 1774-1777. Because some of the regiments had been stationed outside Ireland during this period, the trial data has a greater

⁴² Cases were drawn from NA WO71/76, WO71/14, WO71/16, WO71/27, WO71/34, WO71/35, WO71/39, WO71/41, WO71/42, WO71/43, WO71/44, WO71/53, WO71/67, WO71/76, WO71/77

geographical significance for the British Isles.⁴³ The third data set, which represents summary justice, is drawn from a general order book for Gibraltar, kept by Captain Archibald Cunninghame. Cunninghame's record of all general orders issued between 1727 and 1745, covering periods of war and peace, provides 216 orders for summary justice. This sample is the largest available from one geographical location for the longest period of time covered by any single surviving orderly book. While conditions in Gibraltar were not strictly analogous to those in Great Britain, since there were no civilian courts in operation there, this sample nevertheless provides the most complete single source for understanding summary justice.⁴⁴ Together, these samples provide a basis for understanding the military justice process as it progressed through the three primary structural phases of the system.

This dissertation also relies heavily on two sets of printed primary sources: the Mutiny Act and the Articles of War. Officially titled *An Act for Punishing Mutiny and Desertion and for the Better Payment of the Army, and Their Quarters*, but referred to during the period as the Mutiny Act, this annual legislation legitimized civilian control over the military justice system.⁴⁵ The Articles of War, the contemporary shorthand for

⁴³ Report on the House of Lords, *Morning Chronicle and London Advertiser*, December 6, 1777; "Returns of Courts Martial in Ireland," August 1, 1774-January 10, 1778, House of Lords Record Office, HL/PO/JO/10/7/544. Records survive for the 1st, 2nd, 3rd, and 4th Regiments of Horse; the 8th, 12th, 13th, and 18th Regiments of Light Dragoons; the 9th Regiment of Dragoons, and the 3rd, 11th, 36th, 67th, and 68th Regiments of Foot. Only general courts martial records survive for the 11th Foot. The data includes the defendant's name, rank, criminal charge, verdict, sentence, and whether the sentence was pardoned, remitted, or executed.

⁴⁴ Archibald Cunninghame, "General Orders of the Garrison of Gibraltar from the 2^d February 1726/7 to 28th October 1745," NAS GD21/625

⁴⁵ *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters* (London: Printed by John Baskett, and by the assigns of Thomas Newcomb, and Henry Hills, deceased,

an even longer formal title, embodied the traditions of military justice, linking back through various editions to the Middle Ages.⁴⁶ Parliament and the crown, respectively, issued both regulations annually from 1715 onwards, although complete series of each have not survived to the present. As a result, it is impossible to reconstruct accurately a detailed record of the accumulated changes reflected in the surviving editions with regard to exactly when these changes occurred. The House of Commons Journals and Cobbett's *Parliamentary History* have proven unhelpful in filling the gaps between the surviving published editions of the Mutiny Act and Articles of War, shedding limited light on the major debates over the Mutiny Act between 1715 and 1782.⁴⁷ Nevertheless, the material that does survive in printed form provides sufficient data to reconstruct general trends and examine the operations of military justice, along with its connections to the state, at pivotal points.

The phrase “for the good of the King’s Service” appeared in primary sources relating to military justice throughout the eighteenth century, though the particular case of Captain George Gleadow in 1776 explains its appropriateness for this dissertation’s

1718). The Mutiny Act of 1718 served as the model for all subsequent editions through the century, which included all elements of the 1718 act. As a result, this act is referenced throughout most of the subsequent analysis. When an element drawn from a subsequent act does not appear in the 1718 act, then the subsequent act is cited. The Mutiny Acts passed in 1718, 1732, 1745, 1746, 1757, 1758, and 1771 were reviewed in the process of preparing the current work, being the only editions available at the time.

⁴⁶ *Rules and Articles for the Better Government of Our Horse and Foot-Guards and All Other Our Land-Forces in Our Kingdoms of Great Britain and Ireland, and Dominions beyond the Seas*. (London: Printed by John Baskett, Printer to the Kings most Excellent Majesty, and by the assigns of Thomas Newcomb, and Henry Hills, deceas’d, 1718).

⁴⁷ William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 7 (London: T. C. Hansard, 1811); *Journals of the House of Commons* (London: H.M. Stationery Office, 1803).

title. On November 16, Gleadow stood trial for neglect of duty, a charge proffered by his commander, Captain-Commandant William Dalrymple. The general court martial swiftly shifted to focus on Dalrymple's conduct after reviewing a regimental court martial that Gleadow chaired. Disagreeing with the court's conclusions, Dalrymple ordered the proceedings revised then reviled the judges' characters in public regimental orders. Gleadow subsequently demanded the general court martial in order to exonerate his character. When called upon to defend his actions, Dalrymple stated "I acted as I thought for the Good of the King's Service."⁴⁸ Many other officers undoubtedly proceeded in the same vein of thinking between 1715 and 1782, while the phrase itself highlights the core question at the heart of the struggle over military justice: what was the best course to take for the good of the King's Service? The legal-military state provided an answer to this question by establishing the maintenance of military support for, and obedience to, the civilian government of Great Britain as the military justice system's ultimate objective.

⁴⁸ Trial of Captain George Gleadowe, Portsmouth, November 16, 1776, NA WO 71/53, 233, 236, 264.

CHAPTER ONE: DEFINING MILITARY CRIME

During the height of the Mutiny Act debates in the House of Lords on February 24, 1718, Lord Harcourt attacked the proposed legislation for granting “courts martial a larger jurisdiction than seemed necessary for maintaining discipline in the army.” As a result, the military justice system that the Mutiny Act authorized could serve as a means “whereby the law of the land might either be obstructed or superseded.” Despite the detailed critique that followed, both Houses passed the bill without significant alteration.¹ Underscoring Harcourt’s point, the following year Colonel Charles Cadogan, commander of the 4th Regiment of Foot and Whig MP for Reading, overstepped the jurisdictional boundary between civilian and military law by attempting to try Private George Hopper for murder at a general court martial. In so doing, Cadogan violated key provisions of both the Mutiny Act and the Articles of War that required the military authorities to surrender soldiers who transgressed common law to the local civil authority for trial.² While claiming that he had waited the eight days required by the Articles of War before

¹ William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 7 (London: T. C. Hansard, 1811), 541.

² *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters* (London: Printed by John Baskett, and by the assigns of Thomas Newcomb, and Henry Hills, deceas’d, 1718), 97; *Rules and Articles for the Better Government of Our Horse and Foot-Guards and All Other Our Land-Forces in Our Kingdoms of Great Britain and Ireland, and Dominions beyond the Seas*. (London: Printed by John Baskett, Printer to the Kings most Excellent Majesty, and by the assigns of Thomas Newcomb, and Henry Hills, deceas’d, 1718), 32.

proceeding to trial and that the local civil authority showed no interest in Hopper, Cadogan relented and surrendered the soldier after facing off against Deputy Judge Advocate General Edmund Burt, Judge Advocate General and fellow Whig MP Edward Hughes, and the Lords Justices (serving as the regency council in the king's absence).³

Scholars of British military justice have hitherto failed to explore the jurisdictional barrier separating civilian and military courts, nor have they interrogated military crime for its larger significance and impact on the army's place in the eighteenth-century British state. Work on mutiny and desertion has plumbed the circumstances surrounding instances of each—the experiences that led soldiers to run away from their units or rebel against their officers—while investigations of plundering, drunkenness, and the amorphously ill-defined conduct unbecoming an officer charge have expanded historical knowledge of the breadth of military criminal offenses.⁴ In total, these studies provide a social commentary on the realities of military life but do not use crime as a means of accessing the larger power relations embedded in the military justice system: there is no sense of a larger pattern of order and disorder within which these crimes fit.

³ Charles Cadogan to the Judge Advocate General, Exeter, October 8, 1719, NA WO71/14, 254-55; Richard Arnold to Edmund Burt, Whitehall, October 12, 1719, NA WO 71/14, 255; Edward Hughes to Charles Cadogan, Whitehall, October 15, 1719, NA WO 71/14, 256-257; "CADOGAN, Charles (1685-1776), of Caversham, Nr. Reading, Berks. | History of Parliament Online," accessed April 14, 2016, <http://www.historyofparliamentonline.org/volume/1715-1754/member/cadogan-charles-1685-1776>.

⁴ Thomas Agostini, "'Deserted His Majesty's Service': Military Runaways, the British-American Press, and the Problem of Desertion during the Seven Years' War," *Journal of Social History* 40, no. 4 (2007): 957-985; Arthur N. Gilbert, "Why Men Deserted from the Eighteenth-Century British Army," *Armed Forces & Society* 6, no. 4 (July 1, 1980): 553-567; Paul E. Kopperman, "The Stoppages Mutiny of 1764," *The Western Pennsylvania Historical Magazine* 69, no. 3 (July 1986): 241-254; Peter Way, "Rebellion of the Regulars: Working Soldiers and the Mutiny of 1763-1764," *The William and Mary Quarterly* 57, no. 4 (2000): 761-792; Stephen Conway, "'The Great Mischief Complain'd of': Reflections on the Misconduct of British Soldiers in the Revolutionary War," *The William and Mary Quarterly* 47, no. 3 (1990): 370-390; Paul E. Kopperman, "'The Cheapest Pay': Alcohol Abuse in the Eighteenth-Century British Army," *The Journal of Military History* 60, no. 3 (1996): 445-470; Arthur N. Gilbert, "Law and Honour among Eighteenth-Century British Army Officers," *The Historical Journal* 19, no. 1 (1976): 75-87.

In contrast, scholars of civilian crime and justice have offered numerous critical insights, particularly in terms of how the manner in which contemporaries defined crime reflected power structures. Douglas Hay and John Beattie have examined the connections between property crime, the courts, and power dynamics in eighteenth-century Britain, while E.P. Thompson has demonstrated how political protest against the erosion of customary rites led to new criminal statutes.⁵ More recent work from Malcolm Gaskill and Jennine Hurl-Eamon has extended this vein of scholarship to open new perspectives on the social construction of crime during the eighteenth century, as a means to access contemporary mentalities on and the gendered nature of crime.⁶ Norma Landau and Mark Goldie have studied how service in the judicial system acted as a significant means for establishing and exercising social power within local communities.⁷ This body of work provides an example of how contemporary concepts of crime shed light upon power relations and state structures, and explains why civilian authorities eagerly defended the jurisdictional barrier between civilian and military courts.

Limiting the operation of military justice to within a jurisdiction that did not threaten civilian courts was a key factor in assimilating the standing army into the British state. The legal-military state provides the framework for understanding the complex

⁵ Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay (New York: Pantheon Books, 1975), 17–64; J. M. Beattie, "The Pattern of Crime in England 1660-1800," *Past & Present*, no. 62 (1974): 47–95; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975); J. M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, N.J.: Princeton University Press, 1986).

⁶ Malcolm Gaskill, *Crime and Mentalities in Early Modern England* (New York: Cambridge University Press, 2000); Jennine Hurl-Eamon, *Gender and Petty Violence in London, 1680-1720* (Columbus: Ohio State University Press, 2005).

⁷ Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984); Mark Goldie, "The Unacknowledged Republic: Officeholding in Early Modern England," in *The Politics of the Excluded, C. 1500-1850*, ed. Tim Harris (New York: Palgrave, 2001), 153–194.

interactions between the ideals of military crime represented in the Mutiny Act and the Articles of War, which the Judge Advocate General's Office existed to enforce, and the realities of military disorder that officers faced and worked to control on a daily basis. The problem was not merely one of insuring that courts martial did not try soldiers for crimes against common law: there was also the matter of insuring that regulations granted military justice sufficient flexibility to address disorder within the army effectively. As the Duke of Bedford noted during the 1749 Mutiny Bill Debates, reducing the power of courts martial increased the probability of mutinies against military commanders while simultaneously decreasing the army's operational effectiveness.⁸ The anonymous author of one pamphlet criticizing the military justice system noted that it was not unusual to be told that a colonel could not "be answerable for his Regiment, if he has not the modelling of it."⁹ Though stated as an attack, the phrase nevertheless reflected the realities of maintaining military discipline in an army that was still in an early stage of the professionalization process. The presence of MPs supporting both sides of the jurisdictional issue, as seen in the Parliamentary debates and the Hopper case above, added further complications to the inherent power struggle over the jurisdictional boundary.

The solution for this tension lay in points of disconnection between the Mutiny Act and the Articles of War. While the Mutiny Act authorized the Articles of War, and several portions of the Articles of War referred to specific sections of the Mutiny Act, the

⁸ William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 14 (London: T. C. Hansard, 1813), 443–444.

⁹ *Seasonable and affecting observations on the Mutiny-Bill, articles of war, and use and abuse of a standing army: in a letter from a Member of Parliament to a Noble Lord*. (London: W. Owen, 1750), 34.

two regulations did not reflect the same perspective on defining military crime. The Mutiny Act echoed its origins in the military crisis of the Glorious Revolution and its background in the abuses that the civilian population had suffered at the army's hands dating back to the Petition of Right of 1628. The portion of the Mutiny Act directly addressing soldier-on-soldier crime was slim and largely focused on threats to the civilian government, particularly mutiny, desertion, and sedition. Most of the Mutiny Act dealt with soldier-on-civilian crimes, such as quartering, mustering, and impressment of carriages. In contrast, the Articles of War reflected its origin in the Middle Ages, as a list of crimes and punishments focused on disorders perpetrated within the army. Those sections of the Articles of War that addressed soldiers committing offenses against civilians and civilian property clearly reflected the Mutiny Act's provisions. In essence, the Mutiny Act's purpose was to guarantee the safety of the civilian population and the army's obedience to the civilian government. The Articles of War were primarily focused on maintaining good order and discipline within the army.

The points of disconnect between the Mutiny Act and the Articles of War granted officers the flexibility required to address varieties of real disorder in the ranks that did not precisely fit into the imagined categories of the official regulations. The absence of detailed definitions of the crimes listed in the Mutiny Act and the Articles of War, along with any form of legal precedent to create a body of supplementary case law, facilitated this process of accommodation. Moreover, the Mutiny Act, and the attention of the MPs and Lords who framed it, was focused on capital crimes. Crown officials tended to cast an equally blind eye to all proceedings below the level of general courts martial, despite

the concerns of some judge advocate generals.¹⁰ This effective connivance insured that officers could proceed at their discretion and according to their own best judgement at the summary and regimental court martial levels of the military justice process. In dissecting the approaches to defining crime reflected in the Mutiny Act, the Articles of War, and trial data, it becomes clear that a working compromise existed that provided government authorities and army officers with the levels of control each needed to insure the military justice system's effective operation.

The Mutiny Act: Parliament and Military Crime

As Lois Schwoerer and other historians have established, Parliament had already subjected the Mutiny Act to nearly thirty years of debate and revision by the time of the Hanoverian Accession in 1714. The height of the struggle over the standing army's continued existence occurred during the Mutiny Act debates of the 1690s, which included several years when Parliament failed to pass the Mutiny Act. While the military justice system was forced to cede jurisdiction over capital cases to assize courts during the period when the Mutiny Act was not in force, the system as a whole continued to function. The Mutiny Act became an established and accepted part of the annual Parliamentary debates and votes by the early eighteenth century, continuing in force, in adjusted forms, through the modern era.¹¹

¹⁰ Edward Hughes to George Treby, Horse Guards, March 3, 1723, NA WO71/15, 69-70; Edward Hughes to Henry Pelham, Horse Guards, October 31, 1729, NA WO71/17, 1-2.

¹¹ Lois G Schwoerer, *"No Standing Armies!": The Antiarmy Ideology in Seventeenth-Century England* (Baltimore: Johns Hopkins University Press, 1974), 155-187; John Childs, *The British Army of William III, 1689-1702* (Wolfeboro, NH: Manchester University Press, 1987), 85-87. Childs notes that the Mutiny Act lapsed between November and December 1689, for eight days in 1690, 82 days in 1692, and for nearly three years between April 10, 1698 and February 20, 1701.

The Mutiny Act of 1718 is pivotal for understanding the development of this legislation across the period 1715-1781. It was the first version of the Mutiny Act to pass through both Houses of Parliament during peacetime and after having been subject to intense scrutiny and debates, since Parliament had passed preceding Mutiny Acts under the cloud of the Jacobite Rising of 1715. The legislation would remain structurally stable, retaining the same form down to the style of font used and the arrangement of the sections, through 1775. The core elements of the Mutiny Act of 1718 appeared in all subsequent versions, making it a baseline for studying the perspectives on military crime embodied in this legislation.¹²

The Mutiny Act offered a deceptively brief treatment of military crime covering the document's first two pages. The preamble contained the justification for authorizing the exercise of military law: that soldiers who mutinied, committed sedition, or deserted the army required "a more exemplary Punishment than the Laws are present will allow." The following paragraph empowered courts martial to inflict "Death, or such other Punishment" as they saw fit on any soldier convicted of mutiny, sedition, desertion, enlisting in multiple units simultaneously, or refusing "to Obey any lawful Command of his Superior Officer." The following sections recognized the king's right to grant commissions for courts martial and sanctioning "Corporal Punishment, not extending to Life or Limb...for Immoralities, Misbehavior, or Neglect of Duty," before setting detailed standards for the composition and conduct of courts martial.¹³ The Act's

¹² *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters; An Act for Punishing Mutiny and Desertion; and for the Better Payment of the Army and Their Quarters* (London: Printed by Charles Eyre and William Strahan, 1775).

¹³ Cobbett, *The Parliamentary History of England*, 14:643.

remaining pages detailed a variety of procedures relating to quartering, mustering units to check how many soldiers they contained, and impressing carriages and other forms of temporary transport.

Though the crimes listed in the initial pages of the Mutiny Act strongly echo the customary focus of military law, as represented in the Articles of War, this section nevertheless hints at the act's focus on securing the government and civilian population from military abuses. The list of capital crimes contained actions that threatened civilians as much as they did the army's internal discipline. As the soldiers stationed in the West Country and serving in the Earl of Dumbarton's Regiment in 1689 demonstrated, an unruly army could quickly turn against local inhabitants and challenge the government's control over domestic affairs, even going so far as to effect regime change. William III's invasion of England in 1688 provided a clear example of the changes a mutinous army could effect on the political landscape.¹⁴ Parliament's willingness to grant courts martial jurisdiction to try and punish practically any non-capital offense further indicates the government's lack of concern with military crimes that did not constitute a direct threat to itself or civilian inhabitants.

The clearest indication that the Mutiny Act's focus was on military disorders that threatened the state is to be found in the remaining bulk of the act itself. The space and attention devoted to establishing procedures governing the key points of contact between

¹⁴ John Childs, *The Army, James II, and the Glorious Revolution* (New York: St. Martin's Press, 1980); Dale Hoak, "The Anglo-Dutch Revolution of 1688-89," in *The World of William and Mary: Anglo-Dutch Perspectives on the Revolution of 1688-89*, ed. Dale Hoak and Mordechai Feingold (Stanford, CA: Stanford University Press, 1996), 1-28.

the army and the state, along with the punishments for violations, describe the act's true focus in detail and are abstracted in Table 1.1 below.¹⁵

Offense	Punishment
Procuring false muster certificates to excuse soldiers	£50 fine, cashiered and barred from holding future office
Officer making false muster	£100 fine, cashiered and barred from holding future office
Muster-master failing to notify civil authorities of impending muster	£50 fine, cashiered
Individual falsely mustering himself as a soldier without being duly enlisted	Justice of the Peace to remand offender to house of correction for ten days
Falsely mustering horse that is not government property	Horse forfeited to informer, £20 fine levied from supervising officer's pay
Paymaster, agent, or clerk detaining pay	Cashiered and disabled from future office-holding, £100 fine levied from offender's pay.
Regimental Agent refusing to obey orders from King or Lord Treasurer	Cashiered and disabled from future office-holding
Officer making false certificate of ill or detached soldiers	Same penalty as making false musters
Officer mustering soldiers by the wrong name	Same penalty as making false musters
Officer illegally quartering soldiers	Cashiered and disabled from future office-holding
Officer accepting bribes not to quarter troops	Cashiered and disabled from future office-holding
Officer failing to pay subsistence/quartering money	Deducted from officer's pay
Improperly commandeering civilian carriages/horses	£5 fine deducted from officer's pay
Quartering soldiers dependents or officers' servants without consent	Cashiered and disabled from future office-holding
Officers/soldiers destroying local game	£5 fine deducted from officer's pay, 20 shilling fee for soldier
Officer performing illegal search	£20 fine

Table 1.1: Military crimes against or involving civilians, Mutiny Act of 1718

In his commentary on the Mutiny Act, William Blackstone placed regulating “the manner in which [soldiers] are to be dispersed among the several inn-keepers and victuallers

¹⁵ *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters*, 1718, 97–116.

throughout the kingdom” at the top of his list of the Mutiny Act’s functions, ahead of mutiny, desertion, and sedition.¹⁶ Some of the reasons behind the priority given to soldier-on-civilian crime lay with the history of military forces disrupting English domestic arrangements. As Lyndsay Boynton has described, problems with quartering soldiers in civilian homes date back to the Petition of Right of 1628.¹⁷ The disruptions to civilian life and the problems of applying martial law across both the rank and file and the associated civilian inhabitants were felt throughout the remainder of the century. As John Childs has established, civilians continued to see themselves as “the victim of the army” during William III’s reign.¹⁸ Instances of free quarter and seizure of civilian assets for military use were not terribly far removed in time from the passage of the first Mutiny Act and were kept alive by continued references to the Petition of Right of 1628, such as the one included in the Mutiny Act’s provisions on quartering.¹⁹

Issues of state finances were also at stake with these crimes. John Brewer has demonstrated the immense funds raised and devoted to sustaining the army across the eighteenth century, while Alan Guy has examined the complicated and corruption-prone military finance system into which state money flowed.²⁰ As Table 1.1 shows, many of

¹⁶ William Blackstone, *Commentaries on the Laws of England*, 4th ed., vol. I (Oxford: Clarendon Press, 1770), 414.

¹⁷ Lindsay Boynton, “Martial Law and the Petition of Right,” *The English Historical Review* 79, no. 311 (1964): 255–284.

¹⁸ Childs, *The British Army of William III, 1689-1702*, 88.

¹⁹ *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters*, 1718, 101–102. The Mutiny Act forbade officers and constables from quartering troops in private homes (the primary complaint associated with the Petition of Right of 1628) and specified that inns, alehouses, taverns, and other spaces retailing alcoholic drinks were to lodge soldiers instead.

²⁰ John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (New York: Knopf, 1989), 29–64.

the crimes enumerated in the Mutiny Act's latter sections offered means for cheating the government. False mustering, the act of arranging for civilians to pretend to be soldiers by donning uniforms and standing in formation while the muster master made his count, was a widespread abuse that sometimes included pressing privately-owned horses into service for musters of cavalry regiments. John Railton, a veteran of the Horse Grenadier Guards, provided extensive commentary on the methods he observed officers employing to make false musters in his pamphlet *The Army's Regulator* of 1738.²¹ As further reflected in Table 1.1, even quartering was prone to financial abuse, with officers facing many opportunities to accept bribes from tavern owners wishing to avoid hosting soldiers and withholding the money due to tavern owners who did host soldiers.

These elements of the Mutiny Act remained stable through the act of 1775, testifying to the continuity of Parliament's core concerns regarding military disorder. Many of the additions made over the intervening 57 years merely expanded on existing procedural elements regarding courts martial, mustering, quartering, and similar duties, but several new crimes joined the 1718 list. New crimes that were purely military in nature included sleeping on post, abandoning a post without permission, holding correspondence with the enemy, and striking an officer. While only corresponding with the enemy was a direct threat to the state in the same manner as mutiny, desertion, and sedition, the other new crimes had long been part of the Articles of War. Their inclusion

²¹ John Railton, *The Army's Regulator or the British Monitor* (London: Printed for, and sold by W. Smith, at Lord Chancellor Talbot's Head, Serle's Gate, Lincoln's-Inn; E. Davis, in Fullwood's Rent, Gray's-Inn, Holborn; and by the author, at the Star and Garter, in the Haymarket, St. James's, 1738). The Horse Grenadier Guards were part of the Household Cavalry, the mounted troops that formed part of the monarch's personal guard. Like the grenadiers of the infantry, the Horse Grenadiers were known for throwing grenades in addition to using swords and flintlock carbines in combat. George Smith, *An Universal Military Dictionary or a Copious Explanation of the Technical Terms &c. Used in the Equipment, Machinery, Movements, and Military Operations of an Army* (London: Printed for J. Millan, near Whitehall, 1779), 117.

in the Mutiny Act signaled a closer link between the two regulations. The parliamentary framers of the Mutiny Act added embezzling government property and military stores to the list of military crimes against the government. This new regulation directed that any commissioned officer, storekeeper, or commissary who was convicted of embezzling would be cashiered (dismissed from the army), fined £100, and forced to pay back the value of the goods stolen. If the offender could not pay the money back or if his personal property could not be auctioned off to cover the sum owed, he was to be incarcerated until such time as the debt was covered.²² The Mutiny Act thus remained even more focused on protecting the civilian government's interest against military disorder than it had been at the beginning of the period under study.

The Articles of War: Customary Attitudes towards Military Crime

In contrast to the Mutiny Act, with its firm grounding in the seventeenth century struggles over the standing army, the Articles of War stretched back to the Middle Ages. The earliest known surviving version, Henry V's *The Statutes and Ordinaunces to be kept in Time of Were*, dates from 1419, with surviving copies of sixteenth and seventeenth Articles of War surviving in great numbers.²³ Until 1747, all editions of the Articles of War shared the same format—a list of crimes and punishments, with occasional points of procedure to guide courts martial—and were based in the royal prerogative, with the exception of those Articles of War promulgated by Parliamentary

²² *An Act for Punishing Mutiny and Desertion; and for the Better Payment of the Army and Their Quarters*, 205, 213.

²³ Travers Twiss, ed., *Monumenta Juridica: The Black Book of the Admiralty* (London: Longman & Co., 1871), 282–301.

and Protectorate forces in the seventeenth century. As with the Mutiny Act, the Articles of War of 1718 provided the blue print for subsequent editions until mid-century, providing an effective baseline for study. This version of the Articles of War was particularly noteworthy for having been brought in accordance with the mandates of the Mutiny Act in the same year.²⁴

Unlike the Mutiny Act, the Articles of War were not focused on maintaining the strict jurisdictional line between military and civilian justice or protecting civilian interests, although certain individual articles within the code reflected those elements of the Mutiny Act. Instead, the Articles of War focused on soldier-on-soldier crime, curbing disorders within the army and guaranteeing the continued function of military discipline. The form and content of the Articles of War of 1718 reflect this concern for the good order of the army, as well as the regulation's deep roots in military tradition. The 46 sequentially-numbered articles provided officers with a checklist of crimes, occasionally with specified punishments, to which they could compare the daily disorders committed in the ranks. A significant minority of the articles dealt solely with procedural matters, such as the conduct of courts martial. The remaining majority are abstracted in Appendix A.

The criminal articles cover a wide variety of offenses, reflecting an attempt at providing a comprehensive framework for the military justice system. Though not officially classed by thematic sections in 1718, the flow of the listing nevertheless conveys groupings of articles touching on the same core criminal theme. Articles 1-5, for example, address religious offenses, including failure to attend or conducting business

²⁴ Edward Hughes to Henry Pelham, Horse Guards, October 31, 1729, NA WO71/17, 1-2.

during divine services, making sacrilegious outbursts, and defaming places of worship. Other similar thematic clusters occurred around mutiny (Articles 7-9) and desertion (Articles 10-12). Still other articles contained multiple elements focusing on one crime. Article 19, which dealt with dueling, listed five related offenses: using provoking or reproachful language, challenging an officer or soldier to a duel, the commander of a guard permitting duels to be fought or serving as a second, resisting arrest for dueling or breaking confinement, and upbraiding an officer or soldier for refusing a challenge. Some articles stood out for focusing on a single infraction, such as Article 27 (forbidding sutlers from selling liquor between 9 PM and reveille) and Article 37 (officer or soldier making a false alarm in camp). Overall, the Articles of War constituted a record of accumulated experiences with military disorders and their punishments firmly embedded within centuries of military tradition.²⁵

Through comprehensively listing offenses against good military order, the Articles of War provided an implicit state-sanctioned standard of conduct for officers and soldiers. The intention for the Articles of War to be used as code for military behavior, rather than simply as a guide for punishing misbehavior, is reflected in the two methods of phrasing for articles. The individual articles treat crime in one of two ways: first by setting a model of acceptable behavior and noting punishments for failing to follow the model, second by describing unacceptable actions and stating penalties for committing them. For example, Article 1 directed officers and soldiers to “diligently frequent Divine

²⁵ *Rules and Articles for the Better Government of Our Horse and Foot-Guards and All Other Our Land-Forces in Our Kingdoms of Great Britain and Ireland, and Dominions beyond the Seas.*, 1–7, 10–12, 20–21, 27. Sutlers were civilians who accompanied the army and sold food and other goods to soldiers. Smith, *An Universal Military Dictionary or a Copious Explanation of the Technical Terms &c. Used in the Equipment, Machinery, Movements, and Military Operations of an Army*, 240.

Service and Sermon,” threatening fines and imprisonment for non-compliance. In contrast, Article 4 ordered that any officer or soldier caught “prophaning” churches or threatening chaplains and ministers was to be tried by a court martial and sentenced to corporal punishment. These regulations applied to officers and men, though not all articles were equally applicable to both. For example, Article 16 required officers to surrender soldiers who offended against common law over to the civil magistrate: common soldiers did not have the authority to make such transfers. Article 35 forbade soldiers from sleeping at their posts while on sentry duty, which officers did not perform.²⁶ Promoting these standards of service was a vital part of maintaining good military discipline, particularly during an era that lacked official state-sponsored academies to train officers, who were in turn forced to rely on privately-written and published guide books for formal advice.²⁷

Like the Mutiny Act, the Articles of War changed over the course of the eighteenth century, though in a more marked fashion. The Articles of War of 1747 adopted a new format that remained in use throughout the remaining decades of the century, grouping the articles found in previous editions under thematic sections.²⁸ The Articles of War of 1749 offer the earliest surviving version of this new format. Articles

²⁶ *Rules and Articles for the Better Government of Our Horse and Foot-Guards and All Other Our Land-Forces in Our Kingdoms of Great Britain and Ireland, and Dominions beyond the Seas*, 1718, 1–3, 8–9, 25–26.

²⁷ J. A Houlding, *Fit for Service: The Training of the British Army, 1715-1795* (Oxford; New York: Clarendon Press ; Oxford University Press, 1981), 153–256; Ira D Gruber, *Books and the British Army in the Age of the American Revolution* (Chapel Hill, NC: University of North Carolina Press and the Society of the Cincinnati, 2010), 4–5.

²⁸ While a surviving copy of the 1747 Articles of War has not come to hand, Colonel George Townshend testified to the re-organization taking place in that year during the 1750 Mutiny Bill Debates. Cobbett, *The Parliamentary History of England*, 14:643.

detailing specific crimes appeared under the section headings of Divine Worship, Mutiny, Musters, Returns, Desertion, Quarrels and Sending Challenges, “Suttling,” Quarters, Carriages, “Of Crimes punishable by Law,” “Of Stores, Ammunition, &c.” “Of Duties in Quarters, in Garrison, or in the Field,” Administration of Justice, and “Relating to the foregoing Articles.”²⁹ These thematic sections included new crimes along with all of the crime elucidated in the Articles of War of 1718. While some of these new crimes added to the number of articles focused on discrete offenses, others had a catch-all quality to them, which made them ideal for addressing disorders not specifically listed under more specific articles. Among the most important of these new catch-all articles were Section 15, Article 25 (Administration of Justice) and Section Twenty, Article 3 (Relating to the foregoing Articles). Article 25 directed that any officer convicted by a general court martial of “behaving in a scandalous infamous Manner, such as unbecoming the Character of an Officer and a Gentleman” should be immediately discharged from the army.³⁰ Neither this nor any other article provided any suggestion of what constituted scandalous infamous behavior, making this an easy charge to level at any officer who offended his superiors. Arthur Gilbert has established that courts martial regularly employed this charge to try offenses against the unofficial honor code in use amongst the officer corps.³¹ Section 20, Article 3, empowered general courts martial to investigate and punish “all non-capital crimes, disorder, or neglects” that threatened military discipline

²⁹ *Rules and Articles for the Better Government of His Majesty’s Horse and Foot Guards, and All Other His Forces in Great Britain and Ireland, Dominions beyond the Seas, and Foreign Parts* (London, 1749).

³⁰ *Ibid.*, 27.

³¹ Gilbert, “Law and Honour among Eighteenth-Century British Army Officers.”

and order, and which were not mentioned in the preceding articles.³² The article provoked significant backlash from opposition MPs and Lords in the Mutiny Act Debates of 1749 due to its potential for enabling officers to transgress the jurisdictional boundary by trying soldiers who violated civilian law under this article. No such examples of abuse have yet been uncovered, though the presence of these catch-all articles provided an essential flexibility for officers facing the realities of military disorder. While introducing some controversy, the new format reflected a broader and deeper engagement between its framers and the military justice system.

It is difficult to determine precisely who was responsible for framing the Articles of War during the eighteenth century. While Parliament occasionally reviewed copies of the Articles along with the Mutiny Act, MP's and Lords generally viewed this document as a product of royal prerogative and made no attempts to interfere with it. In fact, the Mutiny Act recognized the crown's right to "Form, Make and Establish Articles of War."³³ William Augustus, Duke of Cumberland, is the most likely candidate for instigator of the format change in 1747. Rex Whitworth, Cumberland's biographer, has found documents in the Duke's surviving papers indicating that he reviewed drafts of the Articles of War and the Mutiny act in his capacity as captain-general and de facto commander of the British Army.³⁴ In a later example, from March 1780, Secretary at War Charles Jenkinson consulted Commander-in-Chief Lord Jeffrey Amherst on modifying

³² *Rules and Articles for the Better Government of His Majesty's Horse and Foot Guards, and All Other His Forces in Great Britain and Ireland, Dominions beyond the Seas, and Foreign Parts*, 1749, 30.

³³ *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters*, 1718, 112.

³⁴ Rex Whitworth, *William Augustus, Duke of Cumberland: A Life* (London: Leo Cooper, 1992), 136–137.

the article regulating the discharging soldiers at the conclusion of their service. Upon receiving Amherst's approval, Jenkinson requested that the general lay the measure before the king and intercede with his fellow commanders to insure its implementation.³⁵ The Judge Advocate General's Office seems to have played no appreciable role in reviewing the Articles of War according to the surviving evidence. Nevertheless, it is clear that high ranking military commanders and officials within the civilian administration over the army collaborated in framing these regulations. As a result, both the Mutiny Act and the Articles of War can be seen as reflecting the ideals and preoccupations of the legal-military state's primary powerbrokers. As highly placed as they were, however, these individuals had a relatively limited role to play in the actual administration of military justice and the concomitant articulation of military crime vis-à-vis actual disorders.

Summary Justice and Trial Data: Defining crime in practice

Taken together, the Mutiny Act and the Articles of War provided the basis for a centralized system of military justice, framed at the highest levels of government and reflecting significant civilian input. The effort invested in framing these regulations, however, was all for naught if the officers responsible for executing them did not properly engage with the system. Although the developing legal-military state exerted pressure on officers to familiarize themselves with changes in these regulations and to proceed in accordance with a growing body of trial procedure, several bars to

³⁵ Jenkinson to Amherst, March 4, 1780; Jenkinson to Amherst, 12 March 1780; NA WO4/109, 294-295, 332-333. March was the customary month for debating and voting upon the new Mutiny Act.

implementing a standardized approach to defining military crime remained. The first was the lack of specificity in the governing regulations, which left significant room for interpretation. While officers would seize on this flexibility in applying the Mutiny Act and the Articles of War to actual disorder, which did not always fit within the official framework, the absence of definitions gave rise to a great deal of variety in the formulation of criminal charges that still makes the trial data difficult to organize and quantify today. Second, officers received no formal training in the content and application of military law. While the Articles of War included a requirement for officers to read them aloud to their soldiers once every two months, that exercise fell significantly short of the levels of training and experience that contemporary civilian lawyers and judges could be expected to have. While some justices of the peace, as defenders of the military justice system were known to observe, may have had the limited instruction of reading the laws and privately-printed guide books only, they nevertheless operated in a legal environment populated by trained professionals. Army officers did not: in point of fact, Charles Gould was the first judge advocate general to have any formal legal training and did not begin his service in earnest until the 1750s.³⁶

Despite these handicaps, officers bore the brunt of applying Whitehall's and Westminster's regulations in the mercurial environment of real military disorder. As numerous chroniclers of the British Army have established, army life in garrison and on

³⁶ *Rules and Articles for the Better Government of Our Horse and Foot-Guards and All Other Our Land-Forces in Our Kingdoms of Great Britain and Ireland, and Dominions beyond the Seas.*, 1718, 36; John Courteney, *Remarks, on a pamphlet, entitled A Mirror, &c., written by C-s L-s, M.D. [i.e. Charles Lucas]. Drawn, from the proceedings of a general court martial, on the trial of an appeal, brought before them by David Blakeney, Matross. Also, an appendix, containing, the copies of several depositions, etc. [By John Courtenay.]* (Dublin: Printed, and sold by the Booksellers and Hawkers, 1768), 5. Frederick Bernays Wiener, *Civilians under Military Justice: The British Practice since 1689, Especially in North America* (University of Chicago Press, 1967), 175.

campaign was arduous, filled with both boredom and fatigue. The ready availability of alcohol along with a highly status-conscious officer corps combined to raise the level of social volatility inherent to army life.³⁷ In facing the maelstrom of disorders that resulted, officers could only rely on the provisions of the Mutiny Act and the Articles of War, both of which lacked detailed explanations of the crimes they listed. The oath that officers swore before sitting as judges at courts martial captures the rough nature of the guidance on applying the letter of military law contained within the regulations themselves. The oath directed judges to proceed according to the Articles of War and the Mutiny Act, and “if any Doubt shall arise which is not Explained by the said Articles or Act of Parliament,” to rely upon their conscience, understanding, and “the Custom of War in like Cases.”³⁸ The recognition of individual officers’ conscience and understanding, along with the influence of military tradition, laid the groundwork for officers to deviate from the absolute letter of military law in small ways to meet the requirements of the regulations and to maintain discipline within their commands.

British officers dedicated little space in their personal correspondence and diaries to discussing issues of military justice, instead focusing on social affairs and the financial

³⁷ H. C. B Rogers, *The British Army of the Eighteenth Century* (New York: Hippocrene Books, 1977); Stephen Brumwell, *Redcoats: The British Soldier and War in the Americas, 1755-1763* (Cambridge: Cambridge University Press, 2002); Stephen Conway, “British Army Officers and the American War for Independence,” *The William and Mary Quarterly* 41, no. 2 (1984): 265–276; Sylvia R Frey, *The British Soldier in America: A Social History of Military Life in the Revolutionary Period* (Austin: University of Texas Press, 1981); Fred Anderson, *A People’s Army: Massachusetts Soldiers and Society in the Seven Years’ War* (Chapel Hill: Published for the Institute of Early American History and Culture, Williamsburg, Va., by the University of North Carolina Press, 1984); Kopperman, “The Cheapest Pay”; Mark Frederick Odintz, “The British Officer Corps, 1754-1783,” 1988; Stana Nenadic, “The Impact of the Military Profession on Highland Gentry Families, C. 1730 - 1830,” *The Scottish Historical Review* 85, no. 219 (2006): 75–99.

³⁸ *Rules and Articles*, 1718, 13-14.

elements of regimental management.³⁹ As a result, grasping officers' approach to defining crime in the army requires quantifying data from the three levels of the military justice process. As J.A. Sharpe has observed, quantifying data from eighteenth-century British justice systems is problematic on numerous levels and must be approached with care.⁴⁰ The data sets employed for the following analysis are the largest and most complete available for the respective levels of the military justice system to which they pertain. These three levels were summary justice, regimental courts martial, and general courts martial. Summary justice, usually meted out on the spot when officers discovered a violation, was the broad base of the military justice pyramid. Officers exercised this power by virtue of their commissions, which charged them with "well-disciplining" the soldiers under their care and Article 22 of the Articles of War, which threatened any officer who failed in this duty with trial by a general court martial.⁴¹ Regimental courts martial tried soldiers for minor crimes liable for corporal punishment only, while general courts martial dealt with capital crimes, like those listed in the opening pages of the

³⁹ Correspondence of Brigadier-General John Forbes, John Forbes Papers, Dalhousie Muniments, NAS, GD 45/2; Correspondence of General Alexander Leslie, NAS, GD 26/9/512; Correspondence of Captain William Leslie, NAS, GD 26/9/513; Correspondence of Captain John Leslie, GD 26/9/522; Correspondence of Captain David Leslie, NAS, GD 26/9/524; Correspondence of Captain Robert Dalrymple, NAS, GD 110/953; Correspondence of Major William Howe, NAS, RH15/17; Correspondence of Archibald, Charles, and Alexander Robertson, NAS GD 146/18; Correspondence on the Duke of Gordon's Regiment, 1778, Papers of the Gordon Family, NAS GD 44/43; Sir Henry Clinton Papers, William L. Clements Library, University of Michigan, Ann Arbor, Michigan; Colonel Charles Whiteford Correspondence, 1738-1752, BL ADD 36592; Horsbrugh Papers, BL ADD 50260.

⁴⁰ J.A. Sharpe, "Quantification and the History of Crime in Early Modern England: Problems and Results," *Historical Social Research / Historische Sozialforschung* 15, no. 4 (56) (1990): 17–32.

⁴¹ *Rules and Articles*, 1718, 23-24. For examples of commissions see Commission to William Robertson as Ensign in the 63rd Regiment of Foot, November 24, 1775, NAS GD132/819. See also Commission to William Robertson Gent. as Lieutenant in the 55th Regiment of Foot, December 18, 1777, NAS GD132/821.

Mutiny Act. The varying degrees of formality involved in these three levels of the military justice process generated markedly different forms of surviving data.

Records are most lacking for summary justice, to the point that Arthur Gilbert has argued that it cannot be studied nor classed as part of the military justice system.⁴² Yet the glimpses of summary justice that appear in other documents, such as general courts martial proceedings, suggest that officers addressed most forms of disorder at this level, thereby dissuading soldiers from escalating their behavior.⁴³ Orderly books, recording the daily orders issued within British Army units and garrisons, provide the most direct source for quantifying summary justice. Captain Archibald Cunninghame's Orderly Book for Gibraltar, which recorded all general orders issued by successive governor-generals under both peacetime and wartime conditions between 1727 and 1745, provides the most comprehensive data set for summary justice.⁴⁴ The general orders, which remained in effect until superseded by subsequent regulations, included 213 orders for summary justice, specifying crimes and the punishments that were to be meted out on the spot. These orders are especially valuable because senior officers with decades of experience and service designed them, thus reflecting a thorough operational knowledge of the army and of the military justice system.

Regimental courts martial left behind a larger documentary footprint, due to a requirement for the courts to prepare written proceedings for the regimental commander

⁴² Arthur N. Gilbert, "Military and Civilian Justice in Eighteenth-Century England: An Assessment," *Journal of British Studies* 17, no. 2 (1978): 42.

⁴³ For example, see witness testimony to summary justice in the Trial of Lieutenant William Catherwood, April 18, 1774, NA WO71/53, 18-131.

⁴⁴ Archibald Cunninghame, "General Orders of the Garrison of Gibraltar from the 2^d February 1726/7 to 28th October 1745," NAS GD21/1/625

to review and approve before the sentence could be executed. In contrast to general courts martial, regulations did not require officers to forward regimental court martial proceedings to the Judge Advocate General's Office for review. As a result, regimental courts martial proceedings are rare survivals, usually appearing in officers' personal papers. The data set employed below is drawn from a rare surviving set of abstracts that regiments prepared in response to an inquiry from the House of Lords made on December 5, 1777. The data set includes information from trials in fourteen regiments covering the period August 1, 1774 through December 1777. Comprising 1400 cases, it is the single largest data set available for regimental courts martial. While providing little insight into the larger circumstances of each case, since witness testimony was not recorded in the abstract, the data on criminal charges is invaluable, particularly in the way it reveals patterns of similar practice across these regiments.⁴⁵

General courts martial have provided the largest, most easily accessed, and most misleading source of data available from the military justice process. Though favored by practically every scholar of military justice, general courts martial were not representative of everyday crime in the eighteenth-century British Army.⁴⁶ Convening a general court

⁴⁵ "Returns of Courts Martial in Ireland," August 1, 1774-January 10, 1778, House of Lords Record Office HL/PO/JO/10/7/544. Records survive for the 1st, 2nd, 3rd, and 4th Regiments of Horse; the 8th, 12th, 13th, and 18th Regiments of Light Dragoons; the 9th Regiment of Dragoons, and the 3rd, 11th, 36th, 67th, and 68th Regiments of Foot. Only general courts martial records survive for the 11th Foot.

⁴⁶ Stephen Conway, "To Subdue America: British Army Officers and the Conduct of the Revolutionary War," *The William and Mary Quarterly* 43, no. 3 (1986): 381-407; Conway, "The Great Mischief Complain'd of"; Sylvia R. Frey, "Courts and Cats: British Military Justice In the Eighteenth Century," *Military Affairs* 43, no. 1 (1979): 5-11; Frey, *The British Soldier in America*, 71-93; Gilbert, "Law and Honour among Eighteenth-Century British Army Officers"; Gilbert, "Military and Civilian Justice in Eighteenth-Century England"; Arthur N. Gilbert, "British Military Justice during the American Revolution," *The Eighteenth Century* 20, no. 1 (1979): 24-38; Gilbert, "Why Men Deserted from the Eighteenth-Century British Army"; Arthur N. Gilbert, "The Changing Face of British Military Justice, 1757-1783," *Military Affairs* 49, no. 2 (1985): 80-84; Glenn A. Steppeler, "The Common Soldier in the Reign of George III, 1760-1793." (Ph.D. dissertation, Oxford, 1984). All rely on general courts martial data for their discussions of the military justice.

martial was a complicated process, which began with an application to the Judge Advocate General's office if the regiment was stationed in Great Britain or to the local commander-in-chief in the empire for a warrant to hold the court. To secure a warrant, the officer requesting a general court martial had to make a convincing case of need to justify the outlay of resources.⁴⁷ As a result, only the most serious cases appear in these records, which have not been completely surveyed to establish their true extent. No such compact standardized sample exists for general courts martial. Due to the thousands of cases known to exist in the bound volumes, the data set employed below came from a random sampling of the general courts martial proceedings across the period 1715-1781, netting 892 cases. Procedure required general courts martial proceedings to capture extensive data on witness testimony and evidence, which offer a means for understanding exactly what behaviors officers perceived to be a threat. Regulations further required the proceedings to include the specific article of war violated in the charge, thus providing insight into how officers used the Articles of War in practice.⁴⁸ General court martial proceedings thus recorded how officers bridged the gap between the actual disorder and the criminal categories set by official regulations.

There are two methods for employing this data to reveal how officers defined military crime and the degree to which they engaged with the official regulations. The first is to examine the general court martial data to evaluate the degree to which officers proceeded in accordance with official regulations by citing relevant sections of the

⁴⁷ John Parr to Charles Gould, Plymouth Barracks, November 1, 1771, NA WO72/6.

⁴⁸ The instructions sent with every general court martial warrant required the deputy judge advocate recording the proceedings to insure that "all sentences of Courts Martial are to be Decisive according to the Articles of War." "A Deputation Sent to Ensigne Jno Parker with Instructions for holding Courts Martial," June 14, 1722, NA WO71/14, 312.

Articles of War, effectively a top-down approach from the perspective of the reviewing authorities in Whitehall. The second method is a bottom-up view, investigating how criminal charges displayed across the three levels of military justice to gain a better idea of the variety of ways in which officers classified crime, focusing on the patterns evident in the phrasing of criminal charges and how closely those charges resembled relevant sections from the Articles of War. The emphasis in this second approach is on the levels of the military justice process where civilian authorities did not exercise direct oversight or involvement and where officers were free to exercise their discretionary powers and proceed in accordance with their own understanding of what the disciplinary situation required. Together these methods offer an opportunity to begin understanding how officers labeled the disorders they faced and the degree to which they consciously engaged with the developing legal-military state.

In examining the general court martial data set from the judge advocate general's perspective, issues immediately arise. Of the 892 trial proceedings examined, only 457 or 51 percent of the total set, cited a specific article of war. Of the remaining 435 that contained no reference to a specific article in relation to the charge, 143 trials ended in acquittals, where one would not expect the judges to necessarily reference a specific article. Nevertheless, 290 trials that resulted in a guilty verdict and significant punishment contained no direct reference to the Articles of War. Yet the crown and local commanders-in-chief approved these proceedings, which took place both within Great Britain and in the larger imperial sphere, and placed the sentences into execution. This combination of officers ignoring protocol and the reviewing authorities' tolerance for this

shortfall in roughly 33 percent of cases sampled highlights the limits of the legal-military state's control over defining crime in actual practice.

A second indication of the legal-military state's limits can be found in the relatively small number of specific articles cited in the 457 trials that recorded direct engagement with the Articles of War. The Articles of War of 1718 contained 33 articles enumerating specific crimes, while the Articles of War of 1749 contained 71 such articles. The trials in the general court martial data set cited 39 different articles: nine distinct articles from the pre-1747 era and 26 from after 1747. These articles, the frequency with which they were cited, and the degree of match between the crime covered in the article and the actual charge levelled against the defendant reveal how officers applied and engaged with the Articles of War. Overall the data reveals that officers generally applied the Articles of War correctly, despite showing an overwhelming reliance on a relatively small portion of that code.

Of the 244 general courts martial trials held before 1747 in this sample, 65 (26 percent) cited individual articles of war. That figure falls significantly below the 51 percent rate for the overall sample, likely a reflection of the system's relative newness during the period. Due to some trials featuring multiple charges, there were 71 discrete references to specific articles of war, as displayed in Table 1.2. The most important element of this data is the overwhelming use of Articles 10 and 11, which addressed different varieties of desertion. The use of both articles indicates that officers, even when charging soldiers with desertion, were able and willing to distinguish between a soldier who left his regiment and attempted to disappear into civilian life and a soldier left one regiment to join another without permission.

Article of War Cited	Frequency	Crime as Stated in Articles of War
Article 6	1	Seditious or disrespectful speech to monarch, generals
Article 9	4	Resisting officer in execution of his duties
Article 10	54	Desertion
Article 11	5	Enlisting in another unit without a discharge from current unit
Article 13	2	Leaving confinement/escaping from prison
Article 14	4	Misbehavior before the enemy
Article 19	1	Dueling

Table 1.2 Frequency of specific articles of war and their crimes cited in pre-1747 general court martial trials

The articles cited with less frequency indicate offenses of particular concern to officers, where the judges serving in these court martial trials acted to insure their proceedings would be approved. The trial citing Article Fourteen is a case in point: assembled on November 3, 1746, the court martial tried 25 men of General Frampton's Regiment for running away from French soldiers at a skirmish on September 21 that was part of the L'Orient Expedition in France. By convicting four of the offending soldiers and sentencing them to death, the court was sending a message about the price of cowardice to the entire regiment and other units engaged in the expedition, which would have been lost if the reviewing authority had voided the proceedings.⁴⁹

This pattern of emphasizing a small number of the Articles of War repeated in the post-1747 trial data. The rate of citing specific articles of war more than doubled in the post-1747 period: out of the 648 trials captured in the sample, 392 or 60 percent included direct references to specific sections of the regulations. Due to some cases featuring multiple charges, officers cited specific articles of war 491 times. As Table 1.3 reflects, desertion remained a focus for officers' attention, with the added appearance of trials for soldiers who encouraged other men to leave the service. The diversity of other articles

⁴⁹ NA WO71/39, 187-208.

suggests that officers were increasingly familiar and engaging with the formal regulations that framed the legal-military state.

Article of War Cited	Frequency	Crime as Stated in Articles of War
Article 3, Sec 2	19	Joining in mutiny or sedition
Article 4, Sec 2	7	Failing to suppress/warn of planned mutiny or sedition
Article 5, Sec 2	15	Striking superior officer
Article 1, Sec 6	257	Desertion
Article 2, Sec 6	5	Absence without leave
Article 4, Sec 6	5	Persuading soldiers to desert
Article 3, Sec 13	4	Selling or losing arms, clothing, or accoutrements
Article 4, Sec 14	6	Failure to report for duty or leaving his post without permission
Article 5, Sec 14	7	Drunkenness
Article 6, Sec 14	3	Sleeping on duty
Article 23, Sec 15	6	Breaking out of prison
Article 25, Sec 15	4	Conduct unbecoming an officer
Article 2, Sec 20	43	Authorization to try all crimes normally under civilian jurisdiction in areas of the empire without civilian courts
Article 3, Sec 20	23	Authorization to try all non-capital disorders that threaten military discipline and are not mentioned in Articles of War

Table 1.3 Frequency of specific articles of war and their crimes cited more than twice in post-1747 general court martial trials

Two other significant articles stand out in this sample, which partly reflect the expansion of military justice overseas. Article Two of Section Twenty, which had been present in the Articles of War of 1718 as Article 46, presented officers with a general purpose section under which to lump a variety of offenses, particularly robbery, murder, and destruction of property. Section 20, Article 3 similarly offered a catch-all heading for miscellaneous varieties of crime, including offenses covered by other more specific articles, such as making false returns, absence without leave, leaving a post without leave, insolence, and drunkenness. Officers' extensive use of Section 20, Article 3 suggests a preference for generic regulations, which is also evidence in the summary justice and regimental court martial data.

The post-1747 trials also included many unique citations of specific articles, as reflected in Table 1.4. These latter instances reinforce the impression that officers were more comfortable and increasingly engaged with citing the Articles of War in their trial proceedings during the latter half of the eighteenth century. These unique references also

Article of War Cited	Frequency	Crime as Stated in Articles of War
Article 1, Sec 2	1	Using traitorous or disrespectful words about the monarch
Article 2, Sec 2	2	Disrespectful conduct or speech towards general or commander
Article 2, Sec 3	1	Discharging soldiers without unit commander's permission
Article 1, Sec 5	1	Making a false return of soldiers or stores
Article 1, Sec 7	1	Using reproachful or provoking language
Article 2, Sec 7	1	Challenging an officer or soldier to a duel
Article 4, Sec 7	1	Resisting arrest
Article 2, Sec 12	1	Making a groundless or vexatious complaint
Article 1, Sec 13	1	Embezzling or willfully damaging military stores
Article 2, Sec 14	2	Sleeping outside of camp or barracks without leave
Article 3, Sec 14	1	Being out of quarters at night without leave
Article 22, Sec 15	2	Failure to report names of prisoners to commanding officers

Table 1.4 Specific articles of war and their crimes appearing twice or less in post-1747 general court martial trials

indicate the presence of outlier trials in the data set. The references to Section 13, Article 1 and Section 5, Article 1 are both drawn from the court martial of Major William Maxwell of the 6th Regiment of Foot on June 24, 1774 at Kingston, St. Vincent's. Maxwell's commanding officer charged him with "Disobedience of orders, neglect of duty, embezzling and misapplying provisions, making false returns, behavior unbecoming an officer," and with violating Section 2, Article 5.⁵⁰ The presence of these unique references also serves as a reminder that officers did not approach the Articles of

⁵⁰ NA WO71/53, 142-179.

War from a uniform perspective, as a result producing significant variations in the articles cited.

In shifting the focus to data from summary justice and regimental courts martial, the variety of criminal charges broadens considerably. It is especially key to bear in mind that the charges in all of these data sets reflects how officers perceived behavior, not necessarily how that behavior was intended by the perpetrators. The actual intent behind some of these criminal behaviors, particularly cases of perceived resistance to military authority involving common soldiers, will be addressed elsewhere. Patterns observed in the phrasing of charges from the regimental court martial data highlight types of disorder that were of particular concern to officers. The resulting six key themes of absence, drunkenness, property, duty, resistance, and violence-related crimes are displayed in Table 1.5, along with their levels of incidence, and are intended to emphasize the linkages between the different levels of the military justice process.

There are several caveats to this analysis that underlay the relatively conservative approach towards interpreting these patterns. First, the documents reveal a tendency towards cases with multiple charges, which cause one case to fall into several thematic categories. The association of drunkenness charges with a variety of other criminal categories is a case in point: drunkenness, as Kopperman indicates, facilitated the commission of other crimes, particularly desertion.⁵¹ Cases where the defendant faced multiple charges have been treated as separate cases for the purposes of counting the incidence levels across each category. Second, some charges related to a specific category appeared only in one or two levels of the data. Thus the way a specific thematic

⁵¹ Kopperman, "The Cheapest Pay."

category appeared in the general orders for summary justice did not always link cleanly to the general court martial level, reinforcing the diversity of charges and officers' perspectives on defining military crime. As a result, these categories are treated more as suggestive rather than as dogmatic divisions. Third, both the summary justice and general court martial data sets introduce criminal charges from the wider empire that could not be legally prosecuted in the military justice system as it operated in Great Britain. The general court martial data is included to connect officers' approach to defining crime at the lower levels of the military justice process to their engagement with the Articles of War.

Criminal Category	General Orders	Regimental Courts	General Courts	Total Incidence
Absence	35	512	572	1119
Drunkenness	12	364	12	388
Property	34	316	115	465
Duty	51	211	116	378
Resistance	66	179	112	357
Violence	15	126	80	221
Total Data Set Size	213	1721	1005	2939

Table 1.5 Incidence of criminal categories as reflected in general orders for summary justice, regimental courts martial, and general courts martial.

Of all the crimes within the military jurisdiction, absence loomed the largest. The significance of desertion, the manner in which unauthorized absence displayed at the general court martial level, has been observed previously: Arthur Gilbert has attributed desertion as accounting for 90 percent of surviving general courts martial cases, although it accounts for only 56 percent of the cases in the current sample.⁵² As Table 1.6 demonstrates, absence-related crimes went far beyond permanently absconding from a regiment or garrison. Failure to report for duty at a specified time, staying out of barracks

⁵² Gilbert, "Military and Civilian Justice in Eighteenth-Century England," 43.

after hours, and overstaying a furlough all constituted actionable offenses within this category.

Charge	General Orders	Regimental Courts	General Courts	Total Incidence
Absence from duty	1	202	7	210
Absence from quarters	6	111	0	117
Out at Night	0	124	0	124
Desertion	0	46	547	593
Overstaying Leave	0	10	0	10
Quitting Post	8	9	11	28
Unauthorized movement	20	7	1	28
Multiple Enlistments	0	3	6	9
Total	35	512	572	1119

Table 1.6 Incidence of absence-related offenses

The army established specific numbers of soldiers for each regiment, designed to balance financial considerations against labor needs, which explains why false musters were such a significant crime from the government's perspective.⁵³ Thus absence directly impacted unit efficiency and could pose a significant risk to security, both to the soldiers relying on their comrades assigned to stand watch and to the additional people or property whom they may have been stationed to protect. Unauthorized movement applied to cases where soldiers violated orders to stay within a certain area or to avoid other areas. At Gibraltar, these off-limits areas included the garrison hospital, the Roman Catholic church (a remnant from the Spanish occupation), bathing areas in the sea where the men could not be supervised and the hill behind the main fortifications. Visiting the hospital constituted a threat of spreading disease, while regulations barred Roman

⁵³ Houlding, *Fit for Service*; Alan J Guy, *Oeconomy and Discipline: Officership and Administration in the British Army, 1714-63* (Manchester, U.K.; Dover, N.H., U.S.A.: Manchester University Press, 1985).

Catholics from joining the British Army. A hint as to the why the great hill on the peninsula was out of bounds appeared in a June 6, 1740 order, stating that any soldier “seen near the top of the hill...will be deem’d intending to desert.”⁵⁴ Though the Mutiny Act and the Articles of War classified desertion as a capital crime, restricting it to a general court martial’s jurisdiction, the data clearly indicates that officers honored this distinction more in the breach. Absence could also foster other criminal activity: in June 1755 at Inverness, Scotland, Private George Tyrry and Grenadier Richard Sore, both of Colonel Holmes’ Regiment, left their sentry posts to rob the customs house and subsequently deserted with their ill-gotten gains.⁵⁵

As Table 1.6 reflects, most of the general court martial cases in the absence category focused on desertion. These trials generally cited the relevant article of war against desertion. For the first few decades of the century, Article 10 dealt directly with desertion, while Article 11 addressed the related crime of multiple enlistments, where a soldier would enlist in one unit, then leave it and join another unit. Two soldiers of Colonel Tatton’s Regiment faced a general court martial on November 12, 1735, for deserting their companies and enlisting in other regiments. The court charged both with violating Articles Ten and Eleven.⁵⁶ Cases occurring after the format shift of 1747 cited Section 6, Article 1 (Desertion), which dealt with simple desertion, while Article Three of

⁵⁴ Cunninghame Orderly Book, 119.

⁵⁵ NA WO71/42, 45-55. A grenadier was a special variety of infantryman, trained and equipped to lead assaults on fortifications by lobbying hand grenades at the enemy. Smith, *An Universal Military Dictionary or a Copious Explanation of the Technical Terms &c. Used in the Equipment, Machinery, Movements, and Military Operations of an Army*, 117.

⁵⁶ NA WO71/16, 48-52.

the same section treated multiple enlistments. The general court martial that tried Private Thomas Davidson of Lieutenant-General Shelton's Regiment for desertion in July 1753 charged him with breaking both of these articles.⁵⁷ Occasional outliers occurred in the data, reflecting differences in the way some officers applied the regulations. When Grenadier Edward Seager of Colonel Pocock's Regiment appeared before a general court martial in November 1715, he faced a charge of desertion and violating Article 23, against overstaying a furlough.⁵⁸ Tyrry and Sore each faced charges of violating Section 14, Article 6 (Of Duties in Quarters, in Garrison, or in the Field) for leaving their sentry posts before deserting.⁵⁹ The absence category thus offers a clear-cut example of officers applying the regulations to actual disorders in a seamless fashion.

Given that Paul Kopperman has documented pandemic levels of alcohol abuse in the army, it is little surprise that drunkenness rates highly as a criminal category. Drunkenness appears more frequently in the regimental court martial data than in the other levels, as reflected in Table 1.4, because it was not a capital crime. The Articles of War of 1718 addressed drunkenness in Article 34 (which appeared as Section 14, Article 5 after the 1747 format change), which stated that any officer or soldier "found Drunk on his Guard, Party, or other Duty under Arms" would be cashiered or suffer corporal punishment, respectively.⁶⁰ Appearances of drunkenness in the general orders for summary justice generally involved warnings against it, while five cases of soldiers being

⁵⁷ NA WO71/41, 35-38.

⁵⁸ NA WO71/34, 4, 6.

⁵⁹ NA WO71/42, 45-55.

⁶⁰ *Rules and Articles*, 1718, 25.

drunk on guard duty account for the only general court martial data where drunkenness was the sole charge.

Drunkenness appears in association with other, more serious, crimes more often than any other crime in the data sets. While nearly 50 percent of references to drunkenness in the regimental courts martial data charge the soldiers involved with being drunk, as noted in Table 1.7, those cases generally featured additional charges focusing on what the soldier did while he was drunk. These associated crimes including selling equipment, being absent from various duties, failing to perform mandatory work, and insolence. In general court martial cases, these associated crimes included embezzling regimental funds, absence from a recruiting party, various acts of violence, and resisting arrest.⁶¹

Charge	General Orders	Regimental Courts	General Courts	Total Incidence
Being Drunk	0	180	3	183
Drunk on Duty	7	117	1	125
Drunk on Guard	0	51	7	58
Drunk in Quarters	0	12	0	12
Public Drunkenness	5	4	1	10
Total	12	364	12	388

Table 1.7 Incidence of drunkenness-related offenses

It is noteworthy that most general court martial trials involving drunkenness took place outside of Great Britain, potentially due to the increased threat by operating in foreign areas where attacks were more likely and maintaining peak combat preparedness was more important. Orders from the governor of Gibraltar issued on May 3, 1727, “to

⁶¹ Trial of Sergeant John Harvey, 37th Regiment of Foot, Minorca, January 27, 1768, NA, WO71/76, 305-308; Trial of Private Philip Divine, 54th Regiment of Foot, Gibraltar, December 29, 1766, NA, WO71/76, 95-98; Trial of Private Robert Keeler, 30th Regiment of Foot, Gibraltar, July 8, 1767, NA, WO 71/76, 245-250.

have drunkenness suppress, especially in regard to the Men for duty,” seems suggestive of this perspective on the overall context.⁶² The general court martial trials involving drunkenness, which fall after the 1747 format change in this data sample, cited Section 14, Article 5 providing another example of officers fairly easily applying regulations to actual crime.

Property crime, defined to include financial offenses as well as instances of theft and property destruction, offers an example of an offense category that bordered directly on the civilian jurisdiction, as exemplified by significance of this criminal category to studies of civilian crime and justice.⁶³ To stay within the proper jurisdiction, officers were required to focus on instances of soldiers stealing military equipment and material. Article 40 of the Articles of War of 1718 (which appeared as Section 13, Articles 1-3, after 1747) forbade stealing or selling any equipment issued from government stores, which effectively included most of the typical soldier’s belongings.⁶⁴ While the patterns of property crime reflected in Table 1.8 clearly extend beyond this narrow definition, many of these crimes occurred outside Great Britain, in areas with no civilian courts. Thus coining (the eighteenth-century term for counterfeiting), forgery of financial documents, and vandalism could legitimately fall within the military jurisdiction. Theft and the concomitant sale of the stolen goods by and large involved the strictly military equipment, supplies, and clothing upon which the regulations focused. Regimental court

⁶² Cunningham Orderly Book, 18.

⁶³ Beattie, “The Pattern of Crime in England 1660-1800”; Beattie, *Crime and the Courts in England, 1660-1800*, 140–192; Douglas Hay, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975).

⁶⁴ *Rules and Articles*, 1718, 29.

martial charges mentioned shirts, hats, stockings, and ubiquitous “necessaries,” period terminology for the assemblage of basic issue clothing, all of which appeared in the summary justice and general courts martial data.⁶⁵ Lost equipment included a pistol, a cloak, hat, necessities, and stable equipment. The same varieties of material appeared in charges for selling and buying illicit goods at all levels of the military justice process, reinforcing the links between these crimes.

Charge	General Orders	Regimental Courts	General Courts	Total Incidence
Theft	9	141	52	202
Selling illicit goods	2	88	13	103
Embezzling/financial fraud	0	52	7	59
Losing equipment	0	24	0	24
Robbery	1	8	29	38
Gaming	7	2	0	9
Coining	1	1	7	9
Forgery	0	0	3	3
Purchasing illicit goods	3	0	1	4
Marauding	0	0	3	3
Defacing property	11	0	0	11
Total	34	316	115	465

Table 1.8 Incidence of property-related offenses

Three crimes represent how a similar offensive action could display differently across the military justice process, and also offer examples of soldiers committing crimes against civilians: defacing property, robbery, and marauding. Examples of defacement of property only appear at the level of summary justice from the Gibraltar orders and included cutting trees and brush, removing stones from breakwaters, damaging partridge nests, removing structural elements from barracks when changing quarters, breaking

⁶⁵ Smith, *An Universal Military Dictionary or a Copious Explanation of the Technical Terms &c. Used in the Equipment, Machinery, Movements, and Military Operations of an Army*, 193.

windows, and setting dogs on livestock. This list effectively describes actions that could otherwise be classed as robbery because they involve soldiers taking things without permission: firewood, eggs, worms and insects from the breakwaters for bait, and structural materials used to improve their own quarters. While a single order for summary justice warned against “daily robberies,” actual charges of robbery appeared beginning at the regimental court martial level.⁶⁶ The eight cases reflected in Table 1.5 covered five incidents: a soldier robbing a sailor, a soldier robbing another soldier, a drummer breaking into a house, four soldiers breaking into the home of one Richard Hase and taking alcohol and candles, and one soldier robbing two civilians of unspecified items. As with the incidents lumped under defacing property, these instances describe soldiers forcibly taking items, but in the regimental court martial data there are clear victims. In four out of the five cases, the victims were civilians. The twenty-nine robbery incidents among the general courts martial cases ran the gamut from soldiers stealing items from other soldiers and officers to instances of breaking into military storerooms and civilian homes to take what they could find.⁶⁷ While robbery and theft had much in common, the victimology linked robbery and marauding as well. Captain George Smith defined marauding as soldiers plundering the countryside, specifically targeting civilians.⁶⁸ The

⁶⁶ Cunninghame Orderly Book, 44-45, 49, 98.

⁶⁷ Trial of Drummer James Colliwood, Private Thomas Mould, and Private Hugh Allsop, 67th Regiment of Foot, Minorca, NA, WO71/76, 275-280; Trial of Private Stephen Bloy, Royal Fusiliers, Gibraltar, April 12, 1759, NA WO71/67, 83-89; Trial of Private Samuel Anthony, Private John Eccles, Private John Daw, and Private Archibald Campbell, 19th Regiment of Foot, Gibraltar, November 18, 1768, NA WO71/77, 132-141.

⁶⁸ marauding “means a party of soldiers, who, without any order, go into the neighbouring houses or villages, when the army is either in camp or garrison, to plunder and destroy, &c. Marauders are a disgrace to the camp, to the military profession, and deserve no better quarters from their officers than they give to poor peasants.” Smith, *An Universal Military Dictionary or a Copious Explanation of the Technical Terms &c. Used in the Equipment, Machinery, Movements, and Military Operations of an Army*, 159. Smith’s

cases of marauding tried by general courts martial all occurred in Germany during the Seven Years War and featured soldiers accused of stealing from local civilians.⁶⁹ These ways in which stealing non-military items manifested in different ways across the military justice process underscores the difficulty facing any attempt at creating strictly defined criminal categories, as well as emphasized the flexibility with which officers defined crimes.

Despite the variety of offenses in the property crime category, officers invariably made use of only two articles when bringing offenders to a general court martial. The first, Article Two of Section Twenty of the post-1747 Articles of War, empowered courts martial to try any offenders against “the known Laws of the Land,” including the crimes of theft, robbery, and coining. The second, Article Three of Section Twenty, authorized courts martial to try officers and soldiers for all crimes and disorders “to the Prejudice of good Order and Military Discipline” that were “not Capital” or enumerated elsewhere in the Articles of War.⁷⁰ The reliance on these two articles to fulfill regulatory requirements reflects the locations of these trials, which were predominantly outside Great Britain, in Gibraltar, Minorca, and North America. Of the trials sampled, the only case of property crime in Britain that fell under the purview of a general court martial: three men of the 11th Regiment of Foot who robbed civilians along the south coast of England, claiming to be searching for smuggled goods. The trial proceedings contained no reference to an

dictionary was a privately printed volume appearing in 1779: while it provides handy definitions for certain crimes, it was only available to officers who purchased it and was not in print for most of the period.

⁶⁹ Trial of William Spooner, General Howard’s Regiment, Adnihouser Camp, Germany, August 16, 1759, NA WO71/67, 217-218; Trial of Alexander McIntosh, Lord Homes’ Regiment, Adnihouser Camp, Germany, August 16, 1759, NA WO71/67, 218-219; Trial of Private John Morgan, General Husk’s Regiment, Adnihouser Camp, Germany, August 16, 1759, NA WO71/67, 219-220.

⁷⁰ *Rules and Articles*, 1749, 29–30.

article of war, yet still received royal approval, with no explanation provided for why the men were not tried at a local civilian court.⁷¹ Section 9, Article 5 of the post-1747

Articles of War offers a potential explanation for this conundrum, as well as for the cases of soldiers robbing civilians that appear in the regimental courts martial data. This article directed officers to “to see Justice done” if a civilian complained of being mistreated by an officer or soldier under his command.⁷² While not explicitly requiring a court martial to convene for addressing civilian grievances, Article 5 could have been construed to offer grounds for civilians proceeding against soldiers in the military justice system.

While no official correspondence suggests to indicate any specific sanction from Whitehall for such practices, it would fit in with officers’ demonstrated preference for charging men who committed property crimes under the catch-all articles, rather than invoking the more specific sections of the Articles of War concerned with embezzling.

The duty-related offenses correlated to violating the expectations for how an officer or soldier was to behave. While Arthur Gilbert has demonstrated that expectations for how officers should behave were rather subjective, contemporary military advice book author Thomas Simes provided a lengthy description of expectations for the ideal common soldier in *The Military Instructor*. Simes advised that a soldier must

...pay the greatest attention to the articles of war when he hears them read...prefer to fall like a brave man, rather than be branded with the name of a coward, or deserter...be sober and orderly in his behaviour, respectful to his superiors, and obedient to all officers, from the Commander to the Launce Corporal...keep his uniform, as well as other apparel, neat and clean; his arms and accoutrements bright and in excellent order...ever to be alert, and

⁷¹ Trial of Private John Duggan, Private Henry Magee, and Private Thomas Elliot, 11th Regiment of Foot, Salisbury, England, January 6, 1755, NA WO71/42, 7-11; Henry Fox to Charles Gould, War Office, January 22, 1755, NA WO71/42, 12.

⁷² *Rules and Articles*, 1749, 14.

observe his orders; ask no reasons for them, or dare to think them of little consequence...⁷³

Most of these expectations could also be applied to officers during the period. Table 1.6 demonstrates how breeches of these standards translated into criminal charges.

Charge	General Orders	Regimental Courts	General Courts	Total Incidence
Neglect of Duty	14	67	13	94
Unsoldier-like behavior	7	39	1	47
Mishandling of Prisoners/Deserters	0	31	1	32
Sleeping on Post	3	23	7	33
Guard Duty	23	23	5	51
Irregularities	0	17	0	17
False Report/Return	0	13	14	27
Conduct unbecoming an officer	0	0	32	32
Failure to report crime	3	0	1	4
Misbehavior before the enemy	0	0	43	43
Not relaying orders	1	0	0	1
Total	51	213	117	381

Table 1.9 Incidence of duty-related offenses

The combination of highly specific and highly general charges is reflective of the intersection between the military justice system and the army's myriad structural and operational idiosyncrasies. The more specific charges, including sleeping on post, making a false report or return, and failure to report a crime, reflected key stress points within the army's organizational matrix, where failure to perform one's duty could have significant

⁷³ Thomas Simes, *The Military Instructor, For the Non-Commissioned Officers and Private Men of the Infantry*, London: Millan, 1779, pgs 31-33.

and direct consequences. For example, the single general court martial case involving failure to report a crime was the trial of a sergeant for not warning the officers of his regiment that soldiers were planning a mutiny.⁷⁴ The highly general catch-all categories, such as neglect of duty, irregularities, unsoldier-like behavior, and conduct unbecoming an officer reflected a recognition that forms of disorder could occur which could not be anticipated or easily described in a formal code. As Arthur Gilbert has demonstrated, courts martial utilized the conduct unbecoming an officer charge to police personal disputes and honor code violations that might have otherwise created a rift in the army's command structure, a point Caroline Cox has echoed in her study of honor in the American Continental Army during the Revolutionary War.⁷⁵ Neglect of duty performed a similar function. While instances at the summary justice and regimental court martial level provide few details on how officers levelled this charge, the general court martial data records instances ranging from an officer not inspiring his men to work sufficiently hard, a surgeon's mate ignoring his patients, to a lieutenant in the Royal Artillery arresting the wrong soldier after a fight and failing to report the incident in a timely fashion.⁷⁶ The high frequency of these catch-all charges speaks to the degree to which officers focused on forms of disorder that did not fit within the confines of more specific charges.

⁷⁴ Trial of Sergeant John Hunly, 17th Regiment of Foot, Fort Edward Camp, New York, June 25, 1759, NA WO71/67, 175-179.

⁷⁵ Gilbert, "Law and Honour among Eighteenth-Century British Army Officers"; Caroline Cox, *A Proper Sense of Honor: Service and Sacrifice in George Washington's Army* (Chapel Hill: University of North Carolina Press, 2004).

⁷⁶ Trial of Captain Christopher Russell, 17th Regiment of Foot, Fort Ticonderoga, NY, NA WO71/67, 223-235; Trial of Surgeon's Mate Peter Elligee, 33rd Regiment of Foot, Minorca, October 22-23, 1766, NA WO71/76, 52-72.

Officers' demonstrated greater specificity when linking charges to individual articles of war for duty-related offenses. Officers linked cases of soldiers sleeping on their posts to Section 14, Article 6, and officers behaving inappropriately to Section 15, Article 25.⁷⁷ Soldiers of General Frampton's Regiment, charged with misbehaving themselves in front of the enemy in November 1746 were also cited for violating Article Fourteen.⁷⁸ Yet catch-all articles of war still appeared in general court martial proceedings: officers cited Section 20, Article 3, of the post-1747 Articles of War in relation to charges of "military misbehavior," "making an unjust complaint," and "ill conduct," reflecting the vague nature of these charges.⁷⁹ Thus officers' use of the Articles of War mirrored the mixture of specific and general charges appearing throughout the summary justice and trial data.

Despite its obvious significance to officers, as reflected in Table 1.10 below, resistance is the most difficult thematic category to approach. The criminal charges contained therein are linked by a combination of overt and implied opposition to the army's social and command hierarchy. As a result, these charges, more than any other

⁷⁷ Trial of Private Joseph Waters and Private Samuel Horton, 61st Regiment of Foot, Louis Camp, Grande Terre, March 24, 1759, NA WO71/67, 61-63; Trial of Lieutenant Robert Pennington and Lieutenant John McCulloch, Lord Tyrawley's Regiment, Gibraltar, May 10, 1749, NA WO71/39, 102-126; *Rules and Articles for the Better Government of His Majesty's Horse and Foot Guards, and All Other His Forces in Great Britain and Ireland, Dominions beyond the Seas, and Foreign Parts*, 1749, 18, 27.

⁷⁸ Trial of Private Robert Watson, Private Joseph Berryman, Private Matthew Thorp, Private Charles Belcher, and Private Richard Taylor, General Frampton's Regiment, NA WO71/39, 187-208; *Rules and Articles for the Better Government of His Majesty's Horse and Foot Guards, and All Other His Forces in Great Britain and Ireland, and Dominions beyond the Seas* (London: Printed by Thomas Baskett, printer to the King's most excellent Majesty; and by the assigns of Robert Baskett, 1746), 9.

⁷⁹ Trial of Lieutenant Dalrymple and Ensign Gaskell, Gibraltar, September 6-8, 1768, WO71/77, 107-117; Private John Ledger, 39th Regiment of Foot, Gibraltar, August 17, 1770, NA WO71/77, 302-308; Trial of Captain Richard Russell, General Braddock's Regiment, Gibraltar, July 17, 1755, WO71/42, 75-123; *Rules and Articles for the Better Government of His Majesty's Horse and Foot Guards, and All Other His Forces in Great Britain and Ireland, Dominions beyond the Seas, and Foreign Parts*, 1749, 30.

variety, reflect the officers' appraisal of behavior. The other criminal categories could be ascertained in more concrete fashions—whether a man left his post without permission, was obviously drunk, took items that were not his, failed to march properly, or struck someone. Resistance relied on an officers' perception of a soldier or other officer challenging him in the execution of his duty. Thus crimes of resistance were intrinsically linked both to ideas about duty, particularly obedience, and to one's position on the army's social ladder. Yet as up to debate as these charges may be, the gravity of their impact on the army's cohesion and operational capacity is beyond question, as scholars of mutiny have amply demonstrated.⁸⁰

Charge	General Orders	Regimental Courts	General Courts	Total Incidence
Disobedience of Orders	43	87	21	151
Insolence	5	60	22	87
Breaking Confinement	0	14	7	21
Damaging Equipment	0	14	1	15
Self-mutilation	0	3	0	3
Challenging officer in execution of his duties	0	0	1	1
Sedition	0	0	16	16
Mutiny	0	0	41	41
Treason	1	0	3	4
Defacing Orders	2	0	0	2
Selling liquor	11	1	0	12
Firing muskets without permission	4	0	0	4
Total	66	179	112	357

Table 1.10 Incidence of resistance-related offenses

⁸⁰ John Prebble, *Mutiny: Highland Regiments in Revolt, 1743-1804* (London: Secker & Warburg, 1975); Kopperman, "The Stoppages Mutiny of 1764"; Way, "Rebellion of the Regulars."

The charges contained in this category represent a similar grouping of highly specific and general crimes seen across all categories. The former easily correlate with specific sections of the Articles of War: breaking confinement was covered by Article 23 Section 15, and damaging equipment by Article 3 Section 13.⁸¹ Regimental courts martial tried one trooper of the 3rd Regiment of Horse for “Cutting his Sword Belt”, another for “Cutting his Hat Contrary to Orders,” and a soldier of the 3rd Regiment of Foot “For destroying his Waistbelt.” These instances suggest a level of willful destruction that exceeded normal wear-and-tear. Examples with more pointed symbolic value included “breaking a window” and “breaking the door of the Blackhole, & lighting a Fire on the Guard bed.”. The cases of mutilation, including one trooper of the 12th Light Dragoons tried for “Cutting off[f] his Thumb” and two soldiers of the 68th Regiment who cut off their fingers, were probably designed to secure a discharge.⁸²

The disobedience of orders and insolence charges offer a key for understanding the other general charges in this category, since both occur throughout all three samples. The governors of Gibraltar employed disobedience of orders as a general charge against any small offenses they wished to quell. General orders for October 16, 1740, declared that soldiers firing their muskets without permission would be “punish’d for disobedience of orders” while an October 28, 1742 order forbidding the sale of liquor referenced the “several Irregularitys” committed daily under that cover and threatened punishment for any soldier “discovere’d acting contrary to this order.”⁸³ On November 11, 1735, the

⁸¹ *Rules and Articles for the Better Government of His Majesty’s Horse and Foot Guards, and All Other His Forces in Great Britain and Ireland, Dominions beyond the Seas, and Foreign Parts*, 1749, 10, 17, 27.

⁸² HL/PO/JO/10/7/544.

⁸³ Cunninghame Orderly Book, 123-124, 150. The other three of the four orders against discharging muskets came during the siege of 1727, implying that soldiers coming off guard were emptying the loaded

governor forbade soldiers from working as porters hauling material for civilians “on pain of being punish’d for disobedience of orders.” In the general orders for May 2, 1731, the governor ordered a purge of the garrison’s dog population due to over-crowding and directed any soldier “discover’d not complying with this order” to be severely punished.⁸⁴

Regimental court martial data also reveals the ranks of officers and non-commissioned officers whom soldiers most frequently disobeyed. Seven troopers of the 8th Dragoons stood trial for “Disobedience of Orders to a Qur Masr [Quartermaster] when on Command in England for Horses,” while a soldier of the 68th Regiment of Foot faced a regimental court martial for disregarding his major’s orders. Four other men stood charged with disobeying their corporals’ orders. Other soldiers faced charges for refusing to attend their duties, appear for muster, return to their barracks, and for not providing testimony for a regimental court martial. Examples of disobedience of orders charges from general courts martial included a dragoon who refused to carry a horse collar, a soldier who refused to remove his hat when order to do so, an officer leaving a transport ship without permission, and an American provincial officer who refused to march with his troops until he received his pay.⁸⁵ These examples emphasized that failure to heed any orders given by a superior, even a non-commissioned officer, laid the grounds for disobedience of orders charges.

Insolence charges were similarly focused on displays of resistance to authority figures. The five orders against insolence in the Gibraltar sample confirm that

cartridges by firing their pieces rather than by using a metal corkscrew-like device called a worm, in conjunction with their ramrod, to laboriously extract the musket ball and powder.

⁸⁴ Cunningham Orderly Book, 65-66, 95, 154.

⁸⁵ NA WO71/16, 31-32; NA WO71/27, 148-171; NA WO71/53, 188-201; NA WO71/67, 273-274.

contemporaries applied this label to verbal expression, but provide no further details on precisely what soldiers said. An order from March 28, 1732 forbade “provoking language” while an order from February 16, 1733 referenced “abusive language,” which echoed Article 19’s prohibition of “provoking speeches.” Three out of the five orders pertained to soldiers being insolent to corporals and sergeants, while the other two addressed insolence to the overseers of the works.⁸⁶ Charges of insolence leveled in the regimental court martial data included sixteen cases of insolence towards a corporal, nine cases of insolence towards a serjeant, and six cases towards an officer. A trooper and a trumpeter of the 8th Dragoons stood accused of being “Insolent to a Qur Masr [Quartermaster] in having refused to Sweep a part of the Barrk Yard.” The general court martial of Private Duncan Stewart at Chatham Barracks in 1769 for “insolence towards Sjt. Samuel McWilliam” specified Stewart’s offense as consisting of providing “many provoking and aggravating Answers” to his sergeant’s questions and calling McWilliam “a Rascal, a Scoundrel, and a Villain.”⁸⁷ In explaining his rationale for charging one of the captains in his regiment with insolence, Lieutenant Colonel John Darby stated that “too great mildness might have been of bad tendency and Injured the Service,” offering a rare insight into officers’ thought processes.⁸⁸ As with disobedience of orders, insolence served as a charge for curbing any challenge to the command hierarchy.

⁸⁶ Cunninghame Orderly Book, 72-73, 78, 116, 155, 192; *Rules and Articles for the Better Government of Our Horse and Foot-Guards and All Other Our Land-Forces in Our Kingdoms of Great Britain and Ireland, and Dominions beyond the Seas.*, 1718, 10.

⁸⁷ NA WO71/27, 190-194.

⁸⁸ NA WO71/67, 223-235. The court found Russell guilty of disrespectful behavior and ordered him to apologize to his commander.

Disobedience of orders and insolence easily transitioned into mutiny and sedition. In February 1753, Ensign Hammond Clements stood charged with “Mutinous behavior on guard and speaking disrespectful words of his superior officers” at Gibraltar. After becoming drunk at a party in the guard house while he was on duty and refusing to leave when ordered to do so by his commander, Clements loudly insulted the general officers of the army and the Duke of Cumberland for suppressing his advancement in rank. He then threatened fellow officers first with a bottle and then with his sword when they attempted to arrest him.⁸⁹ The sedition cases in the sample were effectively instances of insolence aimed at the King and occurred during the first half of the century when Jacobite threats were at their height. For example, seven soldiers stood accused of making disloyal toasts to figures including the Duke of Ormond and James Francis Edward Stuart, and to the “Royal Exchange.”⁹⁰

The combination of alcohol abuse, high social tensions, and demanding duties captured in the preceding thematic categories along with the presence of weapons and men trained in their use explains the frequency of violence-related criminal charges. As reflected in Table 1.11, the violent crimes that remained in the military jurisdiction are what Jennine Hurl-Eamon has described as petty violence in her own study of comparable offenses in the civilian courts.⁹¹ Officers’ concerns clearly focused on the potential for bodily harm inherent in these violent confrontations. Charges from all three

⁸⁹ NA WO71/41, 1-6.

⁹⁰ Private William Robinson of the Coldstream Guards was tried in August 1715 for making toasts to “the Stewarts, Butlers, Royal Exchange.” NA WO71/14, 52-54.

⁹¹ Hurl-Eamon, *Gender and Petty Violence in London, 1680-1720*.

levels of the military justice process employed the key terms of forcing, quarreling, abusing, fighting, and striking.

Charge	General Orders	Regimental Courts	General Courts	Total Incidence
Assault	9	56	44	109
Assault with weapon	0	7	13	20
Assaulting Civilian	4	25	11	40
Rioting/making a disturbance	2	52	5	59
Total	15	140	73	228

Table 1.11 Incidence of violence-related offenses

Quarreling provides an example of how officers classed assaults across the military justice process. On June 29, 1729, General Jasper Clayton, Governor of Gibraltar, ordered all non-commissioned officers and soldiers “to part quarrels, and prevent any fighting in houses, Barracks or Streets.” His rationale was made clear in the general orders for June 25, 1731, which observed that “many fatal Consequences have and may happen” as a result of such altercations.⁹² Privates Jeremiah Lodge and Edward Sarkey of the 9th Regiment of Dragoons faced a regimental court martial on the same day in October 1777 for “Quarreling in the Barrack Room.” A general court martial tried Ensign Daniel Cole of Brigadier General Clayton’s Regiment and Ensign Scipie Oliphant on September 11, 1727, at Gibraltar for “Quarreling & beating and abusing” one another. These charges echo Article 19’s directive to officers and soldiers to “part and quell all Quarrels.”⁹³

⁹² Cunninghame Orderly Book, 66-67.

⁹³ NA WO71/35, 234-239; *Rules and Articles*, 1718, 11.

Aside from the probability of physical harm, assault also contained an element of resistance to the social order. This shade of social struggle comes across most clearly in charges of striking. Fourteen out of the sixteen regimental court martial cases of striking centered on soldiers targeting their superiors. Seven soldiers struck or threatened to strike corporals, five soldiers struck sergeants, and one trumpeter of the 12th Dragoons struck the regimental adjutant, a junior officer.⁹⁴ General courts martial trials for striking broke down along similar lines: of the sixteen trials, six defendants struck corporals, three struck sergeants, and four struck officers.⁹⁵ The focus on striking tied in with Article 9, which made it a crime for a soldier to strike his superior.⁹⁶

Assault with a weapon, assaulting civilians, and rioting all marked an escalation of the basic crime of assault. Assault with a weapon was nothing more than one or both parties in a one-on-one confrontation laying hands on, in most cases, a bayonet and attacking. Examples included two cases of soldiers drawing their bayonets in a threatening manner, one soldier threatening to stab a corporal with his bayonet, one soldier assaulting a sentry with his bayonet, and one soldier “throwing his Bayonet at a

⁹⁴ HL/PO/JO/10/7/544.

⁹⁵ Trial of Captain Francis James Scott, New York, January 24, 1777, NA WO71/53, 401-430; Trial of Private Robert Keefer, Gibraltar, July 8, 1767, NA WO71/76, 245-250; Trial of Private Edward Matthews, Nottingham, England, February 15, 1770, NA WO71/52, 11-17; Trial of Private Thomas Armstrong, Horse Guards, England, February 20, 1735, NA WO71/16, 42-45; Trial of Private Laurence Griffen, Gibraltar, July 4, 1768, NA WO71/77, 60-68; Trial of Private Thomas Darling, St. Philips, Minorca, June 21, 1753, NA WO71/41, 96-98; Trials of Gunner Thomas Burgess and Matross Thomas Hall, Gibraltar, September 12, 1726, NA WO71/35, 176-177; Trial of Ensign Samuel Barry, New York, May 17, 1768, NA WO71/77, 28-39; Trial of Lieutenant William O’Farrel, St. Philips, Minorca, August 8, 1749, NA WO71/39, 127-132; Trial of Private John Jones, Horse Guards, England, February 17, 1777, NA WO71/27, 408-419; Trial of Private Thomas Thomas, Gibraltar, May 13, 1771, NA WO71/77, 420-428; Trial of Private John Patten, Horse Guards, England, December 16, 1725, NA WO71/35, 99-100; Trial of Private Anthony Alders, Horse Guards, England, October 25, 1715, NA WO71/14, 57.

⁹⁶ *Rules and Articles*, 1718, 10.

Soldier & wounding him without provocation.”⁹⁷ Private William Monk of the 2nd Regiment of Foot Guards faced a general court martial in March 1726 at the Horse Guards for “Throwing his Bayonet” at a corporal.⁹⁸ Most of the general court martial cases for assault with a weapon involved firearms. Of the thirteen cases, eight charges mentioned “shooting” or attempted shooting and four focused on stabbing. The final charge included both forms of armed assault: Private Philip Divine of the 54th Regiment of Foot was charged with “stabbing a man through the arm with his bayonet; loading his firelock; threatening to shoot the first man to approach him; wounding a corpl in the hand” while drunk at Gibraltar in 1766.⁹⁹ Another general court martial convicted Private John Frost of the 39th Regiment of “Attempting to shoot Ens. James Maxwell” and violating Article Five Section Two of the Articles of War in 1770 at Gibraltar when Maxwell ordered him arrested for being drunk on guard duty.¹⁰⁰

Soldiers assaulting civilians was an inevitability with a standing army operating in close contact with local populations. Although the Mutiny Act directed the army to surrender soldiers accused of violating civilian law to the local courts, most of the material relating to this variety of charge originates from outside of Great Britain, where the military justice system policed soldiers for all sorts of crimes under Article 46 of the Articles of War.¹⁰¹ General orders issued at Gibraltar on May 9, 1740, forbade soldiers

⁹⁷ HL/PO/JO/10/7/544.

⁹⁸ NA WO71/35, 113-115.

⁹⁹ NA WO71/76, 95-98.

¹⁰⁰ NA WO71/77, 295-300.

¹⁰¹ *An Act for Punishing Mutiny and Desertion; and for the Better Payment of the Army and Their Quarters* (London: Printed by Charles Eyre and William Strahan, printers to the King’s most Excellent Majesty, 1774), 91–92; *Rules and Articles*, 1718, 36. The Mutiny Act directed that any officer or soldier accused of

“to strike or abuse any Inhabitant, Genoese, Spaniard, Moor, or Jew on any pretence what- ever” and to not return “any abuse or stroke from any persons as above mentioned.”¹⁰² The regimental court martial data from Ireland includes many charges of assaults on civilians, such as “Striking a Woman,” “wounding an Inhabitant,” and “Assaulting a Townsman without any provocation.” A regimental court martial in the 36th Regiment of Foot tried a soldier “On Complaint of an Inhabitant of the Town for drawing his Bayonet upon him and threatning to Stab him.” This latter instance provides a clue to why these cases appeared in the military justice system: Article Five of Section Nine directed commanding officers “to see Justice done” to any officer or soldier under their command who aggrieved civilians, if the latter complained to him. This article specifically mentioned “beating, or otherwise ill-treating” civilians.”¹⁰³ General courts martial invoked Article 46 of the Articles of War to try murder cases abroad. In May 1759, Dragoon James Dodds of the Royal North British Dragoons, stood accused of murdering a peasant family while foraging for food outside of Munster, Germany.¹⁰⁴ Similarly in August of the same year, Sergeant Matthew McIvory was charged with “murdering a peasant” in Germany.¹⁰⁵ In 1768, Private James Sutherland of the 39th Foot was charged with “wilful murder of a mariner” at Gibraltar for fatally stabbing Martin

“any capital Crime, or any Violence or Offence against the Person, Estate, or Property, of any of His Majesty’s Subjects, which is punishable by the known Laws of the Land...” should be turned over to the civil magistrate. Failure to do so, followed by conviction at a Quarter Sessions, would result in immediate dismissal for the offending officer.

¹⁰² Cunninghame Orderly Book, 116-117.

¹⁰³ *Rules and Articles*, 1774, pg 164. Any officer failing to see justice done was directed to be “punished by a General Court-martial as if he himself had committed the Crimes or Disorders complained of.”

¹⁰⁴ NA WO71/67, pgs 94-103.

¹⁰⁵ NA WO71/67 pgs 221-222.

Codey of the Sloop *Mary* in the stomach in front of numerous witnesses.¹⁰⁶ These cases demonstrate officers' adaptability in addressing forms of disorder not necessarily envisioned as a primary focus for the legal-military state.

Instances of rioting and creating public disturbances marked violence on a larger scale than assault. General orders for May 16, 1740, directed non-commissioned officers to arrest any soldiers making "any disturbance at night in the Barracks" and confine them at the main guard for later punishment.¹⁰⁷ Regimental court martial charges included "rioting in the street," "rioting in town," "breeding a riot," and "encouraging two Soldiers to be Riotous." A further six cases focused on "making a disturbance in the Barrack."¹⁰⁸ The five general court martial cases involving rioting and disturbing the peace included only two cases mentioning specific articles of war. Gunner Thomas Burgess and Mattross Thomas Hall of the Royal Regiment of Artillery were tried together at Gibraltar in 1726 for "Making a disturbance in the barracks and striking the orderly Cpl." Both were convicted of violating the 9th Article of War for assaulting Corporal Jonathan Masterson in the barracks, Burgess having taken him by the collar and thrown him to the floor, while Hall struck Masterson with a broom stick.¹⁰⁹ Thus rioting and making disturbances, though of concern to officers, did not link in directly with any specific article of war.

¹⁰⁶ NA WO71/76, 295-298.

¹⁰⁷ Cunninghame Orderly Book, 118.

¹⁰⁸ HL/PO/JO/10/7/544.

¹⁰⁹ NA WO71/35, 176-177.

Conclusion

The legal-military state's foundation lay in separating military and civilian crime, in order to prevent the military justice system from becoming an actual threat to the civilian courts. In practical terms, meeting this objective meant creating and maintaining a strict jurisdictional divide between the two legal systems and stringently defining which offenses could be tried by courts martial, leaving all other crimes to the civilian justice system. Civilian authorities in Westminster and Whitehall employed the Mutiny Act and the Articles of War for this purpose, listing the crimes that required, as the Mutiny Act's preamble stated, "a more exemplary Punishment than the [civilian] Laws at present" would permit. While attempting to formulate a uniform standard defining the military jurisdiction, these regulations contained the seeds for institutional dysfunction due to elements of disconnection between them. The Mutiny Act, which fundamentally reflected the Glorious Revolution settlement and the decades of standing army debates and problems before it, focused predominantly on crimes that soldiers might commit against civilians and the government. The Articles of War, with origins stretching back to the Middle Ages and fundamentally centered in the royal prerogative, emphasized offenses that threatened the army's internal discipline. The officers responsible for actually executing these regulations were more naturally inclined towards the latter than the former, but in neither case found specific definitions accompanying the list of officially recognized crimes. An absence of formal legal training constituted a further hurdle for officers' executing the Mutiny Act and the Articles of War in a standardized fashion, a fact seemingly recognized by the oath sworn by general court martial judges. This oath directed them to proceed according to their consciences, their best understandings of the

disorders they faced, and “the Custom of War in like Cases” if any “Doubt shall arise which is not Explained by the said Articles or Act of Parliament.”¹¹⁰

The difficulties of defining crime reflected the military justice system’s status as a relatively new and developing institution, and offer examples of the legal-military state’s fundamental limitations. While Parliament debated and refined the Mutiny Act over the century and top military commanders collaborated with War Office officials to improve the Articles of War, officers struggled to rectify the regulations’ demands with the realities of military disorder that they faced on a daily basis. Data from the three levels of the military justice process—summary justice, regimental courts martial, and general courts martial—reveal that officers focused on six broad thematic categories of disorder: absence, drunkenness, property, duty, resistance, and violence. These varieties of disorder constituted a threat to the army’s operational effectiveness and to officers’ position in the social and command hierarchy, and can be traced in the form of varying criminal charges through all three levels of the process. General courts martial suggest that officers engaged more directly and effectively with the official regulations as the century progressed, citing specific sections of the Articles of War in conjunction with the criminal charges leveled in these trials. Yet the varieties of criminal charges levelled against similar offenses, reflected in an equally diverse application of specific articles of war and a preference for the more ill-defined generic articles, both complicates any attempt at generating a comprehensive typology of military crime and reinforces the high degree to which the legal-military state failed to enforce standard approaches across the length and breadth of the military justice system. As the examination of the military

¹¹⁰ *An Act for Punishing*, 1718, 95; *Rules and Articles*, 1718, 14

justice process in the next chapter will demonstrate, both the system and the legal-military state were engaged in continuing institutional formation during the period between 1715 and 1781, which would not achieve true standardization until the nineteenth century.

CHAPTER TWO: THE MILITARY JUSTICE PROCESS

On July 10, 1779, during the American Revolutionary War, a general court martial convened at Mamaroneck, New York, to try Private John Sutherland of the 64th Regiment of Foot for desertion. The case proceeded quickly through testimony establishing Sutherland's twelve years of service in the regiment, marking him as an experienced veteran, followed by descriptions of his capture. Two soldiers of the 17th Regiment of Foot had found Sutherland hiding in a bush beside the road on which their companies were marching. Both soldiers testified that Sutherland had admitted to deserting his regiment because of being drunk. When placed on his defense, Sutherland explained how he had visited a friend in another regiment the previous night, become drunk, and become lost in the woods. When he awoke the next morning, Sutherland found himself miles away from his camp and was afraid to return after having been absent overnight. Despite asking for and receiving favorable testimony from his captain, who stated that Sutherland had always been reliable and seemed to have wandered off due to drunkenness rather than an intent to desert, the court martial found him guilty and sentenced him to death.¹

Captain John Peebles of the 42nd Regiment of Foot was among the judges serving on the court martial board that day and recorded a detailed account of his thoughts on the

¹ NA WO71/90, 9-11.

trial in his diary. His entry for July 10 briefly recounted Sutherland's trial, describing the soldier as a "a poor silly creature" whose story of being drunk and becoming lost the night convinced Peebles that Sutherland had no intention to desert. Despite his opinion of the man's innocence, Peebles recorded that the court convicted Sutherland "by a mode of procedure...that I never saw or hear'd of before, & cannot reconcile to justice & humanity." Regretting his concurrence with the verdict and sentence without having protested first, Peebles joined other officers in approaching Major-General John Vaughn on July 19 to inform him of the "irregularity in the proceedings" and request that Sutherland's execution be delayed until the officers could confer with Lieutenant-General Sir Henry Clinton, Commander-in-Chief of British Forces. Vaughn agreed to speak with Clinton and discovered that the Commander-in-Chief had left orders to pardon Sutherland "at the foot of the Gallows" which satisfied Peebles "with respect to the safety of a mans life who was not regularly condemn'd."²

Peebles' commentary on Sutherland's case provides a rare window into nuances of the military justice process that have been largely overlooked in the existing scholarship. Arthur Gilbert and Glenn Steppeler have investigated the conduct of regimental courts martial, while Gilbert has evaluated the military justice system in the light of contemporary civilian courts. Gilbert and Sylvia Frey have also examined punishment patterns, which they have used to evaluate court martial procedure by implication. Gilbert, however, has dismissed the possibility of studying summary justice. No scholar has yet carried out a focused evaluation of general courts martial to complement the work on regimental courts, despite an overwhelming reliance on general

² John Peebles, *John Peebles' American War: The Diary of a Scottish Grenadier, 1776-1782*, ed. Ira D Gruber (Mechanicsburg, PA: Stackpole Books, 1998), 276, 279.

court martial data throughout the field. In effect, these studies have examined some components of the military justice in isolation, without establishing their larger context.³

The existing scholarship's conclusions are mixed and largely contradictory. Gilbert castigated regimental courts martial as "a thin veneer of legality" providing officers with the "freedom to punish soldiers without regard for law, procedure, or even equity." In contrast, Stepler argued that the conduct of regimental courts martial "was strikingly similar to the practice of the civil courts." Frey argued for a general decline in the severity of punishment over the century, which she credited to the effect of enlightenment thought on officers. Gilbert used Frey's own statistics, along with work by John Beattie and Douglas Hay, to refute her claims, observing that the trend in punishment data from general courts martial matched what Beattie and Hay observed in civilian courts: a general hardening in approaches to punishment overall in the last decades of the century. In his article comparing military and civilian justice, Gilbert referred to Leon Radzinowicz's work when concluding that both systems suffered from the same "capriciousness in sentencing and vague charges" that constituted military justice's weakest elements. This body of scholarship on courts martial has not provided larger insights into the relationship between the military justice system's structural

³ Arthur N. Gilbert, "The Regimental Courts Martial in the Eighteenth Century British Army," *Albion: A Quarterly Journal Concerned with British Studies* 8, no. 1 (1976): 50–66; Arthur N. Gilbert, "Military and Civilian Justice in Eighteenth-Century England: An Assessment," *Journal of British Studies* 17, no. 2 (1978): 41–65; G. A. Stepler, "British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century," *The English Historical Review* 102, no. 405 (1987): 859–886; Sylvia R. Frey, "Courts and Cats: British Military Justice In the Eighteenth Century," *Military Affairs* 43, no. 1 (1979): 5–11; Sylvia R. Frey, *The British Soldier in America: A Social History of Military Life in the Revolutionary Period* (Austin: University of Texas Press, 1981); Arthur N. Gilbert, "The Changing Face of British Military Justice, 1757-1783," *Military Affairs* 49, no. 2 (1985): 80–84.

components, the flow of the military justice process, nor the significance of either within the larger context of state formation.⁴

In contrast, the work on civilian courts, beginning with the studies by Radzinowicz, Beattie, and Hay that Gilbert cited, has done much to illuminate the connections between the justice system and state formation in eighteenth-century Britain. Radzinowicz and Beattie have established the basic parameters of the system's structure and procedure, including the relationships between various courts, and done much to discredit the Whig interpretation of the "Bloody Code", as John Styles and Joanna Innes have noted. Hay, along with E. P. Thompson and Norma Landau, have focused on the intersection between the courts, social status, and the exercise of elite power, particularly in relation to the larger significance of service as a justice of the peace or judge. While John Langbein has offered a countervailing perspective challenging the idea that courts served as a tool for elite manipulation of social dynamics, more recent work from Mark Goldie, Peter King, and David Lemmings has reinforced the notion of courts as instruments of government.⁵ The enduring themes of capital punishment, judicial process,

⁴ Gilbert, "The Regimental Courts Martial in the Eighteenth Century British Army," 52; Stepler, "British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century," 878; Gilbert, "Military and Civilian Justice in Eighteenth-Century England," 61; Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (London: Stevens, 1948); Frey, "Courts and Cats," 5; Gilbert, "The Changing Face of British Military Justice, 1757-1783," 80-81; J. M. Beattie, "The Pattern of Crime in England 1660-1800," *Past & Present*, no. 62 (1974): 47-95; Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay (New York: Pantheon Books, 1975), 17-64.

⁵ Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," *Journal of British Studies* 25, no. 4 (1986): 380-435; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975); Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984); Douglas Hay, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975); John H. Langbein, "The Criminal Trial before the Lawyers," *The University of Chicago Law Review* 45, no. 2 (1978): 263-316; John H. Langbein, "Albion's Fatal Flaws," *Past & Present*, no. 98 (1983): 96-120; Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (New York: Oxford University Press, 2000); Peter King, *Crime and Law in England, 1750-1840: Remaking Justice from the Margins* (Cambridge, UK; New York: Cambridge University Press, 2006); David Lemmings, *Law and Government in England during*

and reinterpretation of laws in the courts are equally vital for understanding military justice.

Regulating the military justice process was a crucial step in institutionalizing the military justice system and assimilating it into the larger state structure due to contemporary focus on the intersection of procedure and punishment. Having confined the operation of the military justice system within a narrow jurisdiction by defining military crime, civilian authorities were still left with the problem of insuring those crimes were tried with some form of due process. Contemporary critics focused on the Mutiny Act's authorization for capital punishment, demanding, in the words of Lord Trevor during the Mutiny Act Debate in the House of Lords in 1718, "that no punishment shall be inflicted at any court martial, which shall extend to life or limb" because of the seemingly arbitrary nature of the military justice process.⁶ The crown had demonstrated similar concern with the potential abuse of capital punishment in the army nearly two decades earlier. William III issued an edict in 1690 requiring all general courts martial to submit written trial proceedings for his review before executing any capital sentence.⁷ In order to make courts martial acceptable to both Parliament and the crown, the judge advocate general, who acted as the arbiter of the legal-military state, had to insure that officers followed proper protocol when trying offenders.

the Long Eighteenth Century: From Consent to Command (Houndmills, Basingstoke Hampshire; New York, NY: Palgrave Macmillan, 2011); Mark Goldie, "The Unacknowledged Republic: Officeholding in Early Modern England," in *The Politics of the Excluded, C. 1500-1850*, ed. Tim Harris (New York: Palgrave, 2001), 153–194.

⁶ William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 7 (London: T. C. Hansard, 1811), 539.

⁷ Charles M Clode, *The Administration of Justice under Military and Martial Law: As Applicable to the Army, Navy, Marines, and Auxiliary Forces*, 2nd ed. (London: J. Murray, 1874), 90.

The emerging legal-military state complicated this mission by delegating a significant amount of agency and responsibility to officers, due both to tradition and to the Judge Advocate General's Office's limited administrative capacity. Although a varying number of clerks and deputies assisted in handling the office's business, the most important matters depended on the judge advocate general's personal presence in Whitehall. Lacking the operational flexibility to appear at courts martial outside of the Horse Guards in Whitehall, the judge advocate general was forced to rely on officers deputized to serve as judge advocates at trials across Great Britain and the empire. Officers derived further influence from the provisions in the Mutiny Act and Articles of War that directed them to serve as judges and invested commanding officers with the power to call courts martial. Outside of Great Britain, particularly in far-flung imperial outposts and during wars abroad, the regulations specified that requests for holding general courts martial would go to the local commander-in-chief, who would also review the final proceedings and confirm, mitigate, or pardon the sentence on the crown's behalf. Combined with the limitations of the reporting requirement, the reliance on officers required the judge advocate general to focus on methods for better engaging and training them in the doctrine of the Mutiny Act and the Articles of War.

The legal-military state manifested a limited but growing level of centralized control over the military justice process between 1715 and 1781. This control was expressed primarily through enforcing the procedural portions of the Mutiny Act and the Articles of War by reviewing general courts martial proceedings. These records provided the judge advocate general with a clearer picture of officers' engagement with the regulations and offered him the opportunity to enforce the Mutiny Act and the Articles of

War by requiring officers to revise proceedings that did not meet standards. The judge advocate general was nevertheless limited in his ability to police the military justice process by the legal-military state's institutional capacity. The overwhelming reliance on officers to staff the system in the field and a lack of comparable reporting of summary justice and regimental courts martial effectively limited the judge advocate general's influence to general courts martial. As a result, officers retained and exercised a significant amount of independent power at these lower tiers of the military justice process. The remainder of this chapter will probe these complexities and the limits of civilian control over the military justice process in three sections. The first will examine the ideal vision of how the military justice process should have worked based on the Mutiny Act and the Articles of War. The second section will turn to investigate how summary justice and regimental courts martial actually functioned, along with the degree to which they may have reflected the influence of the formal regulations. The final section will examine the contested ground of general courts martial, where the Judge Advocate General's Office clashed with officers for control over capital punishment.

The Military Justice Process in Theory and Practice

The best method for expanding the legal-military state's control apparatus into the military justice process was through requiring officers to increase their compliance with the Mutiny Act and the Articles of War. As with defining crime, extending central control required adjusting a pre-existing framework, which was in place long before Parliament passed the first Mutiny Act. Despite Stephen Payne Adye's attempts to situate military tribunals as a descendent of the medieval court of chivalry in his *Treatise on*

Courts Martial, thereby aligning military and civilian courts, these courts originated in the Articles of War.⁸ Courts martial were a well-established feature of military justice by the mid-seventeenth century, though the division between regimental and general courts was not yet set.⁹ Summary justice, which provided the broad base of the pyramidal institutional structure upon which regimental and general courts martial sat, was a fixture of military tradition that featured in officers' commissions in the eighteenth century. Thus, as with defining military crime, the eighteenth-century developments in the military justice process built upon a foundation that was deeply rooted in time and tradition.

Regulations released following the Restoration in the 1660s set the final form and function of courts martial that would persist throughout the eighteenth century. Issued on April 9, 1666, the *Orders and Articles of Warr composed and Corrected by the Advice of*

⁸ G.D. Squibb, *The High Court of Chivalry: A Study of the Civil Law in England* (Oxford, UK: Clarendon Press, 1959), 2–3, 8; Stephen Payne Adye, *A Treatise on Courts Martial* (New-York: Printed by H. Gaine, 1769), 34–35. According to Squibb, the problem with the eighteenth-century accounts lies in a mis-translation of the medieval court's Latin name, *Curia Militaris*, which many authorities took to mean "military court." In contrast, Squibb argues, based on the time frame in which the Court of the Constable and Marshal appeared, that instead of *miles*, the noun form of *militaris*, meaning "soldier," the term actually meant "knight," providing a different translation for the latin as the "chivalry court." While the Constable and Marshal, who presided over the Court of Chivalry, were empowered with the authority of disciplining the army during times of war, this grant was separate from their court. Squibb, who has provided the only thorough examination to date of the High Court of Chivalry's surviving records, notes that they contain no references to "desertion or mutiny or any other offence within the jurisdiction of the modern court martial." Both Payne and John Williamson ignored the decades of structural and procedural developments that occurred prior to the publication of their treatises. John Williamson, *The Elements of Military Arrangement Comprehending the Tactick, Exercise, Manoeuvres, and Discipline of the British Infantry, with an Appendix, Containing the Substance of the Principal Standing Orders and Regulations for the Army* (London: Printed for the author, 1781), 195–207.

⁹ For example, the 1642 Articles of War directed that "All controversies between Souldiers and their Captains, and all others, shall be summarily heard and determined by the next Councell or Court of war, except the weightinesse of the cause require further deliberation." *Military Orders and Articles Established by His Majestie, for the better Ordering and Government of His Maiesties Army*, (York: Robert Barker and the Assignes of John Bill, 1642), 12. Similarly-worded directions with references to a "councell or Court of War" are found in *Military Orders and Articles Established by His Maiestie, For the better Ordering and Government of his Maiesties Armie*, (Oxford: Leonard Lichfield, 1643), 8 and *Military Orders and Articles Established by His Majesty, For the better Ordering and Government of His Majesties Army*, (Oxford: Leonarch Lichfield, 1644), 16.

the Duke of Albemarle, Captain-General of His Majesty's Armyes, established the two-tiered structure of general and regimental courts martial, and defined their jurisdictions with reference to punishment. General courts martial would try all officers and soldiers whose crimes were “punishable to the loss of life or mutilation of members.” These highest military tribunals would also consist of at least thirteen officers, five of whom would be captains or above in rank. When a field officer was on trial, only officers ranking as captains or above sat as judges. The regulations restricted regimental courts to trying soldiers and non-commissioned officers for “all offences, misdeameanours, and outrages...not extending against life or limb.” Albemarle’s Code also established a subset of regimental courts martial for “the tryal of the offenders in such little garrisons by a convenient number of the Officers of the next adjacent Governors,” limiting the jurisdiction to “offences committed by common Soldiers, not extending to life or mutilation of members.”¹⁰ This portion of the code recognized that in certain circumstances, a given detachment would not be large enough to muster a sufficient number of officers to serve in a regimental court martial and thus authorized the convening officer to bring in additional officers from nearby garrisons. Thus from a relatively early date, the structure of the military justice process was already attuned to the realities of military life and reflected the dependence on officers that would limit the legal-military state’s influence in the eighteenth century.

Albemarle’s Code also established the fundamental elements of the trial process. First, these regulations dictated that the commanding general would issue warrants for

¹⁰ “Orders and Articles of Warr composed and Corrected by the Advice of the Duke of Albemarle, Captain General of His Majesty’s Armyes,” April 9, 1666, in Charles M Clode, *The Military Forces of the Crown: Their Administration and Government* (London: J. Murray, 1869), 447. Hereafter referred to as Albemarle’s Code.

both general and regimental courts martial and provide warrants for the smaller garrison courts martial to the various governors of key posts. The regulations recognized the office of judge advocate and charged him to attend all general courts martial, summon witnesses, and administer oaths to them and judges. Arresting officers were required to inform the judge advocate of their prisoner's crime within 48 hours or the prisoner would go free. Any person who used "braving or menacing words, signes, or gestures" while a court martial was sitting could face capital punishment. Albemarle's Code also established the so-called "devil's article," permitting courts martial to try "all other faults, disorders, and offences that are not mentioned in these articles," and introduced the notion of proceeding according to "the general custom and laws of war."¹¹ These elements would remain mainstays of the military justice process throughout the eighteenth century, with the exception of the Devil's Article, which would disappear by 1718 and reappear in 1749.

By 1718, Parliament, acting through the Mutiny Act, had added several important provisions to the basic framework contained in Albemarle's Orders that provided courts martial with a firmer foundation in legislation. The Mutiny Act officially recognized the King's right to "grant a Commission under his Royal Sign Manual" to any officer of the rank of major or above to hold a general court martial within Great Britain in peace time. The King could furthermore issue a commission to the Lord Lieutenant of Ireland for holding courts martial in that country. While not observing the difference between general and regimental courts martial by name, the act also sanctioned courts martial inflicting punishments "not extending to Life or Limb" on any soldier for "immoralities,

¹¹ Clode, *Military Forces*, 448-449.

misbehavior, or Neglect of Duty” in addition to authorizing capital punishment for mutiny, sedition, desertion, and other serious crimes. An oath was included for the judge advocate and judges to swear to well and truly Try and Determine according to your Evidence” the case between the king and the defendant. Death sentences could only be inflicted if at least nine of the thirteen judges concurred. Trial proceedings could only occur between eight o’clock in the morning and one o’clock in the afternoon. Finally, the act recognized the king’s right to establish Articles of War and provide warrants for holding courts martial in “his majesties dominions beyond the seas.” Any soldier who transgressed the law in those imperial possessions was liable for trial in Great Britain or Ireland as if he had committed the crimes there instead.¹²

The Articles of War published in 1718 affirmed the Mutiny Act’s parameters for courts martial and offered additional supplementary material. As with the approach to defining crime, the Articles of War reflected a greater focus on the details of the army’s internal dynamics, in contrast to the Mutiny Act’s focus on delineating military and civilian justice. The first important section of supplemental information focused on regimental courts martial. Article 17 invested the commanding officer of a unit with the authority to assemble a regimental court martial, consisting of no less than five commissioned officers, for “inflicting such Corporal Punishments, as the Neglect of Duty, Disorders in Quarters, or other such Crimes may deserve.” A simple majority of votes would decide the verdict and sentence. Article 18 required commanding officers to

¹² *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters* (London: Printed by John Baskett, and by the assigns of Thomas Newcomb, and Henry Hills, deceas’d, 1718), 96, 97, 112–113. The Mutiny Act of 1718 was particularly important because it was the first one of the Hanoverian period subject to intense Parliamentary debate and would serve as a model for subsequent acts.

call regimental courts martial to investigate any grievances that a non-commissioned officer or soldier might submit, particularly if the soldier thought “himself Wronged by his Captain, or Officer Commanding the Troop or Company.” If the results of the trial failed to satisfy the soldier, he could appeal to a general court martial where, if the appeal proved groundless or “vexatious,” the soldier would be punished for wasting time and resources.¹³

Article 20 added significant levels of detail to guide the proceedings of general courts martial. These supplementary details began by specifying that the judge advocate general “or some Person having a Deputation to Act for him, shall Inform the Court, and Prosecute in his Majesties name.” The judge advocate general or the deputy judge advocate acting in his stead would administer the oath to witnesses and judges as listed in the Mutiny Act, with a second oath solely for the judges that appeared only in Article 20. This second oath directed officers to proceed according to the Articles of War and the Mutiny Act, and, in case of doubt, to rely on their conscience, the best of their understanding, and “the Custom of War in like Cases.” Furthermore, the oath included the promise not to divulge the sentence of the trial nor to “Disclose or Discover the Vote or Opinion of any particular Member of the Court-Martial.” General courts martial were thereby sealed until the king or commander-in-chief had reviewed the proceedings. The judges would vote from youngest to oldest to avoid the senior officers influencing their juniors. The article ended by reiterating the gist of William III’s reporting requirement, directing that no sentence of a general court martial would be placed into execution until

¹³ *Rules and Articles*, 1718, 9-10.

a “Report be made of the whole Proceedings to his Majesty, or the General Command in Chief” and his approval secured.¹⁴

Article 38 was the most important part of the Articles of War for defining the direction in which the military justice process was expected to proceed, which the article linked to the degree of punishment required in any given case. It directed officers to begin with summary justice, which involved the least formal varieties of punishment, and proceed up through the courts martial tiers from there. In contrast, the parliamentary framers of the Mutiny Act and other civilian commentators approaching the military justice process from that perspective proceeded from the general courts martial level downwards, a point that reveals the fundamental disconnect between some of the framers of military justice and the men required to operate the system. Beginning with the statement that officers and soldiers should not be kept in lengthy pre-trial confinement, which would require other personnel to do it in their stead, Article 38 directed commanding officers to call a regimental court martial within eight days of the offender’s arrest. Most importantly, the commander would only assemble a trial if the offense was “not immediately Punishable by such Corporal Punishment as the there Commanding Officer shall think himself empowered to inflict,” emphasizing summary justice as the primary means for addressing most episodes of disorder. If officers did not consider “themselves empowered to Decide and Punish” the offense at the regimental level, the article directed that the commanding officer of the regiment to contact the Secretary at War “to obtain Our Order, or the Order of Our General or Commander of Our Forces, for a General Court Martial.” In applying for that general court martial warrant, the commanding officer was required to submit all

¹⁴ *Rules and Articles*, 1718, 12-15

“Proceedings, Proofs, and Examinations” made in the case to date, which emphasized the seriousness of, and labor involved in assembling, a general court martial.¹⁵ Overall, Article 38 outlined a thought process as much as a procedural one, encouraging officers to consider addressing disorder from the summary justice angle first, proceeding higher only if the crime proved too weighty. Punishment loomed large as the criteria for evaluating the appropriateness of advancing a case through the system, with only those offenses that reviewing authorities deemed worthy of capital punishment proceeding for trial at the general court martial level.

Two trials held at opposite ends of the eighteenth century provide examples of the military justice process in operation as described and mandated in the Mutiny Act and the Articles of War. The first case, a general court martial held on August 6, 1716, at the Horse Guards in Whitehall, tried Private Samuel Squire of the First Regiment of Foot Guards for mutiny. Captain Rowland Reynolds, who commanded the company to which Squire belonged, testified that Sergeant Richard Orson had brought Squire and two other soldiers to Reynolds’ tent two weeks earlier. Orson reported the Squire refused to follow orders to join the detachment of soldiers marching out for guard duty and had convinced the other two young soldiers to join him in ignoring the sergeant’s orders. With Reynolds as a witness, Orson ordered the three men to attend to their duty, all of whom refused. The captain ordered them to be confined at the quarter guard. Reynolds called for the three soldiers a few days later and ordered them to join the next guard detachment for the Tower of London. The two younger soldiers “Made their Submissions, Acknowledged their Fault, and pleaded their being ignorant of the Consequence of refusing their Duty as

¹⁵ *Rules and Articles*, 1718, 27-28.

being but young Soldiers” before joining the tower guard as ordered, but Squire yet again refused to obey. Reynolds further testified that he had charged Squire at a regimental court martial, “which Court esteeming it to be too heinous for their Censure, referr’d it to the hearing of this General Court Martial.” In his defense, Squire claimed that he had served multiple shifts of guard duty in the week preceding the incident and that Sergeant Orson had promised not to assign him to any further duties for the next four days. Two days later, Orson violated that promise by ordering Squire back on guard duty. The court did not look on the soldier’s defense with any sympathy, finding him guilty and sentencing him to receive “a Lash with a Twig on his bare Back” from every man in all three regiments of Foot Guards, once a week for three weeks, amounting to thousands of lashes. Upon reviewing the case, the king remitted two thirds of the punishment, ordering that Squires’ own regiment would be the only one to punish him.¹⁶

The manner in which the 1st Regiment of Foot Guards handled Squire’s trial corresponded exactly with the process as described in Article 38 of the Articles of War. Upon realizing that Squire would not obey his orders, Orson brought the offending private to his commanding officer. After confirming the offense, Reynolds used his authority for summary justice to send Squire to the quarter guard, providing him with time to consider his actions and their ramifications. When Squire returned from confinement and still refused to obey orders, Reynolds called for a regimental court martial. The judges of that court, feeling that Squires’ crime deserved more significant punishment than they could authorize, recommended a general court martial. The king

¹⁶ NA WO71/14, 139-141. “Quarter Guard, is a small guard commanded by a subaltern officer, posted in the front of each battalion.” George Smith, *An Universal Military Dictionary or a Copious Explanation of the Technical Terms &c. Used in the Equipment, Machinery, Movements, and Military Operations of an Army* (London: Printed for J. Millan, near Whitehall, 1779), 119.

granted permission to hold a general court martial at the Horse Guards, where the court convened to try the case, resulting in convicting Squire and sentencing him to corporal punishment. While the king intervened in a show of mercy, Squire was nevertheless directed to endure a highly public ordeal of manual correction that would serve as a lesson to the other men in his regiment.

The second trial, of Matross Thomas Blakeney of the Royal Irish Regiment of Artillery in 1768 at Dublin, Ireland, demonstrated the grievance and appeal procedure discussed in Article 18. Dr. George Lucas, an opposition member of the Irish Parliament, elevated this case to celebrity status in 1768 with his pamphlet, *A Mirror for Courts-Martial*, which employed the example of Blakeney's trial as a means of castigating the entire military justice system.¹⁷ According to Lucas, the soldiers of the Royal Irish Regiment of Artillery had suffered from severe deductions out of their pay because their officers forced them to buy additional unnecessary equipment and clothing. To avoid being charged with mutiny, the other soldiers chose Blakeney to appeal to the officers for redress. When the officers refused to address the situation, Blakeney requested a regimental court martial to investigate his grievances. The judges listened to his case about the various stoppages, which he claimed were illegal, then concluded that the stoppages were for the "good of the service," effectively dismissing Blakeney's complaints. The matross appealed for a general court martial, which was granted. After reviewing the evidence, the judges found the grievances largely groundless, declared

¹⁷ "Matrosses, are properly apprentices to the gunner, being soldiers in the royal regiment of artillery...they carry firelocks, and march along with the guns and store-waggons." George Smith, *An Universal Military Dictionary*, 161.; Charles Lucas, *A Mirror for Courts-Martial: in which the complaints, trial, sentence and punishment, of David Blakeney, are examined*. (London, 1768). No surviving proceedings from Blakeney's trial have come to hand.

Blakeney a “seditious and litigious man,” and sentenced him to receive 500 lashes in front of the Dublin garrison.¹⁸

Blakeney dutifully followed the procedures discussed in Article 18: he presented his list of grievances to his commanding officer and requested redress. His officer refused to satisfy him, so Blakeney requested, and received, a regimental court martial, which reviewed his grievances. Finding nothing they deemed to be of substance, the judges dismissed the case, but Blakeney, appealed to a general court martial. After considering the evidence provided in Blackeney’s regimental court martial a second time, the higher court also ruled against him and followed through with the final portion of Article 18 required in instances of “Groundless or Vexatious” appeals. As with Squires’ case, the system worked through its multiple levels as intended, even though Blakeney did not receive the most sympathetic treatment.¹⁹

The military justice process as established by the Mutiny Act and the Articles of War consisted of clearly-defined courts with discrete jurisdictions defined through a multi-step punishment regimen, with clearly defined parameters on where cases should enter and how they should proceed through the system. The crown officials and senior military commanders charged with framing the Articles of War furthermore provided for instances where the guidance offered in the regulations would be insufficient, by directing officers to act upon their conscience and the customs of the service. While not the same as civilian justice, military justice nevertheless had a due process of its own, even though that process was subject to modification by officers in the field.

¹⁸ Lucas, *A Mirror for Courts-Martial*, 14–24.

¹⁹ *Rules and Articles*, 1718, 10

Officers' prerogatives: summary justice, regimental courts, and punishment

Both summary justice and regimental courts martial stood out as a focus for contemporary concerns over abuse of the military justice process, particularly with regard to the key intersection of process with punishment. Each level presented opportunities for officers to wield significant discretionary powers in the treatment of the soldiers under their command with minimal accountability. Summary justice presented problems for regimental commanders, who could easily find their unit's cohesion threatened by overzealous martinet junior officers punishing soldiers on the least pretense. News of such behavior, when it reached a field officer, usually came by way of rumor since there was no procedure for formally reporting or otherwise recording disciplinary action at this level. Regimental courts martial offered majors and lieutenant-colonels far more control over the disciplinary process, since they wielded the authority to assemble courts, review their proceedings, and either confirm, mitigate, or void the sentence. From the judge advocate general's perspective, however, regimental courts were a source of serious abuse, over-stepping their jurisdictional bounds by trying soldiers on reduced charges (absence without leave instead of desertion) and sentencing them to corporal punishments that at least equaled if not exceeded those imposed by general courts martial. In such cases, regimental courts martial came very close to inflicting capital punishment. While not all instances of summary justice or regimental courts martial trials transgressed the boundaries set by the Mutiny Act and the Articles of War, officers' conduct at both levels demonstrated the institutional limits of the legal-military state.

Summary justice was a matter of both duty and necessity for the officer corps. Policing his soldiers and executing summary justice when the need arose were deeply ingrained parts of every officer's duty. The printed commissions that formally set each officer's rank and status within the army's command hierarchy charged the bearer with "Exercising and Well disciplining both the inferior Officers and Soldiers" under their command.²⁰ The implication contained in Article 38, that instances of disorder entered the military court system only when an officer felt incapable of resolving the issue personally, was reiterated in the privately-produced training literature of the period. In 1768, influential military author Captain Bennet Cuthbertson of the 5th Regiment of Foot observed in his *A System for the compleat interior Management and Œconomy of a Battalion of Infantry* that nothing trivialized courts martial in the eyes of common soldiers more than trying offenses "for which an Officer (by his own authority) might have inflicted a punishment, sufficiently adequate, and as severe a one, as a Court-martial may chuse to do."²¹ Thus in addition to duty, there was the added inspiration of necessity: too frequent use of courts martial in place of summary justice would reduce the effectiveness of the courts in making examples of particularly heinous offenders.

The absence of any form of official reporting for summary justice complicates any attempts to study this level of the military justice process, particularly in a

²⁰ Commission to William Robertson as Ensign in the 63rd Regiment of Foot, November 24, 1775, NAS GD132/819. See also Commission to William Robertson Gent. as Lieutenant in the 55th Regiment of Foot, December 18, 1777, NAS GD132/821; Sir Andrew Agnew's commission as Cornet in the Royal North British Dragoons (Scots Greys), May 11, 1705, NAS GD154/612.

²¹Bennett Cuthbertson, *A System for the Compleat Interior Management and Œconomy of a Battalion of Infantry* (Dublin: Printed by Boulter Grierson, 1768), 120. As an indication of Cuthbertson's influence on the British Army, Ira Gruber observes that over 900 officers subscribed to funding the printing of Cuthbertson's book, many of whom went on to hold important commands in the British Army during the American Revolution. Ira D Gruber, *Books and the British Army in the Age of the American Revolution* (Chapel Hill, NC: University of North Carolina Press and the Society of the Cincinnati, 2010), 33.

quantitative fashion. It is still possible to assess the operating of the military justice system at this level, despite Arthur Gilbert's argument to the contrary.²² Two types of official records shed significant light on the manner and method of summary justice: anecdotal evidence contained in general courts martial proceedings as part of witness testimony and the orders for summary justice recorded in the army's orderly books. The anecdotal evidence provides brief but vivid insights into the circumstances and execution of summary justice. Orderly books reflect the institutionalization of practice and serve as a reminder that generals as well as ensigns had powers of summary justice over their commands. This broad base of the military justice pyramid thus stretched to encompass entire garrisons and armies under one commander's disciplinary vision, providing additional social cohesion through a shared experience of military justice.

Anecdotal evidence clearly demonstrates that officers used summary justice generally in reaction to an actual or perceived challenge to their authority. The typical punishments that officers inflicted at this level consisted predominantly of corporal punishment meted out at the end of an officer's cane or stick. At a general court martial held in October 1716, Adjutant Burborough of the Coldstream Guards testified that when Corporal Humphrey Wooldridge failed to heed his orders while forming the guard, Burborough "Shook him with his Cane." At another general court martial, held in June 1721, a witness deposed that Ensign Henry Willoughby gave David Orris, Master Gunner of Upnor Castle, "several blows with his stick" following the latter's insubordination. At a regimental court martial held in July 1722 in the 1st Regiment of Foot Guards, Ensign Carr admitted to striking Private John Curtis with his cane in response to the soldier's

²² Gilbert, "Military and Civilian Justice in Eighteenth-Century England," 42.

abusive language. At a general court martial held in June 1768, witnesses deposed that Lieutenant Wetwang March of the First Troop, Horse Grenadier Guards had struck Private Grenadier Henry Bowen multiple times with a cane, first for punching another soldier and then for refusing to take off his hat when ordered. During his trial for desertion in 1778, Private Patrick Fallan of the 64th Regiment of Foot testified that his commander, Captain Charles Laton, ordered Fallan to be beaten and “tied up and gaged with a rough Stick, which cut his Mouth.” Laton confirmed this testimony, explaining that this was the only effective means of controlling Fallan when he was intoxicated. Some officers, including Captain John Peebles, did not adopt such a cavalier attitude towards executing summary justice. In his diary entry for May 2, 1780, Peebles observed that the soldiers of his company were repeatedly drinking to excess, despite his verbal warnings to the contrary. Noting that he had “knock’d down Nor: M.Kay on the parade not so much for being drunk as for swearing he was not,” Peebles recorded that he was sorry for doing so because an officer “should never punish a soldier in a passion.”²³

While many instances of summary justice were undoubtedly provoked by passion, institutionalized examples reflecting a more considered approach to the army’s needs for discipline exist in orderly books. Captain Archibald Cunninghame’s orderly book from Gibraltar, which recorded general orders issued between 1727 and 1746, contains 188 orders for summary justice. These orders, recorded in Table 2.1, identified specific offenses along with punishments to be meted out on the spot.²⁴ Since general orders from

²³ NA WO71/14, 154, 299, 324; NA WO71/27, 148-171; NA WO71/86, 413-417; Peebles, *John Peebles’ American War*, 366.

²⁴ Archibald Cunninghame, “General Orders of the Garrison of Gibraltar from the 2^d February 1726/7 to 28th October 1745,” NAS GD21/1/625. The total number of punishments reflects some double counting due to the fact that some offenses were punished with two or more penalties, which are recorded separately in this table. Thus the March 18, 1742, order that threatened severe punishment and limitations on movement

the governor acted as standing orders, remaining in effect until countermanded by subsequent orders, these examples demonstrate another side of summary justice, one that was not reflexive in the heat of the moment. Cunninghame's orderly book is unusual, since most orderly books of the period did not accumulate such a lengthy record, nor was Gibraltar particularly representative of the British Army's postings in general. Regiments stationed in Great Britain or Ireland faced the influence of civilian justice operating around them, while the nature of campaigning in Europe and abroad did not usually permit the level of time and attention reflected in the Gibraltar orders for summary justice. Nevertheless, as a longstanding imperial outpost without the influence of civilian justice or the straitened circumstances of an active field campaign, Gibraltar constituted a laboratory for military justice providing important insights into contemporary interpretations of official regulations and application of the military justice process.

The Gibraltar orders reveal a greater variety of both offenses addressed and varieties of punishment used at the summary justice level than is found in the anecdotal court martial data. While the general orders reflect a preference for corporal punishment that is reminiscent of the anecdotal data, the additional varieties of corrective methods used at Gibraltar underscore the thought that went into framing these directives. A July 22, 1728 order directed offenders to ride the "wooden horse," sitting astride a saw horse for varying lengths of time in a public space.²⁵ An officer could also place a soldier under arrest as a less intense punishment and warning, as in Squire's case, or imprison him at

to anyone stealing birds' eggs or destroying their nests on the large hill behind the garrison counts in both the severely punished and deprived of liberty rows. Orders directing that the offender was to be tried by a court martial and punished are not included in this table.

²⁵ Cunninghame Orderly Book, 50, 123-124, 154.

Punishment specified in general order	Number of Orders	Offenses punished
“Severely Punished”	59	absence without leave, drunkenness, purchasing contraband, defacing property, selling liquor, trespassing, insubordination, witness tampering, quarreling, theft
Arrested	40	Absence without leave, drunkenness, neglect of guard duty, defacing property, theft, mishandling arms, quarreling
“Punish’d”	21	Drunkenness, neglect of guard duty, quarreling, disturbing the peace, hiring substitutes, trespassing, defacing property
Demotion	17	Neglect of duty, quarreling, failure to report crimes, selling liquor, incurring debt, not relaying orders
Fined	10	Neglect of guard duty, purchasing contraband, disobedience of orders, selling liquor, portering, absence without leave, selling equipment
Imprisonment/deprived liberty	10	Trespassing, defacing property, disobedience of orders, failure to attend court martial,
Corporal Punishment	9	Selling liquor, neglect of guard duty, purchasing contraband, defacing property, failure to report crimes, trespassing, drunkenness
Extra Duty/Work detail	7	Selling equipment, absence without leave, drunkenness, neglect of duty
Bread and Water	6	Neglect of guard duty, defacing property, absence without leave, drunkenness
“as articles of war direct”	6	Neglect of Duty, selling liquor, swearing, assault
Death	3	theft, corresponding with enemy, trespassing
Total	188	

Table 2.1: Incidence of punishments in orders for Summary Justice issued at Gibraltar, 1727-1745.

the guardhouse or in the black hole on a diet of bread and water.²⁶ Cuthbertson avidly recommended confinement in the black hole, stating that no other form of summary punishment “has met with more success in reducing many soldiers to a proper sense of their duty.” Cuthbertson and other contemporary writers favored reduction in rank as the primary corrective measure for corporals and sergeants.²⁷ Performing extra duties or having fines deducted from soldiers’ pay acted as fitting punishments for labor and financial infractions, offering the opportunity to recover monetary losses while still making an example of offenders. Successive governors ordered death for serious offenses during periods when Gibraltar was under siege, thereby staying within the spirit of military law. Occasional references to the Articles of War affirmed the legitimacy of summary justice punishments.

The overlap between offenses and punishment categories reflects both the practice of inflicting multiple punishments simultaneously for one offense, as well as the variety of punishments that could be levelled against the same form of offense. An example of one offense being punished in multiple ways is seen in orders for January 9, 1732, which directed nighttime patrols to arrest all the drunken soldiers found in the streets, who would be confined, placed on a bread-and-water diet for seven days, and pay one shilling out of their subsistence money to the soldier who performed their duties while they were

²⁶ The black hole was a small cell used for solitary confinement. Being placed there and kept on a diet of bread and water provided sufficient grounds for a general court martial to significantly reduce the number of lashes inflicted on Horse Grenadier Bowen when tried for disobedience of orders, WO71/27, pg 171.

²⁷ Cuthbertson, *A System for the Compleat Interior Management and æconomy of a Battalion of Infantry*, 125, 127; Williamson, *The Elements of Military Arrangement Comprehending the Tactick, Exercise, Manoeuvres, and Discipline of the British Infantry, with an Appendix, Containing the Substance of the Principal Standing Orders and Regulations for the Army*, 206–207. Williamson recommended that “Non-commissioned officers should be reduced to the ranks, and then to receive such corporal punishment as may be adjudged by the court.”

imprisoned. Absence without leave provides an example of an offense punished in multiple different ways, though not simultaneously. Guards leaving their posts without permission, a type of absence without leave that posed a threat to the entire garrison's safety, were punished at various times with corporal punishment, imprisonment, being placed on bread-and-water, and standing extra duties.²⁸ The Gibraltar orders demonstrate how wide-reaching centrally-administered summary justice could be and the variety of punishments that could be employed at this level to address the same crimes.

The combination of widespread dependence on summary justice and a lack of reporting of how officers used it on a regular basis created the opportunity for abuse of power. Indications of such abuses can be found in the anecdotal data from courts martial, a testament to how problems at one level of the military justice process could have ramifications for the other levels. The general court martial trials of Corporal Thomas Innes and Sergeant John Hunly of the 17th Regiment of Foot on June 25, 1759, at Fort Edward Camp, New York, included revealing testimony on the state of summary justice in that unit. Lieutenant-Colonel John Darby, commanding the 17th Regiment, accused Innes of intended mutiny and Hunly of not informing the officers of an intended mutiny. An anonymous letter that Hunly delivered to Darby sparked both trials, which ended in acquittals. The letter listed several demands, among them that Darby "Countermand the order of the Non commissioned officers carrying Sticks to the parade, and that no Officer is on any pretence to Strike a Man," with a threat of fatal consequences if this and other demands were not met.²⁹

²⁸ Cunninghame Orderly Book, 41, 71, 125, 128-129.

²⁹ NA WO71/67, 164-179.

The general court martial of Lieutenant William Catherwood of the 66th Regiment of Foot on April 18, 1774, at Berwick in northern England for various forms of ungentlemanly conduct provided an equally severe though far more detailed account of abuses of summary justice. Several witnesses testified to the variety and abusive nature of the summary punishments that Catherwood had inflicted on soldiers under his command during the late 1760s when the regiment was stationed in Jamaica. Catherwood beat one man in the chest so hard that he induced internal bleeding, from which the soldier died some weeks later. In another instance, Catherwood accused a sergeant of stealing rum, beat him with a musket, attempted to grab a sentry's bayonet with which to stab the sergeant, and eventually had the non-commissioned officer chained to the guard room bed and confined there for eight weeks. The lieutenant had other men confined within the "black hole," a small, air-less, light-less chamber in an old powder magazine. On another occasion, Catherwood ordered two soldiers "tied up to three Firelocks, with one foot off the Ground for the Space of an hour." Upon hearing complaints from the soldiers in Catherwood's company, Major William Coates, commanding the 66th Regiment, re-assigned Catherwood and issued a regimental order forbidding excessive summary punishment.³⁰

Despite such examples of severe punishments inflicted at the level of summary justice, some offenses required a level of correction that even an officer like Catherwood could not justify. In such cases where, as Cuthbertson expressed in notably whiggish terms, "the general depravity of the Soldiery" required severe punishments beyond what an officer could inflict personally or that required a more formal inquiry, a regimental

³⁰ NA WO 71/53, 76-83.

court martial was necessary.³¹ Both the Mutiny Act and the Articles of War authorized these tribunals to inflict corporal punishments “not extending to Life or Limb” but severe enough to match what “Neglect of Duty, Disorders in Quarters, or other such Crimes may deserve.”³² In addition to elevating the intensity of punishment, regimental courts martial brought the collective weight of a unit’s officer corps and the official regulations to bear against an offending soldier. This stage of the military justice process introduced the first round of procedural requirements imposed through the Articles of War, initiating the portion of the military justice system that featured a formal trial process. These courts signaled the transition from judgment and punishment based on an individual officer’s perspective to an evaluation at least partially based on systematic standards created by the central authorities.

Similarities in surviving regimental courts martial proceedings from different regiments across the eighteenth century suggest a significant degree of army-wide standardization of practice. This element of regimental courts is particularly remarkable in light of the fact that no formal reports would be filed at Whitehall for the judge advocate general’s review. In contrast to Arthur Gilbert’s dismissal of regimental courts as mere legal fiction, Glenn Steppler’s examination of regimental courts martial records from the First Regiment of Foot Guards, identified significant standardization and stability of form and procedure over a forty-year period. Regimental court martial proceedings contained the names of the judges, the name of the accused, the charge

³¹ Cuthbertson, *A System for the Compleat Interior Management and Economy of a Battalion of Infantry*, 119.

³² *An Act for Punishing*, 1718, 96; *Rules and Articles*, 1718, 9.

against him, a brief recounting of the evidence presented, and the verdict and sentence.³³ These same elements were present in a similar layout in the proceedings from regimental courts martial held in the Brigade of Guards during the summer of 1722 and miscellaneous regimental courts martial proceedings from the 1730s through the 1780s, and were present in an abstracted form for regimental courts martial held by regiments in Ireland between 1774-1778.³⁴ The level of standardization in these regimental courts martial proceedings suggests that officers operated from a common understanding of how to record these tribunals that spanned the century, testifying to the trend towards centralization and institutionalization of the military justice process.

The types of crimes that appeared in regimental courts martial proceedings suggest that officers generally followed the proscription against trying capital crimes in these courts, despite the absence of oversight from Whitehall. The abstract of regimental courts martial data collected from regiments serving in Ireland between 1774-1777 in response to an order from the House of Lords provides an insight into the patterns of crime and punishment beyond Stepler's analysis of the First Regiment of Foot Guards' proceedings. The data from the 1400 cases in the set, including cases with multiple charges, is arranged by punishment and presented in Table 2.2. As with officers

³³ Stepler, "British Military Law, Discipline, and the Conduct of Regimental Courts Martial in the Later Eighteenth Century."

³⁴ Guards Regimental Courts Martial 1722, WO71/14, pgs 305-327; Proceedings of a Regimental Court Martial held by order of L^t. Ross Commanding 71st Reg^t, Camp near Newton Creek, New York, 1783, NAS GD153/1/6/1; "Proceedings of a Regimental Court martial held by the Officers of the 52nd. Regiment by Order of Lieu^t. Colonel Jones Quebec 19th. August 1766;" Thomas Gage Papers, Vol 56, William L. Clements Library, University of Michigan, Ann Arbor, Michigan; Regimental Courts Martial held in Cotterell's 6th Marine Regiment, August 1743 and March 1744, Author's Collection; Irish Regimental Courts Martial Abstracts, 1774-1778, House of Lords Record Office, HL/PO/JO/10/7/544.

executing summary justice, the regimental courts martial judges handed down predominantly corporal punishments, usually lashes with a cat-of-nine-tails whip.

Punishment	Frequency of occurrence	Freq. of mitigation	Freq. of pardon	Crimes
Lashes	972	463	158	Absence without leave, drunkenness, assault, insolence, sleeping on guard, selling equipment, breaking confinement
Demoted/suspended	146	9	6	Embezzling, neglect of duty, drunkenness, assault, absence without leave, theft
Picketing	75	10	9	Drunkenness, rioting, absence without leave, disobedience of orders, theft
Extra Duty	44			Absence without leave, drunkenness, disturbing the peace
Confinement	43		3	Absence without leave, drunkenness, quarreling, breaking confinement
Ask pardon	5			Disobedience of orders, insolence
Fined	26			Losing/selling clothing and equipment,
Acquitted	123			Disobedience of orders, theft, insolence, quarreling, assault, neglect of duty, absence without leave, drunkenness
Total	1434	482	176	

Table 2.2: Incidence of punishments in Irish regimental court martial data, 1774-1778

Picketing was a variety of corporal punishment where a soldier stood “with one foot upon a sharp-pointed stake: the time of his standing [was] limited according to the offence.”

Sentences directing men to be picketed without their shoes off indicate that soldiers must have normally worn their shoes for this punishment, which would have been especially

difficult to endure while barefoot.³⁵ As with riding the wooden horse, picketing would have been executed in a public space where the offender served as an example to his comrades.

Fines and serving extra guard duties or on work details served the same function for regimental courts martial as they did in summary justice. Just as picketing represented an increase in the severity of corporal punishment over that inflicted by summary justice, confinement also became more severe. Over 60% of the confinement sentences specified that the convicted offender would be sent to the black hole. The appearance of publicly asking pardon or forgiveness from an aggrieved officer or non-commissioned officer as a form of punishment served to reinforce individual authority as much as to punish disorder.

The regimental court martial data also record instances of mercy in the military justice process, reminiscent of Douglas Hay's observation of mercy in property crime cases.³⁶ The rates of mercy relative to specific crimes suggest that the regimental commanders reviewing the court martial proceeding may have exercised their powers of mitigation and pardon to reinforce their authority in a similar manner to what Hay observed among civilian court judges. Of the 972 men sentenced to receive lashes, 64% had their sentences reduced (48%) or pardoned altogether (16%). Yet this level of mercy did not extend evenly across the punishment sets. Of the 146 instances of reduction or suspension of rank, only 10% of convicted offenders had their sentences reduced (6%) or

³⁵ George Smith, *Universal Military Dictionary*, 203; a regimental court martial in the 4th Regiment of Horse held on September 12, 1775, sentenced Trooper Robert Warbroath to be "picketted three times without Shoes" for disobedience of orders. HL/PO/JO/10/7/544.

³⁶ Hay, "Property, Authority and the Criminal Law."

pardoned (4 percent). This statistic suggests that conviction of a crime serious enough to demotion would bar the offenders from further service as a non-commissioned officer. Soldiers sentenced to be picketed experienced slightly better odds of avoiding part or all of their punishment, with 25 percent either mitigated or pardoned. Regimental commanders pardoned seven percent of soldiers sentenced to be confined, all of whom had been ordered to the black hole. The absence of mitigation or pardons for sentences of fines, extra duties, and begging pardon suggest that limiting these punishments was ineffective as a form of reinforcing the commander's authority. By showing mercy to those forms of punishment that left the greatest scars, both physically and metaphorically, on offenders, commanding officers could portray themselves as a shield against the rigors of military justice, while the court martial proceeding itself served as a warning to other would-be offenders.³⁷

Despite their adherence to the Articles of War and demonstrations of occasional acts of mercy, officers did push regimental courts martial past the prescribed jurisdictional limits. No lesser of an authority than Bennet Cuthbertson both described and recommended the practice that most often brought down the ire of the Judge Advocate General's Office. In commenting on desertion, Cuthbertson recommended that if the commanding officer thought a regimental court martial might "probably inflict as great a punishment as [a general court martial] might judge necessary," he should try the deserter for "absenting himself from his company without leave."³⁸ While John Beattie

³⁷ Douglas Hay, "Property, Authority, and the Criminal Law." One might observe that the military data supports Hay's argument far better than the civilian court data he utilized.

³⁸ Cuthbertson, *A System for the Compleat Interior Management and Economy of a Battalion of Infantry*, 143.

has uncovered evidence of civilian grand juries indicting offenders for lesser crimes to avoid capital prosecution, the opposite issue was at stake in the regimental court martial situation.³⁹ As Cuthbertson implies, the point of reducing a desertion charge to absence without leave was to punish the soldier just as severely without going through the more extensive general court martial trial.

Depriving soldiers of the due process afforded to capital cases by the Mutiny Act and the Articles of War enraged the judge advocate general and constituted a significant barrier to expanding the legal-military state. In a letter dated March 3, 1723, Judge Advocate General Edward Hughes complained to Secretary at War George Treby about the many excesses of regimental courts martial that “have often inflicted such unmerciful Corporal Punishments which have made even Death more desireable.” After observing that such practices clearly evaded the will of Parliament and the crown, Hughes reported that these illegal proceedings had often taken place in “St. James’s or Hyde Park, where the Offenders have been Tyed to a Tree.” An entire regiment executed the corporal punishment “to the Dishonour and Terrour of His Majesties Service.” Hughes pleaded with Treby to issue an order to regiments not to inflict corporal punishments beyond 100 lashes. The judge advocate general’s pleas apparently fell on deaf ears, since he wrote Treby’s successor, Henry Pelham, on the same issue in 1729. Forty-one years later, on August 22, 1770, Judge Advocate General Charles Gould wrote to Thomas Waite, Secretary to the Lords Justice in Ireland, that sentences of one thousand lashes “have

³⁹ J. M Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, N.J.: Princeton University Press, 1986).

been sometimes given and executed” at the direction of regimental courts martial.⁴⁰ The struggle over regimental courts martial would continue until 1802, when Parliament amended the Mutiny Act to require regiments to submit reports of their court proceedings to the Judge Advocate General’s Office for review.⁴¹ For the entirety of the eighteenth century, these courts would continue to provide an opportunity for officers to punish soldiers for what should have been capital crimes away from the judge advocate general’s watchful eye.

Civilian Oversight and General Courts Martial

Despite officers’ capacity to circumvent regulations by abusing regimental courts martial, a steady demand for general courts martial persisted, which provided the best opportunity for developing the military justice process into a fully integrated part of the state apparatus. Many possible explanations exist for the survival of general courts martial in the face of opposition from some officers. The requests for warrants to hold general court martial suggest that some officers felt duty-bound to follow military law. Longstanding military tradition, as reflected in Albemarle’s Code, demanded that capital crimes be tried at the general court martial level. Regimental courts martial did not offer an appropriate venue for trying officers, nor could there be any chance of escaping royal displeasure for flagrantly violating the Articles of War by executing a soldier by the sentence of a regimental court martial. Most importantly for the legal-military state, the

⁴⁰ Edward Hughes to George Treby, Horse Guards, March 3, 1724, NA WO71/15, 69-70; Edward Hughes to Henry Pelham, Horse Guards, October 31, 1729, NA WO71/17, 1-2; Charles Gould to Thomas Waite, Horse Guards, August 22, 1770, NA WO72/6.

⁴¹ Gilbert, “The Regimental Courts Martial in the Eighteenth Century British Army,” 66.

continued demand for general courts martial indicated an acceptance of the Mutiny Act and the Articles of War. The army's highest tribunals certainly played a major role in officers' increasing engagement with regulations, since the procedures for securing a general court martial warrant and receiving authorization to execute a general court martial sentence rested in demonstrating compliance with the Articles of War and the Mutiny Act.

Officers required significant reasons to request warrants to hold general courts martial, particularly in Great Britain, since such applications would bring disciplinary conditions inside their regiments to the attention of both the judge advocate general and the secretary at war. The relatively small number of general courts martial held relative to regimental courts martial underscores this point: in the Irish regimental courts martial abstracts, the ratio was four general courts martial to 1400 regimental courts martial over the four years between the beginning of 1774 and the end of 1777.⁴² Correspondence from officers regarding confirmation of capital sentences, along with the details included in some general courts martial proceedings, indicate the extenuating circumstances behind requests for warrants, which may have played a role in the judge advocate general's decision to refer the applications to the king for confirmation. In a letter enclosed with a general court martial proceeding for desertion held in November 1715, Colonel John Pocock pleaded with the secretary at war, who referred the matter to the judge advocate general, to have the guilty verdict and capital sentence confirmed as

⁴² HL/PO/JO/10/7/544. The returns from the 9th Dragoons, 12th Light Dragoons, 3rd Horse, and 68th Regiment of Foot report one general court martial each out of a total of 38, 39, 47, and 270 trials respectively. It is possible that other regiments also held general courts martial that were recorded on other returns that have since been lost. This sample is the only one of its kind for the regular army regiments that offers an opportunity for such comparisons.

quickly as possible since Pocock had “lost very near two hundred Men by desertion, since my Regiment have been Raising...unless examples are made there is an end of the Service at once.”⁴³ In 1771, Major Richard Allen of the 35th Regiment of Foot wrote to Judge Advocate General Charles Gould after hearing that the king was inclined to pardon Drummer John Faulkner of the 35th after reviewing the proceedings of the general court martial that sentenced Faulkner to death. While admitting that Faulker had returned voluntarily from his fourth desertion, Allen argued that if the drummer “shou’d be pardoned, the Consequence may be very bad to the Regiment, as every Soldier will think, it’s not in our Power to make any Example, let their Crimes be of ever so greivous a Nature.” As in Pocock’s case nearly sixty years earlier, the 35th Regiment was experiencing a desertion crisis at the time of Faulkner’s trial, which led Allen to argue that “an example or two of Death is absolutely necessary.”⁴⁴ The unusually lengthy and detailed general court martial of Lieutenant William Catherwood of the 66th Regiment of Foot documented a decade’s worth of attempts to remove the officer from the regiment after he had demonstrated his incompetence while serving in Jamaica. Despite multiple letters from and interviews with the regiment’s overall commander, Major General Lord Adam Gordon, and other senior officers informing Catherwood that he would never be promoted and signing a contract with the entire regimental officer corps to sell his commission, the lieutenant would not depart. The officers took advantage of a tussle between Catherwood and Major William Coates to bring the lieutenant to a general court

⁴³ John Pocock to the Secretary at War, Chard, November 16, 1715, NA WO 71/34, 5.

⁴⁴ Richard Allen to Charles Gould, Bristol, November 17, 1771, NA WO72/6

martial and finally rid themselves of his company.⁴⁵ Such matters were obviously well beyond regimental courts martial judges' ability to address adequately.

After receiving royal approval to hold a general court martial, officers had to wait through a sometimes lengthy period of trial logistics as the secretary at war and the judge advocate general identified and summoned thirteen officers to serve as judges, selected a deputy judge advocate to preside at the trial, and notify witnesses. Any of these steps could present potential obstacles to commencing the trial. In May 1718, Deputy Judge Advocate General Edmund Burt complained to Secretary at War the Honorable Robert Pringle that officers called to serve as judges had refused to attend the general court martial of Colonel Valentine Morris. Pringle asked for a list of the officers who failed to attend, promising to lay it before the King. While no record of George I's reaction has yet been located, his response seemed to set a sufficient precedent: wilfull non-attendance does not appear in the subsequent record.⁴⁶ In some geographical areas, however, there simply were not enough officers available to hold a general court martial. As a result, the secretary at war was burdened with making up the missing number of officers by calling on neighboring units and garrisons. When preparing for Catherwood's trial at Berwick-upon-Tweed, Secretary at War Lord Barrington was forced to draw officers from as far away as Newcastle.⁴⁷ When arranging the general court martial of Private Patrick Ryan of the 17th Regiment of Foot six years earlier in Wells, England, Lieutenant-Colonel John Darby warned Barrington that an insufficient number of officers were on hand to hold the

⁴⁵ NA WO71/53, 20, 29-37, 44-46.

⁴⁶ Edmund Burt to Sir Robert Pringle, Horse Guards, May 9, 1718; Robert Pringle to Edward Hughes, War Office, May 9, 1718; NA WO71/34, 222-223.

⁴⁷ Sir Charles Gould to Lt. Col. Reynolds, Horse Guards, March 15, 1774, NA WO81/13, 21.

trial.⁴⁸ Warning witnesses to be ready for trials could also be an intensive endeavor.

When preparing for Catherwood's trial, Judge Advocate General Sir Charles Gould was forced to call on the better part of the 66th Regiment's officer corps to prepare their testimony, in addition to a litany of other witnesses.⁴⁹

While preliminaries for trials held abroad could be more streamlined, in part due to the absence of the judge advocate general's intervening authority, calling a general court martial was still an involved process. Procedural errors could derail a case as easily in America as they did in Great Britain. In February 1777, British Commander-in-Chief in North America Lieutenant-General William Howe rejected a general court martial held in Rhode Island that Major-General Earl Percy submitted for his approval. Howe observed that Percy had provided the warrant for the general court martial, which he did not have the authority to do. The power to issue general courts martial warrants rested solely in the commander-in-chief's hands. While Howe was willing to issue a new warrant for a trial, such indulgence was not to be taken for granted. In September 1777, Major-General Robert Pigot, the new commander of the Rhode Island garrison, provided pointed justification when he requested additional warrants from Howe, noting that he had "but one Warrant left for holding Gen^l. Courts Martial & here are several Men must be try'd for Sheep stealing & other Crimes, as they are notorious offenders."⁵⁰ While convening general courts martial was a relatively easy affair for the army when it was

⁴⁸ John Darby to Sir Charles Gould, Wells, May 23, 1768, NA WO72/6.

⁴⁹ Sir Charles Gould to various, NA WO81/13, 17-35.

⁵⁰ Howe to Earl Percy, Feb 13, 1777 New York Vol 20:29; Gen. Sir Robert Pigot to Howe, Sep 30, 1777, Newport, Rhode Island, Vol 24:28, Sir Henry Clinton Papers, William L. Clements Library, University of Michigan, Ann Arbor, Michigan.

operating together during wartime, as evidence by orders for general courts martial to convene to try any prisoners brought before them, substantially more involved preparation was required during peace time.⁵¹ When assembling a general court martial in the Caribbean in 1765, Major-General Robert Melville, the local commander-in-chief, had to select the most central island in his area to host the trial and warned all officers to “make a Written report of whatever Millitary [sic] matters Regarding His Majesty’s Service, [as] may in their Oppinions [sic] require the Cognizance of that Court.”⁵² Thus officers exchanged one set of complications for another when holding general courts martial abroad.

Whether in Great Britain or in South Carolina, the deputy judge advocates at every general court martial trial received a set of formal instructions for recording and formatting the trial proceedings, set by the Judge Advocate General’s Office.⁵³ Originally established by Judge Advocate General Edward Hughes in 1715, the universal application of these instructions constituted a significant point of standardized protocol linking all general courts martial back to Whitehall. Even though local commanders-in-chief would review the trials held abroad and act on them long before the proceedings reached Whitehall, the presence of these official directions tied all trials back to the judge

⁵¹ For example, Howe’s evening orders for September 1, 1777, at Head of Elk, Delaware, direct a general court martial to assemble the following day to “try all Prisoners that shall be brought before them.” Stephen Kemble, *The Kemble Papers*, vol. 1 (New York: New York Historical Society, 1883), 482.

⁵² General Orders, Grenada, August 16, 1765, in “Copies of the General Orders transmitted to His Majesty’s 32nd Regiment at S^t Vincent from the Head Quarters of the Government of His Excellency General Melvill at Grenada, From June 1765 to the 15th April 1768,” NAS GD126/28/2/2.

⁵³ In addition to the original copy of the regulations entered behind a deputation to John Beaver to serve as deputy judge advocate for Gibraltar in 1715, identical copies exist for courts martial held in the Brigade of Guards in the summer of 1722, for April 23, 1757 in the Bouquet Papers, and for sometime in the period 1764-1770 in WO72/6. NA WO71/14, 71-73; NA WO71/14, 309-312; Henry Bouquet, *The Papers of Col. Henry Bouquet*, ed. Donald H Kent and Sylvester K Stevens (Harrisburg: Department of public instruction, Pennsylvania historical commission, 1941), 11–14; WO72/6.

advocate general. The instructions began by informing the deputy judge advocate of the proper number and rank of the officers serving as judges, directing him to administer the oaths found in the Mutiny Act and the Articles of War. The deputy judge advocate would administer the oath to the president of the court martial “as a Token of particular respect” and then to swear in the other judges as a group.⁵⁴ The deputy judge advocate would also proceed to administer a separate oath to any individuals offering evidence in the trial. Hughes emphasized the need to record every piece of evidence presented for and against the prisoner with the utmost detail, including any information that led the judges to return a sentence contrary to the Articles of War, “That His Maj^{ty} may thereby be enabled to Judge of the Fact himself with Certainty.”⁵⁵ The instructions included a general form, complete with blanks to be filled in and a diagram demonstrating how the judges’ names were to be recorded to reflect their seniority in the army. After the trial ended, the deputy judge advocate would prepare a clean copy of the proceedings and dispatch it to the judge advocate general’s office or to the local commander-in-chief, and would act to guarantee silence regarding the proceedings, verdict, and sentence until the king or the commanding general confirmed them. Hughes’s closing remarks, still present in the set of instructions from the late 1760s, directed the deputy judge advocate to establish that the defendant, if a soldier, had been properly enlisted, received pay, and heard the Articles of War read to him, otherwise the king would not confirm the proceedings. The army’s circulation of and reliance upon Hughes’ instructions for at least six decades testifies to the real gains made by the legal-military state over the century.

⁵⁴ NA WO71/14, pgs 71-72, 310.

⁵⁵ NA WO71/14, pgs 72, 311. The wording in Parker’s instructions differs slightly, including “the General or Commander in Chief” with the king.

Despite having written instructions on hand, procedural irregularities cropped up throughout the century, which led the king and local commanders in chief to order a revision of proceedings or void the verdict and sentence entirely. Between February 5-7, 1717, Judge Advocate General Hughes wrote to the commanding officers of four regiments, requiring them to revise their proceedings to establish whether the soldiers tried had been properly enlisted and done duty.⁵⁶ In November 1748, Deputy Judge Advocate General King Gould instructed a general court martial to revise their proceedings after they found Lieutenant William Joyce of Laforey's Marine Regiment guilty of assaulting another officer but recommended him for clemency instead of providing a sentence. King Gould's son, Judge Advocate General Charles Gould, routinely issued orders to revise general courts martial proceedings through the latter half of the century. In a letter written on February 19, 1770, Gould instructed one deputy judge advocate to revise a set of general court martial proceedings that featured multiple charges to address each charge individually in the verdict and sentence portion of the proceedings. On December 2, 1770, Gould sent a letter to Captain Henry Schomberg, Deputy Judge Advocate for Minorca, instructing him to reconvene a general court martial board to revise their sentence on an assault case, since they inflicted the death penalty due to the victim expiring of his wounds. Since they had not charged the defendant with murder as well as assault, Gould ruled that they could not sentence the soldier to capital

⁵⁶ Edward Hughes to the Commanding Officer with the Honble. Col. Handasydes Regiment at Abingdon, Horse Guards February 5, 1717; Edward Hughes to Commanding officer with Lord Irwin's Regiment at Kingston upon Hull, Horse Guards February 5, 1717; Edward Hughes to Commanding Officer with Col. Dubourgay's Regiment at Canterbury, Horse Guards February 5, 1717; Edward Hughes to Commanding Officer with Lord Stairs's Regiment of Dragoons at Carlisle, Horse Guards February 7, 1717; NA WO71/14, 171-173.

punishment.⁵⁷ While most instances of revision seem to have been due to small administrative errors and misunderstandings, the possibility remained that some officers attempted to influence general courts martial proceedings in ways that are difficult to detect. In a letter written on August 7, 1774, in Boston, Massachusetts, Captain George Harris of the 5th Regiment of Foot noted that he had spent time the previous day instructing one John Ragg, a new recruit in his regiment, how to plead at a general court martial that was trying him for desertion.⁵⁸ Behavior like Harris's may have had an impact on general courts martial, but the nature of the material makes it impossible to say with certainty from the proceedings alone. Regardless of attempted intervention from officers, both the geographical reach of Gould's letter to Schomberg and the inherent assumption that the soldier had not already been executed attest to the influence of the Judge Advocate General's Office by this date.

The impact of these regulations is reflected in the data from a sample of general courts martial proceedings held throughout the British Empire between 1715 and 1781, displayed in Table 2.3 below. The punishments reflect the court's focus on capital crimes. The presences of flogging, running the gauntlet, and transportation do not necessarily indicate a softening of attitudes towards addressing severe offenses. Approximately 40% of flogging sentences varied between 1,000-2,000 lashes, which Judge Advocate General Gould thought fell "little short of a capital sentence."⁵⁹ Similarly, running the gauntlet

⁵⁷ King Gould to Col. Laforey, Privy Garden, Nov 5, 1748, NA WO 71/39, 19; Sir Charles Gould to Lt. Gardner, Horse Guards, February 19, 1770, NA WO72/6; Sir Charles Gould to Capt Schomberg, Horse Guards December 2, 1770, NA WO72/6.

⁵⁸ Harris' letter appears in S. R. Lushington, *The Life and Services of General Lord Harris, G.C.B., during His Campaigns in America, the West Indies, and India* (London: John W. Parker, 1840), 42.

⁵⁹ Charles Gould to Thomas Waite, Horse Guards, August 22, 1770, NA WO72/6.

Punishment	Frequency of occurrence	Freq. of mitigation	Freq. of pardon	Crimes
Lashes	462	26	18	Mutiny, disobedience of orders, theft, sedition, desertion, insubordination, counterfeiting, assault
Death	196	2	11	Desertion, mutiny, robbing an officer, marauding, murder, misbehavior before the enemy
Acquitted	142			Desertion, mutiny, assault, theft, disobedience of orders, sedition, misbehavior before the enemy
Cashiered/dismissed	30	1	3	Absence without leave, mutiny, ungentlemanly conduct, disobedience of orders, breaking arrest, assaulting an officer,
Demoted/Suspended	21	1	1	Ungentlemanly conduct, absence without leave, neglect of duty
Reprimanded/beg pardon	16			Neglect of duty, insubordination, ungentlemanly conduct,
Transportation	9			Desertion,
Fined	7			Desertion, robbery
Run the Gauntlet	6			Assaulting an officer, insubordination, desertion
Confined	2		1	Desertion, insubordination
Picketed	1			Assault, rioting
Bread & Water	1			Assault, rioting
Total	893	30	34	

Table 2.3: Incidence of punishments in general courts martial

was considered such a severe corporal punishment that the Articles of War restricted it to general courts martial.⁶⁰ Transportation meant service in Africa or the West Indies and probable death from the local climate. Other punishments represent a series of outlying factors. Cashiering and suspension from duty were the punishments invariably inflicted on officers in lieu of corporal punishment or death. Fines reflect the financial impact of certain crimes, while the instances of picketing and being placed on bread and water demonstrate the presence of offenses severe enough to warrant trial by court martial, but which did not produce sufficient grounds for capital punishment. Examples of mitigation and pardon represent instances of intervention by the king and local Commanders-in-chief to manipulate the power dynamic, as reflected in Peebles' discovery of Lieutenant-General Sir Henry Clinton's intention in permitting Sutherland's to be condemned and then pardoned at the gallows.

Conclusion

Exerting control over the military justice process was a second critical factor for consolidating and expanding government control over the military justice system in the eighteenth century. By setting the official definitions of military crime, the combination of parliamentary and crown officials in Whitehall and Westminster had insured that courts martial would be relegated to a jurisdiction that did not immediately threaten the operation of civilian courts. The military courts were nevertheless empowered to inflict capital punishment on offenders, a punishment that had to be tempered with some form of due process in order to be made acceptable to critics. Both the Mutiny Act and the

⁶⁰ *Rules and Articles*, 1718, 25-26.

Articles of War contained detailed instructions on the form and conduct of regimental and general courts martial, dividing the courts based on the punishments each could inflict and effectively creating a template for due process. The focus on the intersection of process and punishment would simultaneously encourage and impair the legal-military state's expansion by focusing attention on capital sentences. A royal requirement instituted by William III in 1690 required officers to submit written records of their general courts martial proceedings for the crown's review and confirmation before executing death sentences. Successive judge advocate generals employed the opportunity of intervening in courts martial presented by this requirement to enforce officers' compliance and greater engagement with the official regulations. By requiring revisions of trials that did not conform to the Mutiny Act, the Articles of War, and various other royal commands, and through promulgating standard instructions for both operating and recording trial proceedings, the Judge Advocate General's Office steadily expanded the legal-military state's reach.

This campaign for increasing standardization and recognition of the power of civilian administrators over army officers was far from a complete success. Neither the Mutiny Act nor the Articles of War empowered the judge advocate general to review or revise regimental courts martial or address the exercise of summary justice. The Articles of War, along with military tradition, directed that disorders be dealt with at the completely unregulated level of casual summary justice whenever possible. Anecdotal evidence from general courts martial reveals that these sorts of disciplinary situations generally involved officers inflicting a beating with their canes on soldiers who challenged their authority. While general orders record instances of high-ranking

commanders exercising summary justice over large numbers of officers and soldiers in a more methodical fashion, this broad base of the military justice process's pyramidal structure constituted a refuge for the exercise of officers' discretionary powers that the legal-military state had no hope of reaching. Though far more regularized, to the point of being held to a uniform standard of conduct and recording throughout the army, regimental courts similarly evaded the judge advocate general's control, though officers abuse thereof did provoke his ire. Despite the Mutiny Act and the Articles of War limiting regimental courts martial to trying relatively minor offenses, contemporary officers found ways to try offenses at this level that should have been heard by a general court martial. In so doing, the regimental courts occasionally inflicted corporal punishments that verged on capital sentences. Despite recommendations from prominent military writers to engage in this practice, officers still requested general courts martial, thereby voluntarily, if not enthusiastically, supporting and participating in the emerging centralized structure of the legal-military state.

CHAPTER THREE: SOLDIERS, MILITARY JUSTICE, AND NEGOTIATED AUTHORITY

On February 12, 1783, Andrew Marshal, Surgeon to the 83rd Regiment of Foot, wrote to his patron, Lord Balgonie, to describe the recent mutiny of his corps. Having bravely defended the channel island of Jersey against a French attack in 1781, the regiment spent the first months of 1783 on transports lying off Portsmouth, England. Disorders began springing up amongst the rank and file in early February, which Marshal credited to reports filtering in of the 77th Regiment's mutiny a few weeks earlier, in response to orders to embark for India. The soldiers of the 83rd Regiment on one ship appeared on deck with loaded muskets and forced sailors to man boats to land them on shore, "hawling [sic] along with them an Officer, partly to cover them from the fire of y^e men of war, & partly for the sake of orders." Within a few days the entire regiment was ashore at Portsmouth, where they formed on the common for a review. The officers directed all those soldiers who would stay loyal to their regiment to gather by their colors, while all those who intended to desert should remain standing in formation. Only a few dozen men moved to form behind the regiment's two flags, leaving 900 soldiers standing in silent testimony to their decision to leave the service. Several months later, the entire regiment would be disbanded. Marshal laid the blame for the regiment's dissolution at the feet of its field commander, Lieutenant-Colonel Fanshawe, whom he credited with over-

charging the men for “feathers, & fopperies” to the point of nearly starving them and for ruling “from caprice, with cruelty.”¹

The 83rd Regiment’s mutiny, chronicled along with similar incidents in John Preble’s *Mutiny*, seemingly offers a textbook example of how historians have characterized soldiers’ engagement with the military justice system. The focus of existing work by Arthur Gilbert, Sylvia Frey, Peter Way, and Paul Kopperman has focused exclusively on elements of resistance and victimization through the lenses of desertion and mutiny.² In examining desertion, Gilbert and Frey have emphasized the high degree to which soldiers had little appreciable agency in the military justice system: desertion appeared either as an attempt to escape from the system or as an example of victimization for being in the wrong place at the wrong time. Way, and to a lesser extent Kopperman, have studied the Stoppages Mutiny in North America in 1763-1764 as an example of mass resistance giving way to negotiation with the highest echelons of the British Army’s command structure. Soldiers mutinied after the army’s commanders decided to begin charging troops on American service for rations after having provided food supplies for free during the Seven Years War. By refusing to do duty, the soldiers forced the military establishment to return to the earlier policy. While useful for establishing some of the roles that common soldiers played in the military justice system, this scholarship conveys the impression that the army’s rank and file were merely subjects of the legal-military

¹ Marshal to Balgonie, Portsmouth, February 12, 1783, NAS GD26/9/520/14

² Sylvia R Frey, *The British Soldier in America: A Social History of Military Life in the Revolutionary Period* (Austin: University of Texas Press, 1981); Arthur N. Gilbert, “Why Men Deserted from the Eighteenth-Century British Army,” *Armed Forces & Society* 6, no. 4 (July 1, 1980): 553–567; Paul E. Kopperman, “The Stoppages Mutiny of 1764,” *The Western Pennsylvania Historical Magazine* 69, no. 3 (July 1986): 241–254; Peter Way, “Rebellion of the Regulars: Working Soldiers and the Mutiny of 1763-1764,” *The William and Mary Quarterly* 57, no. 4 (2000): 761–792.

state, not active participants in it. If this were the case, why would the mutineers of the 83rd Regiment have taken the pain to bring an officer with them for orders?

Scholarship examining how the lower classes and laboring elements of society have engaged in politics provides several additional useful perspectives from which to examine soldiers' interactions with the military justice system. James Scott's work has emphasized the need to consider the multi-layered nature of subordination and resistance, including the subtle ways in which the lower ranks of society used resistance as a means of redressing grievances. Michael Braddick and John Walter have offered the idea of power grids, emphasizing the high degree of fluidity in power relations and the elites' need for the legitimation of their authority through the recognition of their subordinates. Ethan Shagan has emphasized the importance of collaboration as an essential component for the success of larger institutions and movements.³ In light of the existing work on negotiated authority and common peoples' struggle with social hierarchy in civilian society, soldiers' unwillingness to tacitly submit to all demands from their superiors comes as no surprise. The idea that most forms of authority in the eighteenth-century British Empire were negotiated through expressions of power by all of the parties involved is as applicable to the eighteenth-century British Army as it is to any other social hierarchy of the age.

British soldiers actively engaged in the legal-military state through strategies of resistance, collaboration, and negotiation. While both officers' attitudes towards soldiers

³ James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven, CT: Yale University Press, 1990); M. J Braddick and John Walter, "Introduction. Grids of Power: Order, Hierarchy and Subordination in Early Modern Society," in *Negotiating Power in Early Modern Society: Order, Hierarchy, and Subordination in Britain and Ireland*, ed. M. J Braddick and John Walter (New York: Cambridge University Press, 2001), 1–42; Ethan H. Shagan, *Popular Politics and the English Reformation* (New York: Cambridge University Press, 2003), 235–269.

and the institutional framework of military justice limited the parameters of these options, the diversity of ways through which soldiers engaged with military justice cautions against assuming any uniform attitude among the rank and file towards either army life or the disciplinary system. Modes of resistance reflect significantly greater variety than has been investigated by the existing literature. While mutiny and desertion characterize the key subsets of confrontational and escapist approaches to resistance, both actions are characteristic of the most extreme versions of these strategies. Confrontation and escape occurred along a varied spectrum that reached deep into the every-day fabric of military life to include passive verbal expressions of frustration and escape through drunkenness. Collaboration comprised all of the ways soldiers could assist or serve as part of the military justice system, from turning in disorderly comrades and providing witness testimony to actively policing their fellow soldiers. Negotiation is most evident in the large-scale incidents of mutiny and the focused context of deserter advertisements in newspapers, but evidence of soldiers petitioning their officers suggests that compromise solutions to issues were perhaps more common than the majority of evidence suggests. Taken together, these forms of engagement demonstrate that soldiers were an active part of the legal-military state, not simply a focus for its disciplinary attention.

In seeking to recover these perspectives from below, source material must be approached with significant care and a conservation method of interpretation. The eighteenth-century British Army was no different than its civilian corollaries in that regard, though recovering sufficient evidence of soldiers' activity requires a fine grain analysis of documents generally biased against them. The "murmuring" mentioned in some trials provides an example of the nuanced form of most of the evidence of common

soldiers' engagement with the military justice system that can be recovered from surviving records.⁴ While the military justice process preserved significant amounts of material related to enlisted men, it did not preserve their voices intact. Officers conducted the military tribunals and created the records, particularly the general court martial proceedings, that provide the best information on how common soldiers engaged with military authority. Officers' biases obscured resistance by failing to take common soldiers' intentions into account, going so far as to ensnare some soldiers who had no desire for confrontation. Soldiers who cooperated faded into the background of most proceedings, appearing as props whose significance is only apparent upon careful consideration. Officers generally sought to obscure negotiation as much as possible, or portray it as mercy in order to avoid any appearance of weakness. Common soldiers provided relatively few sources that could act as a corrective: the majority of their surviving narratives are noticeably silent on the issue of interactions with officers. Because of these issues, the following analysis will provide a conservative, qualitative, and anecdotal assessment of the ways in which soldiers used the military justice system to negotiate the limits of their officers' authority.

Resisting Military Justice

Common soldiers' resistance to their officers' authority manifested itself in a variety of forms during the period under study. From the large-scale mutinies to shredding general orders, common soldiers took an active role in voicing their

⁴ Trial of Lieutenant William Catherwood, Berwick, England, April 18, 1774, NA WO71/53, 18-131.

displeasure with treatment they perceived to be unacceptable.⁵ For the most part, however, contemporaries and modern scholars have focused on only two of the many crimes enumerated in the Articles of War that related to defying authority: mutiny and desertion. The very name of the annual legislation authorizing courts martial, *An Act for Punishing Mutiny and Desertion*, demonstrated the significance that contemporaries assigned to these forms of resistance to the army's social hierarchy. Existing treatments have tended to focus on large-scale examples of these phenomena, not least because they offer a plethora of surviving primary source material.⁶ At the same time, however, this focus overlooks less dramatic forms of soldiers' resistance to military authority and ignores the issue of bias. Criminal labels reflected how officers perceived a soldier's actions in context. Probing mutiny by focusing on the nine major mutinies that occurred between 1715 and 1785 and examining desertion through a focus on statistical analysis fails to account for more common and less dramatic forms of resistance found in many mutiny cases and does not properly evaluate the individual nature of desertion.⁷ As a

⁵ Archibald Cunninghame, "General Orders of the Garrison of Gibraltar from the 2^d February 1726/7 to 28th October 1745," NAS GD21/1/625, 139

⁶ John Prebble, *Mutiny: Highland Regiments in Revolt, 1743-1804* (London: Secker & Warburg, 1975); Kopperman, "The Stoppages Mutiny of 1764"; Way, "Rebellion of the Regulars"; Gilbert, "Why Men Deserted from the Eighteenth-Century British Army"; Frey, *The British Soldier in America*; Glenn A. Stepler, "The Common Soldier in the Reign of George III, 1760-1793." (Ph.D. dissertation, Oxford, 1984).

⁷ These mutinies included the Highland Regiment in May 1743, the garrison of Louisbourg in June 1747, the garrison of North America in 1763-64, the 78th Regiment (Seaforth's Highlanders) in September 1778, the 76th Regiment (MacDonald's Highlanders) in March 1779, a party of recruits for the 71st Regiments (The Royal Highland Regiment and Fraser's Highlanders, respectively) in April 1779, the Western Fencibles in October 1779, the 77th Regiment (Atholl Highlanders) in January 1783, and the 83rd Regiment (Glasgow Volunteers) in February 1783. Only the mutiny at Louisbourg has escaped scholarly attention to date, with Prebble, Kopperman, and Way covering the remaining episodes.

result, the conclusions of these studies do not provide general insight into soldiers' perspectives on their officers or the military justice system.

The court martial of Private John Brown of the 44th Regiment of Foot for mutiny in December 1775 at Boston, Massachusetts, provides a contrasting example to the largescale mutiny incidents of the period. Captain Cornelius Cuyler of the 55th Regiment of Foot deposed that he caught Brown exiting a vacant house with boards under his hand and ordered him to stop. Brown fled instead and struck Cuyler when the latter caught up with him and grabbed his collar. Other witnesses deposed that Cuyler had been wearing an overcoat obscuring his uniform and had not identified himself to Brown. The defendant in turn claimed not to have recognized Cuyler as an officer. Cuyler could have easily charged Brown with plundering or assault, but instead chose mutiny for reasons that the trial proceedings do not make clear. The case serves as an example of the need to take care when approaching other mutiny and even desertion charges, since an officer's perception of the infraction did not imply a soldier's intent.⁸

The trial of ten men from General Edward Wolfe's Regiment of Marines in 1742 provides a pointed example of the flexibility of mutiny as a criminal label. The soldiers stood accused of that crime due to their refusal to obey the lawful orders of their lieutenant, who direct them to report for duty on board the sloop *Hound*. In the course of the proceedings, witness testimony revealed that the officers owed the marines two years' worth of sea pay and that the soldiers had refused to leave until they were paid, offering no further resistance. When placed under arrest, the men went quietly, going to the length of returning to confinement after being "rescued" by a civilian mob, which demonstrated

⁸ NA WO71/82, 203-206.

their willingness to submit to rightful authority. The court found the men innocent of mutiny but declared them guilty of disobedience of orders, sentencing seven of the men to receive four hundred lashes and the remaining three to suffer six hundred lashes. The king approved the verdict but mitigated the sentences to one hundred and two hundred lashes respectively, a likely reminder that, while the “mutineers” had been in the right, challenging the social hierarchy was an unacceptable means of securing redress. The fact that the court found the men guilty of a lesser charge, which could have been tried by a regimental court martial, provides a further indication that there were disagreements in the officer corps over what acts constituted a mutiny.⁹

Even greater issues of definition plague scholarly treatments of desertion. In theory the charge could be applied to any soldier who ran away from the service for any reason. As Glenn Steppler has shown, officers do not seem to have followed any sort of universal standard when applying it in practice.¹⁰ Surviving trials indicate that some soldiers were charged with desertion who had no intent to resist military authority at all or were attempting to negotiate with their officers. When Private Richard Lacy of the 3rd Regiment of Foot Guards stood trial for desertion in London on November 12, 1715, he claimed that he had gone into the country to see his wife and reclaim several shirts he had left with her. Three days later, Private John Foxsell of General Chudleigh’s Regiment told a court martial at Plymouth that he had left his regiment to see his sick wife and child. While finding both men guilty, the officers in each case recommended them for

⁹ NA WO71/37, 66-68, 71.

¹⁰ Steppler, “The Common Soldier in the Reign of George III, 1760-1793,” 184.

mercy, suggesting the judges were in some degree convinced by the defendants' stories.¹¹ The case of Privates Richard Channing and John Ford of Wills' Regiment in November 1724 provides an example of failed negotiation. When the two men were denied the pay that they thought was due to them by their lieutenant-colonel in July of that year, they went to London to plead their case before their colonel. Unable to find him, the two men enlisted with the Scots Guards, where they were eventually apprehended. In the course of the trial, their lieutenant-colonel admitted that Channing, Ford, and twelve other soldiers had bypassed their captain and came directly to him "in an irregular and Mutinous manner" to beg for redress. His testimony simultaneously confirms Channing and Ford's intention to negotiate, while providing another example of the different ways in which contemporaries used the term of mutiny.¹² In showing how liberally officers applied desertion charges with respect to the offenders' intent, these cases demonstrate the need for a far more flexible approach to the data, one that takes into account the amorphous nature of these criminal categories.

A further problem regarding any analysis of desertion is the markedly individual nature of the crime. While there are some patterns in the trial data, which will be examined below, practically every desertion involved unique characteristics that make easy categorization difficult if not impossible. For example, the same court that tried Channing and Ford examined three other cases of desertion from the same regiment. Private Robert Herve stood accused of deserting from the regiment on August 8, 1724, and stated in his defense that he had gone "to Exeter after One Rebecca Hall whom he

¹¹ NA WO71/14, 63-66; NA WO71/34, 7-9.

¹² NA WO71/35, 38-39.

had Courted in hopes of bettering his Fortune by her Friends.” Herve appeared in public every day and surrendered himself voluntarily to the soldier whom the officers had sent in pursuit of him. Private John Melbourne explained that he had left the regiment in October 1724 to see his seriously-ill mother, after having his request for a furlough denied. Private John Sampson explained that he had run away for fear of being punished for going into debt to his sergeant, whom he claimed ran an illegal liquor store in the regiment. The diversity in this small sample provides an indication of the layers of variables facing any attempt to categorize desertion in isolation.¹³

In order to overcome issues of definition and source limitations, it is necessary to examine resistance as a phenomenon that spanned a spectrum of actions that officers labeled as crimes, rather than being personified in the forms of mutiny and desertion alone. This multitude of approaches that soldiers adopted can be connected together in two ways. First, a relatively small set of problems lay at the root of resistance in general. The most popular core causes included pay issues, abusive treatment meted out by officers, drunkenness (which acted simultaneously as a cause and a form of resistance), and the army’s unwavering demand to control soldiers’ movements. Secondly, one can look to the two general paths that resistance strategies followed that established vertical links between criminal categories: confrontation and escape. In this regard, mutiny and desertion are useful capstone crimes representing each track, with mutiny being the ultimate form of confrontation and desertion the final form of escape. Understanding the interaction between motivation and the developmental courses of resistance helps us to

¹³ NA WO71/35, 39-42.

better access soldiers' intent and to begin to see the process of negotiating authority through their eyes.

The oppressive nature of the common soldier's life during the eighteenth century has long been credited as the main reason for military crime and acts of resistance. Among the most popularly cited of these features was the problem of pay. Gilbert has highlighted how an average infantryman's pay placed him lower on the socio-economic scale than the common laborer, and credited this fact as the cause of theft, drunkenness, mutiny, and desertion.¹⁴ The nature of the military social hierarchy made soldiers particularly vulnerable to abusive treatment, though contemporaries seldom highlighted this issue. When commentators such as Dr. Charles Lucas, author of the infamous pamphlet *A Mirror for Courts-Martial*, did mention abusive treatment, it was generally in regards to extreme punishment.¹⁵ While not unique to the army, drunkenness was a well-recognized problem at the time, as historian Paul Kopperman has shown, and seems to have been both a response to the negative elements of soldiering as well as a social lubricant that made it easier for soldiers to strike out against authorities.¹⁶ Limitations on travel stand out as the least understood or highlighted cause of resistance in the eyes of contemporary observers and modern scholars alike. In order to maintain the security of military installations and employ their manpower as effectively as possible, officers needed to have their soldiers at hand and ready for duty at a moment's notice. As a result,

¹⁴ Gilbert, "Why Men Deserted from the Eighteenth-Century British Army."

¹⁵ Charles Lucas, *A Mirror for Courts-Martial: in which the complaints, trial, sentence and punishment, of David Blakeney, are examined*. (London, 1768).

¹⁶ Paul E. Kopperman, "'The Cheapest Pay': Alcohol Abuse in the Eighteenth-Century British Army," *The Journal of Military History* 60, no. 3 (1996): 445–470.

the army placed severe limitations on soldiers' movements, often confining them to their barracks or other specific areas for significant parts of the day. The high incidence of absence-related offenses testifies to the fact that soldiers were highly mobile individuals who resented these regulations and often ignored them. Lacey and Foxsell's cases mentioned above provide examples of where soldiers violated orders to carry out errands that they viewed as essential. These core causes of resistance, all of which were linked to soldiers' conditions of service, repeated throughout the surviving record of enlisted men's acts of resistance.

While the causes of resistance seem to have remained fairly standard across the board, the acts themselves varied considerably. As the examples already noted have shown, soldiers pursued strategies ranging from complaining amongst themselves loud enough to be heard by their superiors to outright refusal to obey orders. Understanding how soldiers decided to escalate their activities is complicated by the nature of the evidence. Relatively little information was retained for summary justice or regimental courts martial, where officers addressed the more minor forms of infractions. While general courts martial retain the greater level of detail necessary to access common soldiers' voices, the cases tend to focus on extreme episodes. There are, however, some general courts martial cases that detail the various escalating levels of resistance leading to the final decisive episode. When set against the larger, yet less detailed, quantity of information available from summary justice and regimental court martial proceedings, these case studies can be used to chart the general course by which soldiers progressed through the stages of confronting or escaping from military authority.

One of the better examples for charting the escalating stages of the confrontation strategy is the case of Wolfe's Marines noted above. In their lengthy defense, the purported mutineers offered a detailed account of the courses they had pursued to gain redress of their pay grievance before resorting to mutinous action. The marines began by approaching Captain Robert Shafto, the regiment's paymaster, who promised to pay the men. The soldiers then sent written petitions requesting relief to their colonel and to the Secretary at War, neither of which were answered. In addition to these submissive attempts to gain redress, individual marines engaged in additional acts of resistance at the time of their arrest. Private Thomas Prig insulted one Lieutenant Beaumont while that officer was pinioning his arms, threatening to write to the Secretary at War to have Beaumont's commission taken away and behaving in a "very insolent" manner. Private Thomas Clarke "flung down his hat in an insolent manner" when refusing to go on board the transport. Both men were singled out for additional punishment for these overt displays. Overall, the case of the marines presents a scenario where resistance began as a respectful appeal to authority that escalated to a refusal to cooperate coupled with slightly violent expressions.¹⁷

The case of Wolfe's Marines helps place the surviving evidence from summary justice and regimental court martial proceedings into a more coherent context. Summary justice data from Gibraltar, for example, emphasizes examples of insolence and non-cooperation. This focus is likely due to the nature of the information, which was recorded in orderly books as directives forbidding soldiers from being insolent to their superiors or neglecting to follow orders. In these cases, punishment was meted out on the spot without

¹⁷ NA WO71/37, 67-69.

trial, resulting in a dearth of evidence on what sort of appeals might have preceded these outbursts. These orders do provide us, however, with a better understanding of the other ways in which soldiers struck at their officers' authority on a relatively minor level. Examples included giving alcohol to prisoners, trespassing in restricted areas, damaging their barracks, defacing postings of general orders, refusing to report crimes, and firing their muskets in contravention of orders.¹⁸ Abstracts of regimental courts martial held in Ireland between 1774-1778 provide additional details of the sorts of low-level acts of resistance that seem to have been common in the army. Charges leveled against errant enlisted men included disobedience of orders, insolence, making disturbances in barracks, allowing prisoners to escape, encouraging men to desert, and damaging military property. In a move echoing Private Thomas Clarke's behavior during the marine mutiny, Private John Parr of the 36th Regiment of Foot supposedly threw "down his Firelock in a Mutinous Manner" and refused to pick it up again when ordered to do so. While failing to show the more submissive strategies seen in the trials of Wolfe's Marines, this data does testify to the variety of options available to soldiers set on confronting military authority. The general court martial case studies further suggest that soldiers tended to weight their activities to the severity of the pressure they were under from their officers, preferring to act in ways that fell short of mutiny charges.¹⁹

The verbal slurs recorded in general court martial trials for insolence and sedition provide additional examples of ways in which soldiers expressed their disapproval of

¹⁸ Cunninghame Orderly Book, 11, 14, 38, 72-73, 78, 116, 155, 192. Specific examples of refusal to obey orders included soldiers firing their muskets when coming off of guard duty, hiring substitutes to do duty for them, not reporting crimes, and trespassing.

¹⁹ "Returns of Courts Martial in Ireland," August 1, 1774-January 10, 1778, HL/PO/JO/10/7/544, House of Lords Record Office, Westminster, UK

their superiors that fell short of the classic image of mutiny. In 1727, Private Hans Coggin of the Earl of Londonderry's Regiment stood accused of mutiny and seditious words for initially refusing to rack his arms, mocking his sergeant's orders by repeating them while "farting also with his mouth," and swearing that any man who "wou'd serve King George...ought to be damn'd" if they knew what he did of army life.²⁰ Three cases from 1766 follow a similar pattern, though the soldiers accused had sent a petition to their officers for a redress of grievances.²¹ Sedition cases focused on disrespectful verbal expressions aimed at the king or in support of his enemies, the ultimate form of verbal resistance to authority. During the 1715 Jacobite Rising, seven defendants stood accused of making disloyal toasts to figures including the Duke of Ormond and James Francis Edward Stuart, and to the "Royal Exchange."²² Private John Partridge of the Coldstream Guards, accused of speaking "traitorous words about the sacred person of His Majesty," accosted two soldiers who were singing "The Prig that Came From the Warming Pan" in 1724. Partridge damned the soldiers and shouted "there is no other King that James the Third, he is King of England & I know no other." The use of pro-Jacobite expressions as a form of resistance survived for years after the final elimination of the Stuart threat at Culloden in 1746: Private John Collier of Colonel Rich's Regiment was accused of drinking healths to James Francis Edward Stuart in 1753.²³

²⁰ NA WO71/35, 240-256.

²¹ NA WO71/76, 22-48.

²² Private William Robinson of the Coldstream Guards was tried in August 1715 for making toasts to "the Stewarts, Butlers, Royal Exchange." NA WO71/14, 52-54.

²³ NA WO71/41, 99-101.

The ultimate escalation of confrontation appeared in the form of violence, reflected in the general court martial record as verbal threats and actual attempts at inflicting bodily harm. In 1755, Private John Cook of the Royal Welch Fuzileers appeared before a general court martial after threatening to shoot an officer whom Cook claimed had attempted to rape his wife.²⁴ In January 1735, a general court martial at the Horse Guards in Whitehall convicted Private Thomas Emerton of mutiny for threatening to challenge Corporal Thomas Smith to a duel after he refused to post Emerton as a guard at the Prince of Wales' lodgings.²⁵ Private Edward Doyle of Gage's Light Infantry faced mutiny charges in May 1759 at Albany, New York, for striking and threatening to kill a sergeant.²⁶ In many of these examples, soldiers seemed to have acted out of passion rather than from consideration, frequently suffering capital punishment as a result.

Escape strategies present a more complicated developmental dynamic which was not nearly as linear in its overall flow as confrontational strategies were. Escape generally fell into one of two divisions: soldiers who attempted to leave physically and those who attempted to do so psychologically. A range of absence-related offenses fell into the first category, from desertion to being out of barracks at night, leaving work parties, guard posts, and detachments without permission, and self-inflicted wounds (likely intended to remove the offender from the duty roster). Desertion dominated the general courts martial proceedings, while examples of the other infractions appear throughout the summary

²⁴ NA WO71/43, 14-16.

²⁵ NA WO71/16, 39-41.

²⁶ NA WO71/67, 122-124.

justice and regimental court martial data.²⁷ Psychological escape strategies seem to have focused primarily on drunkenness, which provided soldiers with a means of alleviating the stresses of military life without leaving the confines of their posts. Drunkenness and lesser absence-related offenses appear to have constituted the first response to military authority. In the latter case, these escapes consisted of short-term absences with the soldiers returning of their own volition.

The most extreme cases of escape generally fell into the desertion category, where soldiers either sought to change regiments, negotiate with their superiors, or leave the service permanently. When Privates Patrick Fallan and John Bolton deserted from their regiments in 1778, they immediately enlisted in other units. Both men testified to leaving their original companies due to abusive treatment from their officers, appearing to have simply wanted a better situation rather than to leave the army permanently. Thomas Cowdery ran from the Coldstream Regiment of Foot Guards in 1716 after losing his musket and accoutrements. He tried various methods of negotiating a return to the ranks without punishment, including asking a neighbor to write a letter to his captain. He was eventually captured while on his way to work out an arrangement with his sergeant. Few men charged with desertion actually admitted to attempting to escape military service permanently, since that sort of confession would instantly result in a guilty verdict and a heavy sentence. These examples demonstrate how flexible escape strategies could be for addressing a variety of threats, though not always successful.²⁸

Taken together, the strategies of confrontation and escape, with the variety of resistive acts they embraced, point to a larger question: what was the objective of

²⁷ Cunningham Orderly Book, 41, 104, 136, 153; HL/PO/JO/10/7/544.

²⁸ NA WO71/86, 216-218, 413-417; NA WO71/14, 111-113, 124-130.

resistance? In many cases, the end game appears to have been negotiation. Enlisted men struck out against officers in order to bring their superiors to the bargaining table, where soldiers' grievances could be addressed. This theme leaps out from the mutiny of Wolfe's Marines, who sought to force their officers to pay their arrears, as well as from the many large-scale mutinies covered by Prebble, Kopperman, and Way. Yet resistance also had its darker side: when negotiation failed, soldiers sought to remove threats, often by violent means. Examples include Private Thomas Reid of the 17th Regiment of Foot, who attacked his sergeant with a club, Private Edward Doyle of General Gage's Regiment who beat and threatened to kill his sergeant, and Private John Rees of the 17th who threw his captain bodily on the ground. These latter cases represent the limits of resistance as a strategy for negotiating military authority, since officers showed little remorse in awarding death sentences for such actions, thereby permanently removing the offender.²⁹

Collaborating with the System

At the other end of the spectrum of enlisted interactions with military justice was collaboration. Like resistance, collaboration took on active and passive forms. Enlisted men and non-commissioned officers played vital roles in the operation of the military justice process, which ranged from acting as escorts and helpers to provosts-marshal to appearing as key witnesses in trials. Some soldiers, particularly non-commissioned officers, went above and beyond the literal requirements of martial law, pursuing deserters, ferreting out criminals in the ranks, and informing on erring messmates to their officers. More passive collaboration came in the form of providing evidence at trials,

²⁹ NA WO71/67, 122-124, 249-258.

standing as the captive audience for corporal punishments, and serving on firing squads. Without collaboration from common soldiers, the military justice process would have been unable to function as it did, a point that has thus far failed to appear in the commentary of contemporaries and modern scholars alike. Through collaboration, enlisted men could turn themselves into active functioning parts of the process, gaining a degree of protection and agency in the process, if by no other means than earning the approbation of their officers.

For the good, law-abiding soldier of the eighteenth-century British Army, collaborating with authorities would most likely have been a natural impulse. It was certainly the path of least trouble, since cooperating with superiors seldom earned enlisted men punishment, though it might place them into precarious situations with their less obedient comrades. As with resistance to authority, collaboration came in different forms, reflecting varying levels of engagement as well as active versus passive predispositions. In examining the role of obedient soldiers in the military justice process, one can look to the difference between actions mandated by the authorities and those that soldiers could voluntarily choose to engage in for the support of the system, and likely the improvement of their own fortunes.

The military justice process required the participation of practically every part of the army. Non-commissioned officers and enlisted men played absolutely vital roles in this system, to the point where their non-compliance would have derailed military justice. Three of their more essential duties were to act as escorts to the provost marshal or his deputies, police their comrades, and serve as witnesses in trials. In each of these capacities, soldiers strengthened the disciplinary operations by helping to counteract the

authority-to-population ratio that would have otherwise left too small a quantity of individuals, with just provost-marshals and officers, to police the relatively numerous military formations of the period.

Whether in the field or in garrison, provost-marshals carried on an active range of duties primarily related to policing and required assistance to conduct their patrols, arrest malefactors and monitor and transport prisoners. These dedicated martial law officials were often aided by soldiers specifically detached from their regiments for that duty. At Gibraltar in 1726, the Governor directed that the officer of the guard would provide an escort of soldiers, if requested by the provost, whenever a prisoner was confined or brought out for trial.³⁰ The Governor of Louisbourg issued similar orders in 1746.³¹ In May 1743, George II directed the provost-marshal to patrol the camp with a corporal and six men, and in September ordered an “Officer of each nation” in the allied army and 30 dragoons to accompany the provost on his rounds.³² Commander-in-Chief Sir William Howe detached a corporal and four dragoons to provide an escort for the provost-marshal in August 1777, while General Cornwallis ordered regiments to provide a corporal and six men for the provost’s guard.³³

Policing the army went far beyond escorting the provost-marshal on his rounds. Instead, this umbrella task consisted of multiple smaller duties that varied depending on

³⁰ Cunninghame Orderly Book, 39.

³¹ *Ibid.*, 226.

³² Orders, May 16 1743; Orders at Spieres, September 28, 1743; Orderly Book of the British Army at Dettingen with Orders of George II, 1743, NAS GD224/626.

³³ Stephen Kemble, *The Kemble Papers*, vol. 1 (New York: New York Historical Society, 1883), 481; A. R. Newsome, “A British Orderly Book, 1780-1781,” *North Carolina Historical Review* 9, no. 2 (April 1932): 180.

one's rank within the common soldiery. Non-commissioned officers, while differentiated from private soldiers, were nevertheless enlisted men and just as subject to martial law, though punishments differed between the ranks. Non-commissioned officers, as befitted their status, were charged with more supervisory duties within the structure of policing, leaving private soldiers to carry out the more wearisome and common tasks. While non-commissioned officers were charged with overseeing the day-to-day routines of their squads and sections, private soldiers took up the majority of patrolling work and also felt the most focused pressure from authorities to inform on their comrades.

While non-commissioned officers lacked any formal army-wide regulations stipulating their disciplinary duties, contemporary military advice books clearly stated that corporals and sergeants were expected to aid officers by providing close supervision of the rank and file. Non-commissioned officers were authorized to punish any minor infractions that might arise and directed to report more substantial problems to their superiors.³⁴ Orders issued by military authorities throughout the empire enlarged upon this broad base by listing specific duties expected of non-commissioned officers. Sergeants and corporals were repeatedly called upon in general orders issued at Gibraltar to oversee daily duties and maintain a watchful eye on private soldiers. In August 1730, sergeants and corporals were directed to accompany soldiers camped outside the walls into the garrison, being responsible for their good behavior and for returning them to camp. An order issued on August 9, 1735, made non-commissioned officers responsible for calling the rolls after taptoo and reporting any missing men to their officers. Sergeants

³⁴ Thomas Simes, *The Military Instructor, for the Non-Commissioned Officers and Private Men of the Infantry* (London: Printed for the author, 1779), 40, 43; Bennett Cuthbertson, *A System for the Compleat Interior Management and æconomy of a Battalion of Infantry* (Dublin: Printed by Boulter Grierson, 1768), 6–10.

and corporals were also responsible for reading out the daily orders to the men, including warning orders, and escorting parties to different duties, such as attending church, practices not limited to Gibraltar.³⁵ On July 11, 1777, Lieutenant-General William Howe made non-commissioned officers responsible for boats ferrying men who had received shore-leave to New York and back to their transports.³⁶ Sergeants and corporals were also the most likely officials to investigate irregularities. In November 1758, at Loyal Hannan, Pennsylvania, Corporal William Thomson and Serjeant Hand of the 60th Regiment of Foot were dispatched to search for stolen merchandise, resulting in the apprehension and trial of Thomas Smith and Thomas Buttler, privates in the same regiment, for theft.³⁷

To supplement the attention of officers and non-commissioned officers, military authorities also co-opted the private soldiers who served as guards and picquets. While primarily concerned with preventing enemy agents from infiltrating the camp and providing early warning for any significant attacks, these sentinels were often tasked with arresting misbehaving soldiers or campfollowers.³⁸ In 1735, Major Jean Paul Mascarene, Commander-in-Chief in Nova Scotia, directed the officer of the guard to send a file of men to suppress any disturbances occurring at sutler's houses, while also regularly dispatching patrols to insure that soldiers were inside their barracks after taptoo, when off-duty soldiers were required to retire for the night.³⁹ The governor of Gibraltar

³⁵ Cunninghame Orderly Book, 60, 73, 93, 97.

³⁶ Kemble, *The Kemble Papers*, 1:468–469.

³⁷ NA WO71/67, 27.

³⁸ Kemble, *The Kemble Papers*, 1:296, 430–431.

³⁹ “Orders and Paroles of Major Paul Mascarene at Canso, 1735-6,” September 3, 1735, BL ADD 19069. Sutters often served alcohol to soldiers in addition to selling food and other items, making their houses and stalls a focus of disorderly behavior.

routinely ordered detachments from the daily guard mounts to patrol the town throughout the night, arresting anyone who could not produce an appropriate pass or was drunk. Patrols also executed occasional purges of the post's canine population and arrested individuals who made bonfires or set off fireworks without permission.⁴⁰ In Boston, Halifax, and New York, Lieutenant-General William Howe assigned segments of the city to specific regiments, tasking their commanders with patrolling those districts and taking "into Custody all Suspicious and Disorderly Persons found in the Streets at Improper hours". When armies took the field, sentries continued to play an important role in the disciplinary process. In general orders issued on December 25, 1776, Howe urged officers commanding guards to send out frequent patrols at night "to prevent all Depredations and Disorders, several having been lately committed, even close to the sentries on Duty."⁴¹

In addition to providing the manpower for police patrols, military authorities made it clear that they expected common soldiers to inform on each other to non-commissioned officers and officers. Repeated orders requiring enlisted men to turn in their erring comrades suggest, however, that this practice was more honored in the breach. Soldiers were threatened with punishment for not reporting individuals engaged in quarrels, people selling meat outside of the public butchery, or those selling liquor illicitly at Gibraltar. Authorities also offered cash rewards to encourage soldiers to turn in criminals. The Governor of Gibraltar offered bounties to men who reported soldiers who

⁴⁰ Cunninghame Orderly Book, 29, 34, 53, 56, 71, 78, 88-90, 93, 97, 104-106, 122, 128, 132-133, 146, 156, 158.

⁴¹ Kemble, *The Kemble Papers*, 1:270, 285, 315, 323, 348, 430-431, 435-436.

had not followed orders to kill their dogs, were spreading “scandalous papers” through the garrison, or who threw dirt over the rampart at inappropriate spots.⁴²

Although enlisted men played a significant role in military policing, their activities did not give them the same powers of summary justice invested in officers. Any malefactors apprehended by non-commissioned officers or patrols were required to be turned over to the relevant officer, usually the officer of the guard. Any non-commissioned officer or private soldier who attempted to address a situation on his own authority faced stiff penalties. For example, in 1728 the Governor of Gibraltar specified that any sergeant or corporal who discovered soldiers gambling and did not report the offenders to their officers would be immediately demoted. In January 1732, orders threatened any sergeant or corporal who neglected to arrest all men found drunk and outside of their barracks after taptoo with demotion and further punishment.⁴³

Enlisted men’s mandated role in the military justice process did not end with arresting malefactors: soldiers played a vital part in most court martial proceedings. The reforms of the courts martial process that began in 1715 led to a requirement for more information to be captured in trial proceedings, including testimony that enlisted defendants had heard the Articles of War, received pay, and did duty in their units. Enlisted men proved to be the best witnesses for establishing this information, particularly the sergeants who were responsible for maintaining duty rosters, issuing pay, and supervising the men. For example, Sergeant Samuel Burnett of the King’s Regiment’s testimony was essential for securing the conviction of deserter William Bovet

⁴² Cunninghame Orderly Book, 45, 66-67, 77, 122, 197-198

⁴³ Cunninghame Orderly Book, 44, 71.

from the same regiment in 1734. Burnett testified that he had enlisted Bovet, which included reading the Articles of War to the private, and seen him do duty in the regiment.⁴⁴ When Private John Allison of the 51st Regiment of Foot was tried for desertion in 1759, two sergeants testified to his having heard the Articles of War, received pay, and served in his regiment, while a private soldier confirmed the account of Allison's capture.⁴⁵ Non-commissioned officers and enlisted men also played a vital role in confirming the evidence of officers and each other. When Lieutenant Arkman of the Royal Scots Fusiliers brought Drummer John Bourne of Colonel Guise's Regiment before a court martial on charges of desertion from Gibraltar in 1759, he called on two sergeants to confirm his testimony.⁴⁶ Without common soldiers' testimony, the court martial process would have been a significantly more difficult experience.

Beyond these varieties of required participation, certain enlisted men, especially non-commissioned officers, demonstrated additional voluntary zeal for upholding military discipline. Soldiers manifested this additional enthusiasm in several ways, including excessive use of force, going beyond the requirements of duty in chasing deserters, and informing on other soldiers without compensation. Officers allowed their non-commissioned subordinates considerable leeway in dealing with lower forms of disorder in the ranks, which included summary corporal punishment. On April 6, 1756, for example, Major Chapman of the 30th Regiment of Foot ordered all sergeants and corporals to carry sticks with which to beat any private men who attempted to act too

⁴⁴ NA WO71/36, 298.

⁴⁵ NA WO71/67, 67.

⁴⁶ NA WO71/67, 64-65.

familiarly towards them.⁴⁷ While such liberties seem to have been intended to reinforce the authority of sergeants and corporal, some individuals took their indulgence too far. The mutinous letter sent by the private soldiers of the 17th Regiment of Infantry to their officers in 1759 complained of non-commissioned officers beating private soldiers mercilessly.⁴⁸ In March 1732, the governor of Gibraltar officially forbade sergeants and corporals from beating offending soldiers, instead directing the non-commissioned officers to arrest the offenders and hold them for trial.⁴⁹ While such abuses may have resulted from a variety of causes, a desire to reinforce the army's hierarchy seems likely to have been among them.

Another significant manifestation of enlisted enthusiasm came in the pursuit of deserters. While regiments routinely dispatched parties to recover run-aways, some men went well beyond the call of duty, recovering soldiers who, in some cases, had not even been reported as deserters. In 1724, Privates Baptist Millar and Mathew Dickson of Kirk's Regiment, accompanied a friend of theirs to the port of Dalkeith, some four miles from Edinburgh, where he boarded a ship for England. They continued on to the town of Falladam, where they encountered Corporal John Painter of their regiment, who had been dispatched to find a deserter. When they failed to produce furloughs, Painter took both men in as deserters.⁵⁰ In June 1723, Sergeant William Fuller of Groves' Regiment encountered Private Edward Wright of the same corps, "disguis'd like a Native of the

⁴⁷ William Todd, *The Journal of Corporal Todd, 1745-1762*, ed. Andrew Cormack and Alan Jones (London: Sutton Publishing for the Army Records Society, 2001), 14.

⁴⁸ NA WO71/67, 179.

⁴⁹ Cunninghame Orderly Book, 72.

⁵⁰ NA WO71/35, 57-59. Both men were tried for desertion and sentenced to receive lashes, though they claimed they "had no design to desert and beg'd for Mercy."

Country.” Recognizing him as a comrade, the sergeant, though not on duty, arrested Wright and brought him back to the regiment as a deserter.⁵¹ Neither Wright nor Painter were required by regulations to go to these lengths to bring in soldiers, nor is there any indication that they received the bounty offered by the Mutiny Act for capturing deserters. In both cases, the non-commissioned officers seem to have been motivated by extra dedication to their duty.

While rarely found in the surviving records, instances of soldiers voluntarily turning in their comrades for committing crimes, especially property offenses, did occur. Though officers retained most of the power to request courts martial, soldiers could still employ the military justice system to address their own interpersonal disputes by complaining to officers, or arresting soldiers when discovered in the commission of a crime and turning them over to officers. When private soldiers reported their comrades for offenses, the informers gave up all control of the process. In July 1759 outside the lines of Fort Ticonderoga in New York, Private John Stevenson of the 17th Regiment of Foot turned in his comrade Thomas Bayley for robbing him of his pocket book (containing three half guineas and four dollars) and his handkerchief.⁵² Later that month, Private Hugh Frasier of the Royal Highland Regiment caught Private Thomas Dadley of the 17th Regiment rummaging through another man’s knapsack and turned him in to the

⁵¹ NA WO71/35, 22-23. In his defense, Wright claimed that a “countryman” had seduced him to desert and provided him with civilian clothes. The Private further added that a corporal had abused him and threatened to beat his brains out on the drill field, though he had no witnesses to substantiate this claim.

⁵² NA WO71/67, 198-199. The officers confined Bayley to the quarter guard until he confessed his guilt. At his trial, several witnesses came forward who implicated him in other crimes and testified that Bayley had been tried at least twice before by general courts martial and bore an infamous character in the regiment. He was sentenced to death.

quarter guard.⁵³ Such episodes demonstrate the stake that even the lowest ranking soldiers could have in the military justice process.

Negotiated Authorities

Between the extremes of outright resistance to military authority and collaboration with it lay a shifting zone of negotiation, which presented officers and men with a range of options for resolving conflicts. The official regulations were clear on what formal responses the officers should mount to quell these disorders: the Mutiny Act clearly stated that men committing mutiny or desertion were to be brought before a court martial, while the Articles of War stated that any man convicted of those offenses would be punished with death or whatever other punishment the judges saw fit to award.⁵⁴ As explained in Chapter Two, trials were long and drawn-out affairs requiring significant investments of resources that officers, in general, tried to avoid. Other than trials, the military justice system did provide for summary punishment, such as that carried out on the Western Fencibles during an attempted mutiny in that regiment in 1779, when several private men were summarily flogged in front of the regiment.⁵⁵ Such measures, however, could backfire, and also required a significant investment of manpower to over-awe the mutinying troops.

⁵³ NA WO71/67, 244-245. Dudley's captain testified that he knew the prisoner was convicted of theft on two prior occasions. The court sentenced Dudley to 1500 lashes.

⁵⁴ *An Act for Punishing Mutiny and Desertion, and for the Better Payment of the Army, and Their Quarters* (London: Printed by John Baskett, and by the assigns of Thomas Newcomb, and Henry Hills, deceas'd, 1718), 96; *Rules and Articles for the Better Government of Our Horse and Foot-Guards and All Other Our Land-Forces in Our Kingdoms of Great Britain and Ireland, and Dominions beyond the Seas*. (London: Printed by John Baskett, Printer to the Kings most Excellent Majesty, and by the assigns of Thomas Newcomb, and Henry Hills, deceas'd, 1718), 4-6.

⁵⁵ Prebble, *Mutiny*, 193-196.

On the other side of the divide between officers and soldiers, these approaches severely restricted the maneuvers of enlisted men, who could either choose to continue defying military authority, and pay a severe price, or make a total submission in hopes of forgiveness. For example, Private William Costin of the Coldstream Guards deserted multiple times. When tried after being recaptured in 1716, he attributed his continual attempts to escape from his regiment to his colonel's threat to flog Costin to death: faced with this situation, the private chose to try his luck on the run, preferring to be executed by a firing squad rather than through flogging. The court granted Costin his wish.⁵⁶ As seen in the case of Wolfe's Marines discussed earlier, even when enlisted men were legally in the right, they could still expect punishment as a means of reinforcing the message that defiance was unacceptable under any circumstances. Thus solving issues through the channels regulated by the Mutiny Act and Articles of War presented a general no-win scenario for common soldiers.

Negotiating bypassed these issues and allowed soldiers and officers alike to come away from a confrontation with some of their demands met while still satisfying the opposing party. General Wade's preference for negotiating or, as he put it, employing "a less rigorous method" to end the mutiny of Poole's Troop of dragoons was clear. When facing the mutiny of the 83rd Regiment at Portsmouth in 1783, authorities also chose to negotiate rather than attempt to force the issue, either through courts martial or by using "loyal" troops as suppressive forces. In order to insure that the regiment would disembark from their transports in an orderly manner, Lord George Lennox, Governor of Portsmouth, personally assured the men that they would not be sent to India. Meanwhile

⁵⁶ NA WO71/14, 96-99.

the officers attempted to bribe their men with three guineas bounty a piece to stay on board and sail for India, which every soldier refused.⁵⁷

Once the troops were on shore, the authorities attempted various other means to bring them around. General Scott harangued the men, lecturing them about their duty and loyalty to their country, then left them to think about his speech for an evening. The next morning, he paraded the colors in front of the regiment, ordering those men who would stay loyal to their cause and embark for India to follow the colors, and the others to march in the opposite direction. Out of each company, only a few dozen followed their colors, leaving nine hundred men as “deserters.” Subsequent attempts to bribe the men with new bounties and create a new unit from their ranks failed. In the end, the authorities acceded to the enlisted men’s request to be discharged, as per the conditions of their enlistment.⁵⁸ Officers attempted to bring the men back to order without fulfilling their demands on multiple occasions during the eighteenth century, including at Louisbourg in 1747 and in America in 1765, with equally dismal results each time. In these earlier cases, much as in that of the 83rd, the only successful means for ending mutiny was to give the private men what they wanted.

While order could be restored in this manner on a local level, indulging mutineers could create a chain-reaction that was capable of dissolving military discipline on a regional basis. As Dr. Marshal noted in his final letter on the 83rd’s mutiny, had earlier episodes of mutiny in the 77th Regiment of Foot at Portsmouth and on board the HMS *Atlas* been punished with rigor, “we should have had still an army, & a navy. But

⁵⁷ Marshal to Balgonie, Portsmouth, Feb 12, 1783, NAS GD26/9/520/14.

⁵⁸ Marshal to Balgonie, Hilsea Barracks, March 12-13, 1783, NAS GD26/9/520/15.

palliative, indecisive measures can never succeed in navy or army.”⁵⁹ While the military authorities were not in a position to act in more decisive manners, due to a lack of available troops for crushing the mutiny, Marshal’s point does underscore the dangers that too much negotiation posed to military discipline. Officers had to strike a fine balance between recognizing the validity of enlisted men’s claims while also preserving the strict social and command hierarchy of the army. Episodes including the mutiny of the 83rd do not showcase the military authorities at their negotiating best.

In contrast to their handling of mutinies, officers seem to have succeeded far better in negotiated responses to desertion. While mutiny was an epidemic disorder throughout the period under study, the responses to it changed in a marked manner over time. Prior to the 1750s, most mutineers for whom records survive appear to have stayed within the larger confines of the army, switching from regiment to regiment in their travels. When not prosecuting these men in courts martial, the military authorities issued regular amnesty proclamations, inviting men who had strayed from their colors to return without penalty. Soldiers who had enlisted into other regiments were directed to report themselves, but remain with their current corps. The incidence of these amnesties dropped off significantly after mid-century, with such measures only recurring occasionally during times of intense warfare.⁶⁰

The mid-century decline in deserter amnesty mirrored a new approach to dealing with the crime that opened new doors for negotiation. Regiments began to place detailed advertisements in local newspapers describing deserters and offering additional bounties

⁵⁹ Marshal to Balgonie, Hilsea Barracks, March 12-13, 1783, NAS GD26/9/520/15.

⁶⁰ Ad for John Masters of the 38th Regiment of Foot, *Felix Farley’s Bristol Journal*, Saturday, March 29, 1777; Ad for Alexander Macalister of the 42nd Regiment of Foot, *Caledonian Mercury*, February 9, 1780.

beyond that authorized by the Mutiny Act for their capture. In so doing, the regiments essentially deputized the entire civilian populace to aid in their search for these military runaways. Only a minor proportion of deserters appear to have been advertised in the papers, suggesting that these men were carefully chosen out of the larger pool. In some of these advertisements, officers offered a pardon to the deserter if he returned of his own volition within a stated period of time.⁶¹ These conditional pardons were not directed at any specific type of deserter (officers' servants, recruits, and veteran soldiers all appear), thus seemingly reflecting the choices of individual officers rather than a more general trend. Although a slighted form of negotiation, since there were presumably no discussions between officers and enlisted men regarding the latter's sentence, deserter amnesties nevertheless provided a more moderate solution to the desertion problem than the official regulation. Men could return to service without fear of punishment, while officers were able to restore the manpower of their units. Although sufficient records do not survive to chart the overall effectiveness of these measures, selective amnesty did provide another way out of the formal military justice process for officers and enlisted men.

A final area of negotiation for resolving disciplinary issues lay within the military justice process itself. As examined in Chapter Two, reviewing authorities routinely mitigated sentences handed down by courts martial, or pardoned offenders. As with civilian courts, these measures were probably a result of conscious manipulation of the court system by authorities to play on the emotions of common soldiers. This practice

⁶¹ Ad for deserters from the 94th Regiment of Foot, *Exeter Flying Post*, February 4, 1780; Ad for John Martin of the 38th Regiment, *Felix Farley's Bristol Journal*, March 29, 1777; Ad for Richard Farr of the 1st Corps of Infantry, *The Bath Journal*, December 16, 1782.

was clearly at work in the trial of Private John Sutherland of the 64th Regiment in July 1779. Tried for deserting from British forces outside of New York City, Sutherland was sentenced to death, in the words of Captain John Peebles, “by a mode of procedure in Court that I never saw or hear’d of before, & cannot reconcile to justice & humanity.” After making various representations on Sutherland’s behalf, the command staff finally informed Peebles that Sutherland was intended to be pardoned at the gallows.⁶² Such last-minute pardons, designed for shock value, were highly favored during the reigns of Queen Anne and King George I. When multiple men were sentenced to death by the same courts martial, these monarchs often directed that the convicts cast lots to decide who of their number would live or die. Mitigations and pardons of sentences more generally could reflect power struggles within regiments as much as they did concern with manipulating the dynamics of the officer/enlisted relations, but undoubtedly had their effects nonetheless.

The practice of negotiating solutions to mutiny, desertion, and other forms of enlisted resistance provided an essential degree of flexibility to the military justice system, while also affording private soldiers an opportunity to have a voice in their fate without choosing between extremes. The options for resolving enlisted resistance offered by the official regulations—either by trial or by summary punishment—were intensive undertakings requiring significant investment of time and resources. While such solutions could work, and indeed were favored by some military authorities, they lacked the flexibility for addressing the substance of enlisted men’s grievances, which were occasionally justified even by the standards of the Mutiny Act and Articles of War.

⁶² John Peebles, *John Peebles’ American War: The Diary of a Scottish Grenadier, 1776-1782*, ed. Ira D Gruber (Mechanicsburg, PA: Stackpole Books, 1998), 279.

Through negotiated solutions, both officers and enlisted men could achieve at least portions of their goals, while at the same time avoiding the outlay required for the more formal operations of the military justice system.

Conclusion

In contrast to existing scholarship by Gilbert and Frey, which has portrayed enlisted men as the hapless victims of a cruel and capricious system of justice in which they had little to no say, eighteenth-century British soldiers enjoyed a range of options when engaging with their superiors. Common soldiers' interactions with military authorities and the military justice system ranged along a spectrum between resistance and collaboration, with a middle ground of negotiation. These actions reveal that, contrary to prevailing stereotypes, no single perspective dominated the rank-and-file's view of the military justice process.

Resistance, particularly in the forms of mutiny and desertion, loomed large in the historical record and the popular imagination. The term "mutiny" generates images of mass collaborative action by common soldiers and an inversion of the military hierarchy similar to the experience of civilian riots and labor demonstrations. Mutinies of this variety were relatively infrequent during the period under study and predominantly involved new troops who may not have been familiar with other strategies for resolving their issues with the authorities. The concentration of these incidents during the American Revolution suggests that mutinies could feed off one another, generating a chain-reaction leading to increasing levels of disorder. When one looks to how authorities used the term mutiny, however, the phenomenon takes on a broader meaning. Individuals and small

groups, sometimes engaged in non-violent protest, were nevertheless accused of mutiny, though occasional acquittals from these charges demonstrate that not all authorities viewed these actions in the same light. Desertion further underscored this lack of consensus among authorities. Some of the enlisted men captured in this category obviously left the ranks as a form of resistance against abusive officers, unfulfilled contractual obligations, and a system that did not permit them to transfer between units. Others had more innocent intentions, such as visiting family members or running errands, and simply ran afoul of the army's system for spatial control. The variety of actions that fell under these charges demonstrate the high degree to which categories like mutiny and desertion tell us more about what officers thought of their soldiers' actions than what the soldiers intended to do when committing those acts.

While claiming the majority of attention from contemporary commentators and modern scholars, mutiny and desertion represented only the most visible forms of resistance. Beneath these headliners lay a shifting assemblage of lesser acts, often categorized by officers as milder forms of the major crimes. For example, more instances of absence without leave, insubordination, and disobedience of orders appear in the record than do mutiny and desertion. The significantly smaller amounts of detail captured within regimental courts martial records, which were the courts charged with trying these minor offenses, make it difficult to comment on the specific intentions of the enlisted men brought up on these charges. The frequency of charges of absence without leave, however, suggests that soldiers particularly resented the restrictions the army placed on their freedom of movement. The high incidence of drunkenness, in relation to these other crimes and as a single charge, indicates that what might today be considered self-

medicating was, in the eighteenth-century, the first step towards resistance and a social lubricant that made it easier to perpetrate more extreme acts.

Although large-scale acts of resistance have earned the majority of attention from scholars, collaboration was an equally viable option for enlisted men and came with far greater immediate benefits, at least as far as favors from the military authorities were concerned. Enlisted men collaborated with their commissioned superiors in a variety of ways that reflected roles mandated by the military justice system as well as voluntary activity. Military authorities required enlisted men to play a supervisory role over their comrades, to serve as assistants for provosts-marshal, and to man patrols that policed military installations. Enlisted men also played a significant part in the trial process, providing crucial testimony for convicting defendants. Some soldiers, particularly non-commissioned officers, chose to go beyond the call of duty in their support of military justice. Sergeants and corporals routinely brought back suspected deserters even though the non-commissioned officers had not been formerly sent in pursuit of the runaways. Non-commissioned officers also indulged their powers for manual correction, particularly beating men with their canes or sticks, to the point where officers felt required to restrain that activity. Common soldiers were known to inform on their misbehaving comrades, which was as close as they could come to bringing a case against another soldier into the court system. These acts of collaboration demonstrate that many soldiers had a positive stake in the effective operation of military justice, which, without their participation, would not have run as smoothly as it did.

As with any set of behavioral extremes, a middle ground existed between resistance and collaboration, consisting of varying levels of negotiated authority.

Especially in the case of large-scale mutinies that the authorities lacked the resources to crush, enlisted men could dictate terms to their officers. This inversion of the command hierarchy occurred even more infrequently than the actions that brought it on, generally being confined to foreign posts and to areas of England where few additional troops were on hand to quell such disturbances. As a result, mutineers were able to dictate their own terms to their commanders and give voice to complaints that might otherwise have been lost to the historical record.

In general, however, negotiation was a process firmly controlled and moderated by officers and high military officials. While not giving voice to enlisted men's perspectives as much as instances of mutiny, the more frequently-used approaches nevertheless presented an opportunity for common soldiers to gain at least some of their objectives, while also permitting officers to save face. Examples of ways in which the authorities were willing to bend the rules for their subordinates included general deserter amnesties, conditional pardons contained in deserter advertisements, and the manipulation of courts martial sentences. General deserter amnesties, while used throughout the period, predominated in the first half of the century. This practice reflected the high fluidity of the army at the time, which permitted soldiers to easily desert from one regiment and enlist in another corps or disappear into the civilian populace. In the second half of the century, amnesties declined as the practice of placing deserter advertisements in local newspapers increased. A subset of these advertisements, which covered a select portion of the total deserter population, offered individual amnesties, if soldiers returned within a set amount of time. The manipulation of courts martial sentences included mitigation and outright pardons, with the latter often

employed at the gallows to make a greater impact on enlisted men, in a style reminiscent of civilian practice. Taken together, the various forms of negotiation evident in the military authorities' approach towards addressing enlisted resistance demonstrate that the military justice process contained sufficient amounts of flexibility to allow officers to work around problems without having to continually invoke summary justice or call courts martial.

Taken together, the variety of ways in which enlisted men interacted with military justice and authority underscores both the flexibility of the system and the non-totality of military authority. While officers exercised high degrees of power and control over many aspects of their men's lives, there was, nevertheless, room for negotiation and maneuver. Similarly, while largely structured around the preeminence of the officer corps, the military justice system also provided opportunities for soldiers to advance their own fortunes, by making themselves an indispensable part of the disciplinary apparatus. Thus martial law was not always a losing proposition for common soldiers, though it did narrow their options for independent action and channel them towards submission. The episodes analyzed in the course of this chapter have also indicated that the military justice system did not remain static over time: the diversity of actions and reactions examined point towards a change over time in the ways enlisted men engaged with the system and the responses offered by officers. The following chapter will turn towards further probing the depths of the development of military justice.

CHAPTER FOUR: POLITICS AND THE DEVELOPMENT OF THE MILITARY JUSTICE SYSTEM

In the first weeks of January 1750, Members of Parliament and Lords aligned with the ministry and the opposition prepared to fight the second of three major battles mid-century debates over the Mutiny Act. A new pamphlet appeared in the weeks ahead of the debate, entitled *Seasonable and Affecting Observations on the Mutiny-Bill, Articles of War, and Use and Abuse of a Standing Army: In a Letter from a Member of Parliament to a Noble Lord*, which promoted the opposition's criticism of the Mutiny Act and the military justice system.¹ Set as a dialogue between an enlightened opponent of the standing army and a slightly befuddled ministry-aligned lord, the pamphlet insured that the substance of the previous year's debates was fresh on every reader's mind. No answering pamphlet appeared on the ministry's behalf. When the debates commenced in the House of Commons on January 23, one of the issues from the 1749 debates reappeared: the commander-in-chief's power to order courts martial judges to revise their sentences if the commander did not feel the punishment was adequate. This power applied at both the regimental and general court martial level, being invested in a regimental commander and an army commander respectively. When Secretary at War

¹ *Seasonable and affecting observations on the Mutiny-Bill, articles of war, and use and abuse of a standing army: in a letter from a Member of Parliament to a Noble Lord*. (London: W. Owen, 1750).

Henry Fox suggested adding “and no Sentence given by any Court-Martial and signed by the President, shall be liable to be revised more than once,” debate broke out over permitting the revision at all.² The Earl of Egmont, made famous by his critical attacks upon the Mutiny Bills introduced between 1749-1754, proposed eliminating “more than once” from the new clause. As a Scottish observer wrote home to a friend in Edinburgh that the Speaker of the House Sir Arthur Onslow barely contained his rage, denouncing this clause “the most insolent & Bere [sic] faced attempt that Ever was made to Destroy British Spirit and Polite [sic], and to Confine our Libertys within the narrow Limets [sic] of a German Government: I preat it again, A German Government.”³ In the final vote, the new clause passed as Fox had first proposed it, by a vote of 177 to 125.

Onslow’s emphatic use of “German Government” conveys the impact of Hanoverian reform efforts upon the development of the British military justice system, along with overtones of Jacobite and Neo-Harrington critiques of the emerging British state. Thus far, however, the role of politics in shaping the British military justice system, as well as the manner in which attempting to reform military justice generated additional political turmoil, has remained largely unstudied. Out of the several scholars of military justice, only Arthur Gilbert has offered any commentary on the Mutiny Act Debates and then only on the early nineteenth-century debates focusing on regimental court martial

² William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 14 (London: T. C. Hansard, 1813), 621–622.

³ “Copie of a Letter from a Member of P ___l to a friend at Ed^r: Jany 1750,” NAS GD30/2234.

procedure.⁴ While scholars of the Standing Army Debate, Jacobitism, and parliamentary history more generally have not focused on the Mutiny Act debates nor military justice specifically, they work provides important context for understanding the military justice system's development. Caroline Robbins, Lois Schwoerer, J.G.A. Pocock, and Lawrence Cress have established the broad outlines of the Neo-Harringtonian ideological framework and its significance within the Standing Army debate and opposition thinking more broadly.⁵ Paul Monod, Eveline Cruickshanks, and Bruce Lenman have provided a larger framework for understand Jacobitism as a critique of the British state, particularly in England.⁶ W. A. Speck, Daniel Szechi, Margaret Sankey, Jonathan Oates, and Christopher Duffey have covered the military angles of the both the 1715 and 1745 Risings, establishing the campaign backgrounds against which the development of military justice took place.⁷ Speck, along with Jeremy Black and Rex Whitworth have

⁴ Arthur N. Gilbert, "The Regimental Courts Martial in the Eighteenth Century British Army," *Albion: A Quarterly Journal Concerned with British Studies* 8, no. 1 (1976): 64–65.

⁵ Caroline Robbins, *The Eighteenth Century Commonwealth Man: Studies in the Transmission, Development, and Circumstances of English Liberal Thought from the Testoration of Charles II until the War with the Thirteen Colonies*. (Cambridge: Harvard University Press, 1959); Lois G Schwoerer, "No Standing Armies!": *The Antiarmy Ideology in Seventeenth-Century England* (Baltimore: Johns Hopkins University Press, 1974); Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill: University of North Carolina Press, 1982); James Harrington, *The Political Works of James Harrington*, ed. J. G. A Pocock (Cambridge; New York: Cambridge University Press, 1977); J. G. A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, N.J.: Princeton University Press, 1975).

⁶ Eveline Cruickshanks, *Political Untouchables: The Tories and the '45* (New York: Holmes & Meier, 1979); Bruce Lenman, *The Jacobite Risings in Britain, 1689-1746* (London: Eyre Methuen, 1980); Paul Kléber Monod, *Jacobitism and the English People, 1688-1788* (Cambridge; New York: Cambridge University Press, 1989).

⁷ W. A. Speck, *The Butcher: The Duke of Cumberland and the Suppression of the 45* (Oxford: Blackwell, 1981); Daniel Szechi, *1715: The Great Jacobite Rebellion* (New Haven: Yale University Press, 2006); Margaret D Sankey, *Jacobite Prisoners of the 1715 Rebellion: Preventing and Punishing Insurrection in Early Hanoverian Britain* (Burlington, VT: Ashgate, 2005); Jonathan Oates, *Sweet William or the*

chronicled the Duke of Cumberland's career, which significantly impacted developments in the military justice system at mid-century.⁸ Nicholas Rogers, Robert Shoemaker, and James fits, through their studies of the London crowds at the Hanoverian accession, have established the background against which pro-Jacobite disturbances within the army's rank and file occurred. In connecting these fields, the British military justice system offers a new understanding of the political unrest that characterized this period.

The developmental trajectory of the British military justice system during the eighteenth-century was profoundly influenced by and grounded within a larger framework of state politics. Political considerations drove the consolidation and expansion of government control over the military justice system, which in turn generated yet more political debate, due to an absence of consensus on what form the military justice system and the state should take. The domestic and military threats posed by the Jacobite Rising of 1715 provided the political push-factors that initiated an intense period of reform of the military justice system, intended to increase central control. Civil unrest in London, the organizing of Jacobite military forces in Scotland and northern England, and the defection of British army officers to these forces brought the military justice system to the forefront as the means to suppress any Jacobite sympathies and guarantee the army's loyalty to George I's government. The subsequent Jacobite Rising in 1745 highlighted yet further problems within the army that diminished the

Butcher?: The Duke of Cumberland and the '45 (Barnsley: Pen & Sword Military, 2008); Christopher Duffy, *The '45: Bonnie Prince Charlie and the Untold Story of the Jacobite Rising* (New York: Cassell Military, 2003).

⁸ Rex Whitworth, *William Augustus, Duke of Cumberland: A Life* (London: Leo Cooper, 1992); Jeremy Black, *The Hanoverians: The History of a Dynasty* (New York: Palgrave Macmillan, 2004).

effectiveness of its initial response, which prompted a further series of reform efforts between 1749-1751. By the conclusion of these debates, the military justice system had achieved the structure and function that it would retain for the remainder of the century.

These crown-backed movements to reform the military justice system, in turn, ignited fears among the political opposition, based in Neo-Harringtonian thought, that the military justice system constituted a threat to English liberties. In response, the opposition in the Commons and the Lords proposed countervailing changes to the Mutiny Act, which would have significantly weakened the military justice system by returning it to the status of the Mutiny Act of 1713. Passed in the wake of the Treaty of Utrecht, this version of the Mutiny Act did not authorize courts martial to inflict capital punishment. Returning to that status quo would have effectively eliminated over thirty years of institutional development within the military justice system. While unsuccessful in their attempts to reform military justice to match their own vision of the state and dismissed as political theater by historians, the opposition's arguments nevertheless revealed a significant level of engagement with the military justice system and its implications for the state.⁹ The crown's reaction to the Jacobite uprisings and the key Mutiny Act of 1718 and 1749-1751 demonstrate that the development of the military justice system was shaped by, and contributed to the generation of, political turmoil during the first half of the eighteenth century.

⁹ Linda Colley, *In Defiance of Oligarchy: the Tory Party, 1714-60* (New York: Cambridge University Press, 1982), 87; J. G. A. Pocock, *Politics, Language, and Time: Essays on Political Thought and History* (New York: Atheneum, 1971), 122–123.

This chapter will trace the related stories of internal reforms back by the crown and implemented through the Judge Advocate General's Office and the external reform efforts designed at containing the crown's influence chronologically between 1715 and 1781 in three sections. The first section will examine innovations introduced in response to the Rising of 1715, at the crown's direction to provide George I with detailed information on the cases heard by general courts martial. Acting at the king's direction, Edward Hughes, the first judge advocate general of the Hanoverian era, heavily policed the conduct of general courts martial, refining officers' conduct through the opportunities created by the new reporting procedures. Though not acting at the king's behest, Hughes would make several attempts to bring regimental court martial practice into accordance with general court martial procedure. Though devoted to insuring that officers obeyed the Mutiny Act and the Articles of War at all levels, Hughes was unsuccessful in his attempts to expand centralized oversight of the legal-military state beyond general courts martial, due to a lack of interest from the king and successive secretaries at war. Hughes' innovations survived the first serious parliamentary debates over the Mutiny Act, held in 1718 once the threat of the Jacobite military effort had passed. The 1718 debates featured significant exchanges over key constitutional issues, baring the competing visions of state authority at play in the structuring of the military justice system.

The second section examines military justice at mid-century, focusing on the crucial Mutiny Act debates of 1749-1751. With Judge Advocate General Hughes' death in 1734, the system continued to operate without significant changes until William August, the Duke of Cumberland, intervened beginning in 1748. In reaction to problems that had arisen during the Jacobite Rising of 1745, when the British Army's slow

response had very nearly led to disaster for George II's government, Cumberland reformatted the Articles of War and engineered several changes to the Mutiny Act of 1748. Discovered when the Mutiny Act came up for renewal in 1749, these changes sparked three solid years of heated debates, which introduced the John Perceval, 2nd Earl of Egmont onto the English political scene as a staunch whig and opponent of the ministry. As Romney Sedgewick has observed, Egmont would come to be famous for his focused attacks on the Mutiny Act.¹⁰ Though the Mutiny Act would be debated in 1754, by 1751 the last significant changes made to the structure and function of the military justice system were in place, reflecting some elements of the opposition's vision.

The third section will examine the period of consolidation running between 1755 and 1781. These years mark the beginning of Charles Gould's tenure in the Judge Advocate General's Office and end with the publication of John Williamson's *Elements of Arrangement*, the second treatise on the conduct of courts martial. Gould, who served as a deputy judge advocate general from approximately 1754 and became judge advocate general in 1768, was the first incumbent with a formal legal education. Gould transformed the Judge Advocate General's Office into a respected source of legal guidance for officers, expanding central control of the legal-military state through less confrontational means than Judge Advocate General Hughes had employed. By 1781, the military justice system had become a politically accepted institution of the British state,

¹⁰ Romney Sedgewick, "Introductory Survey," in *The House of Commons, 1715-1754: The History of Parliament.*, ed. Romney Sedgewick, vol. 1 (New York: Oxford University Press, 1970), 57–58.

laying a solid groundwork for procedural innovation and consolidation in the nineteenth century.

Military Justice at the Hanoverian Accession

When the Earl of Mar raised the Jacobite standard at the beginning of September 1715, the British military justice system was still in the state of hiatus it had been placed in following the Treaty of Utrecht in 1713. When the Mutiny Act of 1712 expired on March 25, 1713, Parliament passed *An Act for the Better Regulating the Forces to be continued in Her Majesty's service, and for the payment of the said forces and their quarters*, which specifically did not authorize general courts martial to inflict capital sentences. This provision limiting the army's punishment regimen continued in two subsequent acts, the last of Anne's reign and the first of George I's reign.¹¹ The Jacobite Rising in the fall of 1715 inspired Parliament to pass a new Mutiny Act, once again authorizing capital punishment, which in turn revived the Judge Advocate General's Office.¹² The absence of any significant activity in the Judge Advocate General's Office prior to the autumn of 1715 is readily reflected in the general court martial records. The final entry in the general court martial book for Anne's reign was the court martial of Peter Potter, Agent to Wills's Regiment of Marines, on March 11, 1713. The subsequent

¹¹ Thomas Frederick Simmons, *Remarks on the Constitution and Practice of Courts Martial: With a Summary of the Law of Evidence as Connected Therewith, and Some Notice of the Criminal Law of England, with Reference to the Trial of Civil Offences*, 5th ed. (London: J. Murray, 1863), 39–40; 12 Anne, c. 13, (*al. c. 12*); 13 Anne, C. 3 (*al. 12 Anne, st. 2, c. 2*); 1 Geo 1, st. 2, c. 2. All dates have been adjusted so that the new year is considered to have begun on January 1. Otherwise, months and days have not been translated from Old Style

¹² Simmons, *Remarks on the Constitution and Practice of Courts Martial*, 40; 1 Geo. 1, st. 2 c. 34.

entries begin on the next page, with a deputation for George Huish to act as a deputy judge advocate general for the garrison at Portsmouth, dated October 29, 1715.¹³

Following this entry are a series of general courts martial briefs from the summer of 1715, largely trials of deserters. A second general court martial book, containing both trial proceedings and related correspondence, began with a November 1715 general court martial on its opening page.¹⁴ The gap in recording implies that without capital cases to review and place before the king, Judge Advocate General Thomas Hyde, who had held the office since 1705, had nothing to do.¹⁵ Thus when the army needed to hold general courts martial again to try desertion and sedition cases, the system needed to be revived quickly.

Judge Advocate General Edward Hughes, who took office by September 19, 1715, was the man responsible for the flurry of activity reflected in the general court martial books.¹⁶ A native of Wales and MP for Saltash in Cornwall, the first judge advocate general of the Hanoverian era had returned operations to a high pitch by October, when surviving records of out-letters from the JAG offices resumed. These dispatches related both to the operations of the military justice system and to Hughes'

¹³ NA WO71/14, 49.

¹⁴ NA WO71/14, 48-49; WO71/34, 1. Both books eventually cross-referenced one another through marginal notations, with a trial proceeding appearing in one book and related correspondence in the other, though without a clear pattern to the practice.

¹⁵ Joseph Haydn, *The Book of Dignities: Containing Lists of the Official Personages of the British Empire* (London: Longman, Brown, Green, and Longmans, 1851), 202.

¹⁶ Appointment of Edward Hughes as advocate general or judge martial, GB 0210 Tredegar, P2/5, National Library of Wales, Aberystwyth, UK

secondary duties as secretary to the Board of General Officers.¹⁷ Amid discussions of scheduling for future board meetings and choices of deputy judge advocates to preside at general courts martial across England, Hughes entered a steady series of general court martial proceedings, dating from August 1715 onwards. In total, the proceedings for 26 general courts martial trials survive for the period from August to December 1715, which are displayed in Table 4.1.¹⁸

The patterns found in this data provide significant insights into the opening months of the military justice system's renewed operations. This data clearly indicates that general courts martial trials resumed prior to Hughes' appointment in response to pro-Jacobite sentiments and were punished severely, despite the lack of authorization for capital punishment. Though falling far short of the violence seen in civilian Jacobite mobs, soldiers drinking disaffected toasts was cause for concern as evidenced by the punishments meted out. During this period, as Sylvia Frey has observed, soldiers were not flogged with the whip known as the cat-of-nine-tails nor was the punishment carried out by the drummers of the regiment. In a move towards implicating the convicted soldier's comrades in the military justice process, the judges ordered the lashes to be carried out communally, with every soldier wielding a switch and striking the convicted man in turn. Such punishments were likely executed in public and could amount to

¹⁷ NA WO81/1

¹⁸ NA WO71/14, 52-70; NA WO71/34, 1-13. An additional general court martial, which was not entered into the general court martial books, sat in Preston on November 28th to try six half-pay officers captured in arms with the Jacobite Army there, which constitutes a significant outlier from the other cases. Margaret Sankey covers this trial in depth. This trial is an outlier due to its unique nature (the only trial ever held for officers deserting the king's service) and questionable legal foundation (whether officers on half-pay could be charged under the Articles of War and the Mutiny Act). Sankey, *Jacobite Prisoners of the 1715 Rebellion*, 17–40.

thousands of strokes. Judges sentenced Private Thomas Lane of the Coldstream Guards, the first man convicted of sedition for failing “to Name King George, with other Circumstances of Disloyalty” that occurred while he was drinking with his comrades, to

Date	Location	Unit	Crime	Punishment
August 7	Horse Guards	2 nd Foot Guards	Insolence	Lashes
August 7	Horse Guards	2 nd Foot Guards	Sedition, Disaffected toasts	Lashes
August 7	Horse Guards	2 nd Foot Guards	Sedition, disaffected toasts	Run the gauntlet
August 7	Horse Guards	2 nd Foot Guards	Sedition, disaffected toasts	Lashes
August 7	Horse Guards	1 st Foot Guards	Theft	Lashes
August 7	Horse Guards	1 st Foot Guards	Theft	Lashes
September 29	Horse Guards	1 st Foot Guards	Sedition, disaffected toasts	Lashes
October 22	Horse Guards	2 nd Foot Guards	Desertion	Run the gauntlet
October 22	Horse Guards	2 nd Foot Guards	Desertion	Death
October 22	Horse Guards	2 nd Foot Guards	Disobedience of orders	Lashes
October 22	Horse Guards	1 st Foot Guards	Treason, Jacobite Club	Lashes
October 22	Horse Guards	1 st Foot Guards	Treason, Catholic	Lashes
October 25	Horse Guards	2 nd Foot Guards	Insolence	Lashes
November 2	Portsmouth	Dubourgay’s Regt	Desertion	Death
November 2	Portsmouth	Dubourgay’s Regt	Desertion	Death
November 12	Horse Guards	1 st Foot Guards	Desertion	Lashes
November 12	Horse Guards	1 st Foot Guards	Desertion	Lashes
November 12	Horse Guards	3 rd Foot Guards	Desertion	Lashes
November 12	Horse Guards	1 st Foot Guards	Mutiny, Sedition	Lashes
November 12	Horse Guards	1 st Foot Guards	Theft	Lashes
November 14	Plymouth	Chudleigh’s Regt	Desertion	Death
November 15	Newcastle	Hotham’s Regt	Desertion	Death
November 16	Somerset	Pocock’s Regt	Desertion	Death
November 16	Kensington	Groves’ Regt	Desertion	Death
December 12	Horse Guards	2 nd Foot Guards	Disobedience, rioting	Lashes
December 16	Portsmouth	Dubourgay’s Regt	Desertion	Death

Table 4.1 General Courts Martial entered for 1715

be tied to a post, “with a paper on his Breast denoting his Crime, And there receive a Lash with a Twig upon his bare Back, from each man of the Said Regimt.” At its fully authorized strength, the Coldstream Guards at this point in the century would have mustered 1170 men, though units usually ran understrength. After receiving these strokes, Lane was directed to be “Drumm’d Out of the Regiment, and render’d incapable of Serving for the future.”¹⁹ Private John Hamison of the 1st Regiment of Foot Guards, convicted of “Drinking Disloyal and Disaffected Healths & Talking in favour of the pretender” faced an even more severe punishment: in addition to be tied to a stake with a paper on his chest noting his crime, the court directed that Hamison receive a “a Lash with a Twig upon his bare Back” by each man of one of the three regiments of foot guards once a week for nine weeks. The regiments were to take their turns executing the punishment, so in theory every soldier in the Brigade of Guards would have struck Hamison at least three times in that nine-week period. The 3rd Regiment of Foot Guards, like the Coldstream, contained 1170 men at full strength. The 1st Regiment of Foot Guards, however, was a double-strength regiment, boasting 2340 soldiers. Thus Hamison’s full punishment, spread over nine weeks, would have reached a maximum of 14040 lashes. If Hamison even received part of that punishment before being drummed out the regiment, it certainly would have made an impact on the soldiers and civilians witnessing it. The absence of capital punishment prior to October 1715 by no means implied that the army was not taking the Jacobite threat seriously.

¹⁹ NA WO71/14, 54; J. A Houlding, *Fit for Service: The Training of the British Army, 1715-1795* (Oxford; New York: Clarendon Press ; Oxford University Press, 1981), 415–416.

The spread of the general court martial trials in time and over the length and breadth of England testify to the army's focus on securing that kingdom first. The arc of general courts martial activity roughly conformed to the most intense military phase of the 1715 rebellion, as charted by historians Daniel Szechi and Margaret Sankey. The initial movements in Scotland during the summer of 1715 match the slow build-up of court martial cases, which peaked in the same month as the decisive Battles of Sheriffmuir (November 13) and Preston (November 14). The trials of deserters held in regiments stationed through strategic areas in England match Szechi's argument that the army sought to secure that kingdom before moving on to Scotland.²⁰ Two cases in particular stand out as windows into the army's disciplinary priorities at this critical juncture. The first case, tried on October 15, 1715, at Newcastle, centered on Private George Atkins of Hotham's Regiment, charged with desertion and bearing arms with the Jacobites. Atkins had been confined in the guardhouse at Newcastle for being drunk, from which he escaped and apparently joined the Jacobite Army: an officer who had been captured by the Jacobites testified to having seen Atkins serving in their ranks. Atkins claimed that the rebels had captured him immediately outside Newcastle and forced him to serve with them, and that he had escaped them by claiming to be "disturbed in his senses," and had been re-taken by his old regiment shortly thereafter.²¹ The second general court martial, held at Chard on November 6, 1715, tried Private Edward Seager of Colonel Pocock's Regiment for desertion. A sergeant and two corporals captured Seager ten miles outside of Chard, on the road to Ilchester, a major market town. While

²⁰ Szechi, *1715*, 138–142; Sankey, *Jacobite Prisoners of the 1715 Rebellion*, 17–39.

²¹ NA WO71/34, 10-12.

Seager showed no signs of wanting to join the Jacobites, his illegal departure had created serious problems for his regiment. Pocock claimed to have “lost very near two hundred Men by desertion” and needed Seager’s conviction to be confirmed in order to make an example to the other soldiers.²² The king confirmed capital punishment for both Atkins and Seager, though Pocock’s letter accompanying Seager’s trial seemed to suggest that the king might have opted for mercy. As these cases show, desertion could mask pro-Jacobite sentiment, and even when it did not, the loss of manpower was unacceptable. The king’s willingness to confirm verdicts and sentences without requiring more details during these crucial months further underscores the emergency nature of the situation.

The first sign of significant change to the military justice system’s operations came on December 12, 1715, in a letter from Secretary at War William Pulteney to Judge Advocate General Hughes. The first part of the letter communicated the king’s confirmation of a capital sentence for Private of Hotham’s Regiment, who had deserted his regiment and joined the Jacobite rebels. The second part of Pulteney’s letter contained what would turn out to be especially significant orders for Hughes, which would affect the future of the military justice process. Pulteney returned the proceedings of a general court martial held at Bristol on several deserters without having submitted it for George I’s review, because the report was “not drawn up with that clearness and Regularity that is necessary to Satisfie his Majesty in a Case of that great Weight where Life is Concern’d.” In the future, the king expected every capital trial to include evidence establishing that they were properly enlisted, had heard the Articles of War, had actually

²² NA WO71/34, 4-5

committed the crimes charged against them, and that the verdict and sentence be clearly stated. Many of the general courts martial proceedings submitted prior to this point had contained a mere abstract of the case, listing the judges, the defendant, his crime, the verdict, and whatever incidental evidence the deputy judge advocate general thought was worth recording. The king, communicating through Pulteney, directed Hughes to order the Bristol general court martial judges to revise their proceedings and to dispatch “Instructions where any Courts Martial are held, that their proceedings may be drawn up in so plain a manner as may upon all occasions fully Satisfy His Majesty to declare his Pleasure thereupon.”²³

While no contemporary sources survive to explain George I’s sudden desire for more detailed case reports on general courts martial trials, circumstantial evidence points to a variety of push-factors. Following Sheriffmuir and Preston, the odds of significant Jacobite military action temporarily declined, though clashes between Jacobite and Whig mobs in London and elsewhere continued. A break in formal military action coupled with a steady level of domestic disorder culminating in the Mug House Riots of spring 1716 offered both the opportunity and inspiration for implementing new procedures.²⁴ As the military tribunal reserved for hearing cases of treason and sedition, along with desertion and mutiny, insuring that general courts martial proceeded in a proper fashion was essential for employing these courts as a tool for policing disloyalty in the army. In

²³ Pulteney to Hughes, Whitehall December 12, 1715, NA WO71/34, 12.

²⁴ Nicholas Rogers, “Popular Protest in Early Hanoverian London,” *Past & Present*, no. 79 (1978): 70–100; Robert B. Shoemaker, “The London ‘Mob’ in the Early Eighteenth Century,” *Journal of British Studies* 26, no. 3 (1987): 273–304; James L. Fitts, “Newcastle’s Mob,” *Albion: A Quarterly Journal Concerned with British Studies* 5, no. 1 (1973): 41–49; Jennine Hurl-Eamon, *Gender and Petty Violence in London, 1680–1720* (Columbus: Ohio State University Press, 2005), 115–116, 172.

addition, George I's personal interest in the day-to-day operations of his forces no doubt increased his desire both to monitor court proceedings and to bring his officers to heel.²⁵

The king was clearly displeased with the liberties some officers were taking with general courts martial, both in selecting verdicts and sentences and in choosing the details they thought were necessary to convey to him. In a letter written on December 3, 1715, Pulteney informed Hughes that the king would not confirm the sentences passed on Privates William Hicks of the 1st Regiment of Foot Guards and Richard Lacy of the 3rd Regiment of Foot Guards until further information was provided. In particular, George I demanded to know the court's reasons for mitigating punishments for "such heinous crimes as Mutiny and Cursing his Majesty which the first is found Guilty of, and...the Crime of Desertion the other is found Guilty of."²⁶ On December 8th, Hughes replied with new information from the court: Hicks had "behaved like a Madman" at the time of his arrest and during his entire incarceration before the trial, while Lacy had claimed to be retrieving shirts from his wife, not deserting, which the court believed.²⁷ Pulteney relayed the king's approval of these sentences on December 13, along with directions that future proceedings should "express the Reasons which induce the Said Courts Martiall to give their Several Opinions."²⁸

²⁵ For examples of George I's personal engagement with military management, see Alan J Guy, *Oeconomy and Discipline: Officership and Administration in the British Army, 1714-63* (Manchester, U.K.; Dover, N.H., U.S.A.: Manchester University Press, 1985), 34, 64, 91.

²⁶ Pulteney to Hughes, Whitehall, 3 December 1715, NA WO71/34, 9-10.

²⁷ NA WO71/14, 66.

²⁸ NA WO71/14, 63-67.

A second case of overly vague general courts martial proceedings may well have pushed the king into action. On December 6, 1715, a general court martial sat to try Privates Joseph Roberts, Thomas Lucas, William Webb, and Jonathan McLean for deserting from Brigadier Stanwix's Regiment at Bristol. While records of the original trial proceedings do not survive, they were apparently vague enough (following on the heels of the Hicks and Lacy cases) to induce Pulteney to demand a revision in his December 12 letter before submitting them to the king. Hughes dutifully followed Pulteney's order to provide "proper instructions to put it [the proceedings] in due form," creating a set of instructions for deputy judge advocates that would remain in use at least through the 1770s.

Hughes' new instructions for deputy judge advocates introduced a significantly more detailed approach to recording trial proceedings and encouraged stronger engagement with the Mutiny Act and Articles of War. As a result, the crown and the judge advocate general secured a better understanding of exactly how trials unfolded outside of the Horse Guards and officers received improved instruction on implementing the official regulations. In the years since William III's order on July 15, 1690, for general courts martial to submit proceedings for confirmation of capital sentences, no official instructions had been available to guide the deputy judge advocates charged with making these reports.²⁹ General courts martial proceedings from William III's and Anne's reigns that were recorded in the general courts martial books at the Judge Advocate General's Office were brief, containing a list of judges, the defendant's name,

²⁹ Charles M Clode, *The Administration of Justice under Military and Martial Law: As Applicable to the Army, Navy, Marines, and Auxiliary Forces*, 2nd ed. (London: J. Murray, 1874), 90.

rank, and unit, the charge against him, and his sentence.³⁰ While the general courts martial proceedings from August-December 1715 were more detailed than reports from the later Stuarts, the new standard would effectively create a trial transcript rather than a simple report of proceedings. Hughes' instructions began with an explanation of the court's composition followed by the directions for the deputy judge advocate to administer "the Oath you will find among the Articles of War" to the judges. In any case "where Life is in question," the deputy judge advocate was "to give the Oath appointed by the Act of Parliament."³¹ Hughes warned the deputy judge advocate to "take particular Care to Record all Evidence as shall be given," especially in desertion cases, where the king expected all proceedings to specifically record where the man was enlisted, that officers had read the Articles of War to him, that he had been properly certified by a justice of the peace, and received his enlistment bonus. It was also essential to record the time and place of the desertion, as well as when the deserter had been captured. If the court elected to recommend a mitigation of punishment or a pardon, Hughes directed the deputy judge advocate to record the court's reasoning "in a very particular manner, That His Maj^{ty} may thereby be enabled to Judge of the Fact himself with Certainty." If any questions arose during the trial, Hughes referred the deputy judge advocate "to the Articles of War, and Acts of Parliament." Hughes concluded the instructions with a format guide showing how all of the pertinent information should be recorded. In

³⁰ For examples, see Trials of Privates John Seymour, William Jinks, Joseph Shaw, John Cartlegg, John Comb, Robert Smith of Hotham's Regiment for desertion, July 10-12, 1711, NA WO71/14, 22; Trials of Cornet Caldwell and Quartermaster Shaw of the Royal Regiment of Horse Guards for false musters, July 19, 1712, NA WO71/14, 44-45.

³¹ NA WO71/14, 72-73.

melding the pertinent sections of the Mutiny Act and the Articles of War together with basic procedural instructions, Hughes had produced a standard that would provide the primary means for expanding the reach of the legal-military state.

Officers' initially complied with Hughes' instructions to both the judge advocate general's and the king's satisfaction, suggesting that the process of strengthening central administration over the military justice process would be simple. The officers at Bristol followed the new format to the letter when they prepared their revised proceedings, which were accepted and approved by January 28, 1716.³² The first general court martial to follow Hughes's instructions from the beginning of the trial sat at Plymouth on December 29, 1715, to try three deserters from Chudleigh's Regiment of Foot.³³ On January 28, 1716, the first general court martial at the Horse Guards that followed the new procedures took place, trying three men for desertion, enlisting in multiple units, and insolence to an officer.³⁴ The Plymouth court martial sentenced all three deserters to death, while the Horse Guards court martial inflicted capital punishment on Private Thomas Marrit, convicted of enlisting in multiple companies, while ordering the other offenders to be reprimanded. While George I confirmed the sentences in the Horse

³² The instructions appear in NA WO71/14, 71-73, followed by a list of four other deputy judge advocates who received copies. See Chapter Two of the present work for further details on these instructions. The revised Bristol court martial proceedings and Pulteney's letter conveying the king's confirmation can be found in NA WO71/34, pgs 20-23, but are undated. A letter from Hughes to the commanding officer of Stanwix's Regiment at Bristol, dated Whitehall, January 28, 1716, communicated the king's confirmation and can be found in NA WO71/14, 76. Thus the revised general court martial proceedings were submitted sometime between December 12, 1715 and early January 1716, within the timeframe of Hughes's first issue of the new instructions. NA WO71/14, 71-73, 76; NA WO71/34, 20-23.

³³ NA WO71/34, 17-19.

³⁴ NA WO71/14, 78-81.

Guards trial, he ordered only one of the three deserters from Chudleigh's Regiment to die, directing that they draw lots. The combination of successfully following the new protocols and the king's use of selective mercy confirmed that the military justice system was back in full operation and in compliance with the king's standards.

There were signs, however, in these early trials that Hughes' instructions were insufficiently comprehensive to generate completely standardized proceedings that met every particular of the regulations. Despite his efforts, the instructions were open to interpretation on some points, and in other cases officers seemed to have either misunderstood the instructions or read them selectively. Some deputy judge advocates invoked the Mutiny Act in the preamble (as in the December 29th trials) while others did not (January 28th trials). While a seemingly minor point for which the courts were not taken to task, these variations foreshadowed more serious issues to come. On February 28, 1716, Deputy Secretary at War James Merrill returned a general court martial to Hughes for lack of evidence that the defendant, charged with desertion, had heard the Articles of War. Writing in Pulteney's absence, Merrill informed Hughes that the king would no longer confirm any capital sentences "wherein it is not expressly Said, That the Articles of War have been read to the prisoner."³⁵ A far more serious issue appeared in March 1716, when Hughes reported to Pulteney that officers at Hull and other garrisons had refused to execute sentences after receiving confirmation from the king. The delay caused by this refusal had given "all the prisoners at Hull an Opportunity of making their Escape." Pulteney noted that it had always been the custom for sentences to be executed

³⁵ NA WO71/14, 88. Hughes added a note to this effect to the draft instructions for deputy judge advocates contained on pages 71-73, NA WO71/14, 71-73.

following the crown's confirmation and communication thereof from the judge advocate general to the officer commanding. The king directed that "the Same Method shou'd be continued, & Commands That all persons Concern'd, Shou'd pay Obedience thereto."³⁶

In July 2016, the officers of Brigadier Stearn's Regiment of Foot tried Private James Johnson for murdering Private John Rowley, violating the civil-military jurisdictional border. The Prince of Wales, acting as regent in George I's absence, referred the matter to the solicitor general, who ruled that executing Johnson's capital sentence would amount to murder under common law. Hughes, armed with the solicitor general's opinion and the Prince of Wales orders, voided the court martial and directed the officers to surrender Johnson to the civil authorities.³⁷

While Hughes continued correcting general courts martial proceedings, MPs and lords prepared for the first peace time debates over the Mutiny Act following the Jacobite Rising.³⁸ The exigencies of rebellion in 1715 had forced Parliament into authorizing general courts martial to inflict capital punishment, but did not constitute a willing approval for that power in peace time. The opposition's goals in the 1718 debates would be to return military justice to its *status quo ante bellum* status, effectively dismantling

³⁶ William Pulteney to Edward Hughes, Whitehall, March 14, 1716, NA WO71/14, 90-91.

³⁷ Edward Hughes to Brigadier Stearn, Whitehall, October 4, 1716, NA WO71/14, 144-145.

³⁸ Hughes continued correcting desertion cases where the trial proceedings did not prove that the defendant had heard the Articles of War, and dealt with technicalities related to one desertion trial that fell immediately after a general amnesty. Edward Hughes to the Commanding Officer with the Honble. Col. Handasydes Regiment at Abingdon, Horse Guards February 5, 1717; Edward Hughes to Commanding officer with Lord Irwin's Regiment at Kingston upon Hull, Horse Guards, February 5, 1717; Edward Hughes to Commanding Officer with Col. Dubourgay's Regiment at Canterbury, Horse Guards, February 5, 1717; Edward Hughes to Commanding Officer with Lord Stairs's Regiment of Dragoons at Carlisle, Horse Guards, February 7, 1717; WO71/14, pgs 171-173; Trial of Thomas Petty, October 1717, NA WO71/14, 206-207.

the new system that Hughes had labored to build at the king's direction. The competing visions of a centralized state—the German government that Onslow would refer to in 1750—against the opposition whigs' and Tories' preference for a state structured along Neo-Harringtonian lines, with power dispersed into the hands of the landowning elite.³⁹ The first indication of the coming struggle came in the wake of the Mutiny Bill debates in March 1717, when several lords protested against general courts martial inflicting capital punishment, stating that the practice “contrary to the ancient laws of this kingdom.” When the 1718 debates on February 4, the famed Tory leader Archibald Hutcheson objected to the clause enacting “That it shall be and may be lawful to and for Courts martial to punish Mutiny and Desertion with death.” He argued that such a practice was never permitted in England during peace time and that all soldiers committing capital offenses should “be cognizable and punished by the civil magistrate.”⁴⁰ Edward Harley, Auditor of the Imprests, called on Robert Lord Molesworth, author of the contemporaneously famous study on Denmark's fall to a royalist-military plot, for support.

In calling on Molesworth to support their core history-based argument, the Tories and opposition Whigs inadvertently opened the floor to the ministry's progress-based defense. While Caroline Robbins has portrayed Molesworth as a staunch critic of the standing army, in this debate he reversed his position. Arguing that the situation now facing Great Britain was in no way similar to that of Denmark, Molesworth noted that

³⁹ Harrington, *The Political Works of James Harrington*.

⁴⁰ William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 7 (London: T. C. Hansard, 1811), 429–430, 536.

since Parliament had already authorized an army by passing the funding bill, “it was no less necessary to keep those forces within the bounds of duty and discipline, by the ordinary rules of martial law, as was ever practised in all civilized nations.”⁴¹ This unexpected turnabout, with a formerly staunch Whig turning to support the ministry, signaled an important pattern for future debates: the clash between the opposition’s history-based arguments and the ministry’s classically whiggish progress-based arguments. The opposition would continue to appeal to tradition, both through examples reputedly drawn from history and from English constitutional liberties, while the ministry would retort with defenses focused on the current state of affairs and possible developments in the future. The remainder of the House of Commons debate would devolve into a lengthy argument over whether the history of England contained any examples of a court martial held in peace time. Only Robert Walpole’s sudden defection to the ministry, along with his followers, ended the exchange and secured enough votes to pass the bill unchanged.

The subsequent debates in the House of Lords, commencing on February 18, followed a similar pattern of tradition versus progress. The Earl of Oxford opened the exchange by stating that he “would speak for the liberties of the country” and that courts martial were “inconsistent with the rights and privileges of Englishmen.” He furthermore opposed maintaining the army at its enlarged strength, stating that “keeping up so great a number of forces” was “altogether useless in a time of profound peace” and indicated “that something was intended against our happy and ancient constitution.” In response,

⁴¹ Cobbett, 7:537.

Lord Stanhope, speaking for the ministry, emphasized the continuing Jacobite threat and Britain's role as surety for future Italian neutrality. Stanhope argued that "it was matter of prudence, as well as of necessity" to maintain a standing army "both to suppress any insurrection at home" and "to make good our engagements for maintaining the repose of Europe." The Earl of Stratford expressed surprise "to hear that so great a minister as the lord who spoke last" was ignorant of core elements of the Treaty of Utrecht that did not permanently commit Britain to the Mediterranean, an example of the personal attacks that occurred throughout these debates.⁴²

After these preliminary debates establishing the basic positions of the opposing camps, serious debate that would touch on the issue of governmental forms in addition to history versus progress ensued the following Thursday. On that day, Lord Trevor introduced a clause stating "that no punishment shall be inflicted at any court martial, which shall extend to life or limb." Stanhope immediately responded "such a clause would render the Bill ineffectual, banish all manner of discipline from the army, and consequently render it entirely useless," reflecting a keen grasp of the fundamental role that capital punishment played in the military justice system's operations. Further debate reiterated the historical argument that courts martial had never been held in time of peace before against the ministry's progress-based argument of the need for a properly disciplined army for both domestic and foreign policy purposes. Lord Harcourt connected the opposition's hitherto historical arguments with a pressing critique of what the Mutiny Act could mean for the state. Harcourt argued that the Mutiny Act "vested a sole

⁴² Cobbett, 7:538–539.

legislative power in the crown” through which it was delegated to courts martial, which were empowered to set “aside all other laws, both civil and ecclesiastical, in relation to the soldiery.” As a result, courts martial “assume to themselves an arbitrary and unprecedented authority” which was “contrary to magna Charta [sic], and to the birth-rights and privileges of Englishmen.” In effect, Harcourt stated that the Mutiny Act concentrated too much centralized power in the hands of the officers who served as courts martial judges and who might wield it recklessly in pursuit of their own ends. Though theoretically correct, Harcourt did not take the judge advocate general’s recent procedural developments into account, which were designed to stop arbitrary exercise of capital punishment. Nevertheless, from the Earl of Oxford to Lord Harcourt, the opposition manifested the classic Neo-Harringtonian critiques of the army as a source of corruption, appealing to an idealized past where no standing military force with its accompanying justice system was needed.⁴³ Their best efforts were in vain, however: the bill passed into law on February 24, 1718.⁴⁴

While the fundamental struggle over the shape of the British government overall would continue, the successful passage of the Mutiny Act in 1718 signaled the acceptance of the military justice system as a crucial part of the larger state framework. Contemporary commentators recognized that something significant had transpired in the recent debates, but were not capable of seeing its larger ramifications at this stage. James, 1st Duke of Montrose, provided a running account from within the House of Lords

⁴³ Pocock, *The Machiavellian Moment*.

⁴⁴ Cobbett, *The Parliamentary History of England*, 7:539–541.

detailing the ebb and flow of the debates. On February 6, he predicted a quick end of the session because “The party who opposes the Kings measures...putt all their Stress upon y^t affair of the Mutiny bill.” His confidence disappeared in subsequent letters, which spoke to the intensity of the contest in Parliament. On February 15, Montrose reported that the ministry faced “a terrible Battle un y^e H. of L. on teusday [sic] next upon the Mutiny Bill,” and on February 25, with the vote safely passed, he observed that “for foure dayes [sic] following of last week I never got to Dinner till betwixt 8 & 9.”⁴⁵ Montrose’s letters mirror the intensity seen in the votes: the initial vote in the Commons on inserting a clause to remove capital punishment failed by a margin of 18 votes. While the final vote on the Mutiny Bill in the Commons succeeded by 186 to 105, accounts credited the division more to Walpole throwing his support behind the ministry than any compelling arguments in defense of the status quo. Walpole reputedly stated that, while he agreed with the opposition, he would rather have mutiny and desertion “punished by martial law, than not punished at all.” The fundamental question on whether military crimes would be punished by military justice was at the core of the Mutiny Act Debates in 1718. The successful passage of that act, regardless of the closeness of the votes, effectively decided the question of whether the military justice system, equipped with the power of capital punishment, would remain as a permanent institution of the state in peace as well as war. Subsequent debates would merely flesh out the finer points of the system’s operation, determining how much power it could exert over officers and soldiers.

⁴⁵ James, 1st Duke of Montrose to unknown, London February 6th, 1718, NAS GD220/5/824/11A.

The decision in 1718 did not end Parliamentary opposition to the fundamental existence of military justice in its post-1715 form. In the wake of their defeat, 41 opposition lords lodged a formal protest against the Mutiny Act on four counts that speak to their understanding of the military justice system and which provided a framework for future opposition. The first count objected to the exercise of “martial law, in time of peace,” noting that no such power had ever been exercising “within this kingdom by consent of parliament.” The second count observed that “after the Peace of Ryswick, and that of Utrecht,” the acts passed under William III and Anne had not authorized capital punishment but the forces remaining “on foot were kept in exact discipline and order.” The third count struck out at a fundamental shortcoming of both military and civilian justice: a lack of detailed criminal definitions. In this particular case, the lords object to the absence of any guidance on “what words or facts amount to Mutiny or Desertion, or to an exciting, causing or joining in mutiny,” which enabled courts martial to level those charges as they saw fit and to thereby inflict capital punishment “by such an arbitrary decision.” The fourth and final count maintained that if some strictly military offenses were adjudged to be capital in nature, that those offenses should be “left to the ordinary course of law.” Otherwise, officers and soldiers would be deprived of “those valuable privileges which are the birth-right of every Briton,” which the lords did not think they could justify. While objections to the vagueness of military charges would not reappear in subsequent Mutiny Act Debates, the key issues of a lack of historical precedent for the exercise of capital punishment by courts martial in peace time, insistence on returning to the status quo following the Treaty of Utrecht, and surrendering all soldiers and officers accused of capital military crimes to the civilian courts for trial would return again.

With the military justice system's continued existence now confirmed, Judge Advocate General Hughes acted to bring general courts martial into closer compliance with the Mutiny Act, shifting officers away from a sole focus on the Articles of War. On April 26, 1718, Solicitor General William Thomson responded to a query from Hughes on how best to apply the Mutiny Act in desertion cases. As an example, Hughes posited a scenario where a soldier deserted in 1716 and was brought to trial in April 1718, then asked if the soldier should be tried by the Mutiny Act in force in 1716 or 1718. Thomson replied that, due to Mutiny Act granting authority for court proceedings and capital punishment on a year-by-year basis, the soldier should be charged under the act for the year in which he committed his offense.⁴⁶ While no records of courts martial facing that issue exist for April 1718, one held on deserters in Colonel Handasyd's Regiment of Foot on June 28, 1718, at Exeter does. On July 8, 1718, Deputy Judge Advocate Edmund Burt, writing in Hughes's absence, informed Lieutenant Colonel William Pinfold that the general court martial of which Pinfold had been president had tried and convicted two deserters under the wrong Mutiny Act. The men had been tried under the 1718 act, but had deserted in 1717. Pinfold replied on July 14th, acknowledging his mistake and asked whether the court martial could reconvene with the same members, or would need to be completely reconstituted. William Thomson again weighed in on the situation, opining that the same judges could be seated for a re-trial, since the initial proceedings were null and void. The king would accept the revised proceedings and pardon both men.⁴⁷ Deputy

⁴⁶ William Thomson to Edward Hughes, April 26, 1718, NA WO71/14, 328.

⁴⁷ E Burt to Col. William Pinfold or officer in Chief with Col. Handasyde's Regiment at Exeter, Horse Guards July 8, 1718; Col. Wm Pinfold to Burt, Exeter July 14, 1718; NA WO71/14, 228-229; William

Judge Advocate John Elford, presiding at the November 1718 trial of Private William Poovey of Hichinbrook's Regiment did not manage to escape the king's displeasure as cleanly as Pinfold had. Poovey was a repeat offender and had previously escaped death through winning a drawing of lots with another condemned prisoner. The king voided the verdict and sentence of Poovey's November trial, because the court martial had not charged Poovey under the Mutiny Act in force when he deserted. As a result, double jeopardy could have been invoked in his defense, so George I ordered the soldier to be released. Secretary at War Sir Robert Pringle, writing to Hughes with these directions, observed that the monarch was "very much Displeased, that Such an over-sight should have been committed, and so Notorious an Offender by that means escape being punished according to his Demerits." Pringle instructed Hughes to caution Elford against repeating the mistake again, at the implied risk of incurring royal displeasure.⁴⁸

The final phase of Hughes' push for standardization and centralization of the military justice system focused on extending government oversight over regimental courts martial proceedings. The crown had never required officers to formulate proceedings or provide any formal report to Whitehall of the cases they tried in these lesser courts, which were officially barred from trying officers or sentencing soldiers to capital punishment. On March 3, 1723, Hughes laid out the dangers posed by regimental courts martial to Secretary at War George Treby. Hughes noted that the king intended these courts "only to Punish Petty Crimes, such as small Neglects of Duty, or disorder in

Thomson to Edward Hughes, July 17, 1718, NA WO71/14, 329; Robert Pringle to Edward Hughes, Whitehall, August 22, 1718, NA WO71/34, 302.

⁴⁸ Hughes to John Elford, Horse Guards November 13, 1718, NA WO71/14, 233; John Elford to Hughes, Plymouth, November 18, 1718, NA WO71/14, 234; Pringle to Hughes, Whitehall, November 27, 1718, NA WO71/14, 236.

Quarters... to prevent frequent Court Martial General.” In contradiction of the royal will, officers “tryed Men for Desertion under pretence of neglect of Duty, whereby they have evaded bringing of Offenders...before a General Court Martial.” While conflating the jurisdictional boundary, a violation of the Mutiny Act and Articles of War, was a serious breech, Hughes further reported that “Regimental Courts Martial have often inflicted such unmerciful Corporal Punishments which have made even Death more desireable.” Without any mechanism for civilian oversight of their proceedings, officers were free to try whatever crimes they desired in regimental courts martial and hand down almost unlimited corporal punishment.⁴⁹

Hughes’s primary attempt to extend government oversight into the regimental court martial process came in the summer of 1722 during the Brigade of Foot Guards annual encampment at Hyde Park. Hughes issued a deputation to Ensign Jonathan Parker of the First Regiment of Foot Guards to serve as deputy judge advocate to all courts martial held at the camp, along with instructions that nearly duplicated those Hughes issued for general courts martial. The instructions ended with a list of three key procedural items: to insure that the court established every defendant had heard the Articles of War, that every charge be linked to the violation of a specific article of war, and that all proceedings be sent to Hughes for review.⁵⁰ Parker submitted a total of 23 cases to Hughes, all of which followed the general court martial format, including

⁴⁹ Edward Hughes to George Treby, Horse Guards, March 3, 1723, NA WO71/15, 69.

⁵⁰ “A Deputation Sent to Ensign Jno Parker with Instructions for holding Courts Martial” June 14, 1722, NA WO71/14, 309-312

detailed witness testimony.⁵¹ While the experiment seems to have been a success insofar as extending the reporting procedures into regimental courts martial, there are no signs that this practice was adopted or even attempted a second time after 1722. Hughes's 1723 letter to Treby certainly suggests that this was a one-time occurrence.

As the final piece of surviving personal correspondence between Hughes and the War Office indicates, the judge advocate general continued to press the effort to reform regimental courts martial through the last years of his time in office. On October 31, 1729, Hughes expressed his apprehension that his "Complaints about the illegal Proceedings of Regimental Courts Martial must have been unwellcome [sic]" in a letter to Secretary at War Henry Pelham, since Hughes had "made many" but received no response from the War Office. The judge advocate general nevertheless repeated his observations on the abuses committed in those lesser tribunals, particularly hearing capital cases that were slightly reduced in their charge and awarding heinous degrees of corporal punishment. Hughes reiterated "the Necessity of the Act of Mutiny and Desertion...[and the] due regard which ought to be had to a Legal Execution thereof," bemoaning "the ill construction made of that Law" during his years in office. He further claimed that even "Sr. Robert Walpole had mentioned to you, that he thought I ought to have attention to my Complaints."⁵²

⁵¹ NA WO71/14, 305-309, 313-326.

⁵² Edward Hughes to Henry Pelham, Horse Guards, October 31, 1729, NA WO71/17, 1. While links could be drawn between Hughes' complaints about the excessive punishments meted out by courts martial and the clause in the Bill of Rights against cruel and unusual punishment, only references to the Mutiny Act and the Articles of War feature within surviving correspondence from this portion of the eighteenth century.

Having aired his personal grievances, Hughes identified three key problems for Pelham's attention. First, Hughes related having personally witnessed a soldier of the 1st Regiment of Foot Guards receive 600 lashes by sentence of a regimental court martial, for casting aspersions on a sergeant. To place this matter in perspective, Hughes observed that George II had reduced the sentence of a soldier tried by a general court martial for "a high offence against his Royal Family" from 900 to 300 lashes. The contrast between the monarch's mercy and the regimental court martial's excess was damning, particularly in the way soldiers tried by the latter were "debar'd of the Kings mercy or any Advocate for them." Regimental punishments were also contributing to desertion, with eighteen men deserting the day after a regimental court martial in DeLoraines Regiment at Bristol. Secondly, the increasing reliance on regimental courts, in order to circumvent review of the verdicts and sentences, was contributing to a decline in general courts martial. The army in England had "no more than Four Proceedings of Courts Martial...returned to this Office, and of the Guards only Four has been tryed here within this year past." Finally, Hughes reported that the War Office had issued deputations to officers to act as deputy judge advocates without Hughes' approval, which was patently illegal and rendered the proceedings null. In a parting barb, Hughes couched his complaints as coming from his concern that "such abuses of the Martial Law, should happen to be complained of in the House, by such as are fond of blaming the Administration."⁵³

While Pelham may well have ignored Hughes's previous letters, this dispatch sparked a reaction that granted the judge advocate general a final opportunity to plead the

⁵³ Edward Hughes to Henry Pelham, Horse Guards, October 31, 1729, NA WO71/17, 2.

case for reform. Pelham denied having ignored Hughes or having any knowledge of deputations issued from his office without Hughes's approval. Sidestepping the judge advocate general's complaints regarding regimental courts martial, Pelham asked Hughes "to draw up the Complaints you send me in the inclosed paper, in such a manner as I can lay them before the King."⁵⁴ Hughes responded with a 9-bullet pointed brief that began with the statement that "Our present Military Law is founded on the Authority of Parliament, and soon after the happy Revolution was fully establish'd by the Act for Punishing Mutiny and Desertion." Hughes located the king's authority to establish Articles of War within the Mutiny Act, not as a function of the royal prerogative, and that the Articles must conform to the Mutiny Acts. If, as Hughes posited, the authority of regimental courts martial was only founded on the Articles of War and not on the Mutiny Act, then "the use made of them at this time, and for some Years past, is and has been in several instances contrary to the meaning and intention of the Act for Punishing mutiny &c." The operations of regimental courts martial were thus illegal and a potential source of "introducing Evills of the most pernicious Consequence." Hughes went on to list the most significant problems with courts martial, beginning with the practice of trying desertion "by giving it a new name and calling it neglect of Duty," thereby evading "the intention of the Act of Parliament and render[ing] General Courts Martial of no Use." Even worse, regimental courts martial were ordering "immoderate Corporal Punishments, such as neither his present Majesty nor his Royal Father ever thought fit to order to be inflicted on the most notorious offenders." Hughes credited the illegal proceedings of

⁵⁴ Pelham to Hughes, Whitehall, November 6, 1729, NA WO71/17, 2-3.

regimental courts martial to the absence of a requirement for judges and witnesses to swear an oath to proceed according to law, and the lack of a deputy judge advocate to monitor and record the proceedings. Prior to 1718, the wording of the Articles of War and the Mutiny Act was sufficiently vague to suggest that oaths were to be sworn by judges and witnesses at regimental and general courts martial. The changes in that year, which clearly stated that oaths were only required in general courts, deprived soldiers of their “only Security to be fairly and Impartially tried.” Rectifying the situation would be a simple matter, according to Hughes. Most regiments already had an officer officially authorized to act as deputy judge advocate, whose duties could be extended to administer oaths and record regimental courts martial proceedings. These measures were “absolutely necessary for the Kings honour and good of the Service.” Failure to implement them would “give occasion, to such as are desirous to obstruct the Kings affairs in Parliament to complain there of these irregularity’s, and reflect upon the Justice of the Army.”⁵⁵

No sources survive to hint at what reception Hughes’s proposals met with when presented to the king, or even if they made it that far. Regimental courts martial continued to function as they always had, while the judge advocate general’s final years were filled with the routine tasks of administering the system he had done so much to reform. When Hughes died in 1734, the accomplishments left in his wake were many. Through his efforts, the Mutiny Act was recognized as the cornerstone of the military justice system within the British Isles and invoked in all general courts martial proceedings. The new form for general courts martial proceedings that he drafted in 1715

⁵⁵ “Some thoughts of Mr. Hughes the Judge Advocate General on the Martial Law humbly offer’d,” NA WO71/14, 3-4.

were now in universal practice throughout the empire. Officers had come to view the judge advocate general's office with respect, even if it was grudging, and followed the procedural dictates for general courts martial. These included insuring that evidence was given establishing the defendant's proper enlistment and having heard the Articles of War read to him (in cases involving common soldiers), reference to the Mutiny Act for the year in which the crime took place, and notation of which article of war the defendant had violated. While Hughes failed to extend government oversight into the regimental courts, he secured the general courts martial, which in turn bound the army to the government. No subsequent judge advocate general would do as much to shape or advance military justice.

Military Justice at Mid-Century

William Augustus, the Duke of Cumberland, would provide the next push for consolidation and centralization of the military justice system, igniting a heated series of debates from 1749 through 1751. In his capacity as captain-general, Cumberland proceeded on an ambitious program of military reform, designed to strengthen the army for the renewed struggle against the French that he saw looming on the horizon.⁵⁶ Cumberland's prominence in pushing for strengthening central control over military justice was in part due to the relatively undistinguished men who succeeded Edward Hughes's as judge advocate general. Though distinguished Whigs with strong ties to the government, these men lacked his flair for combatting abuses in the military justice

⁵⁶ Whitworth, *William Augustus, Duke of Cumberland*, 130–131.

system and advancing government oversight of courts martial. Sir Henry Hoghton, Baronet, was Hughes's immediate successor, taking office in 1734. An MP from Preston, Hoghton had vigorously defended the government's cause in that area during the 1715 Jacobite Rebellion and remained a staunch supporter.⁵⁷ He inherited all of Hughes's accomplishments, the unfinished business (which remained in that state), and Hughes's deputy judge advocate general and fellow Welshman, King Gould. After an uneventful seven years in office, Hoghton gave way to Thomas Morgan, Esqr, MP for Brecknockshire, Wales in 1741. King Gould continued as deputy judge advocate general until his death in 1756, when he was succeeded by his son Charles, who would shape the military justice system in the latter half of the century.⁵⁸ Neither Hoghton nor Morgan had the formal legal training that would contribute to Charles Gould's success later in the century. In the meantime, correspondence to and from the judge advocate general's office focused on the relatively pedestrian tasks of authorizing new deputy judge advocates, convening judges for courts martial in England, and processing reports from general courts martial held overseas. None of the surviving material hints at the sort of clashes with the War Office or regimental commanders that characterized Hughes's years in office, although Cumberland would soon stir up significant strife with his new projects.⁵⁹

First among Cumberland's several initiatives in the wake of the Treaty of Aix-La-Chapelle was to reorganize the Articles of War in 1747 and introduce new clauses to the

⁵⁷ William Alexander Abram, *Parish of Blackburn, County of Lancaster: A History of BLackburn, Town and Parish* (Blackburn: J.G. & J. Toulmin, 1877), 720.

⁵⁸ Edwin Poole, *The Illustrated History and Biography of Brecknockshire from the Earliest Days to the Present Day* (Brecknock: Published by the Author, 1886), 399–400.

⁵⁹ See NA WO81/3-11 for examples.

Mutiny Act of 1748 to address longstanding issues, which Parliament passed without comment.⁶⁰ The re-organization of the Articles of War was a format change with relatively little impact on the overall character of the regulations: instead of a list of numbered articles, the new format grouped related articles into thematic sections, making them easier to use. The primary change to the Mutiny Act sought to address an issue that had arisen in the 1715 Jacobite Rebellion and emerged again in 1745: the misbehavior of half-pay officers. In 1715, six half-pay officers had been taken with the Jacobite forces at Preston, while others remained at large, and in 1745 the half-pay officers' response to the call for action had left much to be desired.⁶¹ The half-pay establishment existed to provide deserving officers, either wounded in the service or belonging to units that were disbanded at the conclusion of hostilities, with a modest pension. By doing so, the British state retained a ready supply of experienced officers on hand who could be used to fill out new regiments in emergencies, such as those faced in 1715 and especially in 1745, when the bulk of British forces were engaged abroad. While the half-pay system was well-established, the exact legal status of half-pay officers was not: though the military authorities held that these officers were still liable under military law, civilian authorities were divided.⁶² Cumberland solved the issue by expressly placing half-pay officers under the military justice system's jurisdiction in the new Mutiny Act. In a related move,

⁶⁰ While a surviving copy of the 1747 Articles of War has not come to hand, Colonel George Townshend testified to the re-organization taking place in that year during the 1750 Mutiny Bill Debates. Cobbett, 14:643.

⁶¹ For more detailed commentary on the British Army's shortcomings during the 1745 Rising, see Duffy, *The '45: Bonnie Prince Charlie and the Untold Story of the Jacobite Rising*, 131–133.

⁶² A. P. C. Bruce, *The Purchase System in the British Army, 1660-1871* (London: Royal Historical Society, 1980), 23; Sankey, *Jacobite Prisoners of the 1715 Rebellion*, 42–43.

Cumberland also struck at officer absenteeism, an endemic problem of officers leaving their regiments without securing formal leave, which undermined the foundations of military discipline.⁶³

Several factors conspired to create an especially contentious debate over the Mutiny Bill in 1749. Colonel Richard Lyttleton, a disgruntled army officer who had joined the Prince of Wales' camp, ensured that opposition MPs and Lords were aware of Cumberland's modifications to the Mutiny Act of 1749. As a result, these men had ample time to prepare attacks focusing on the Duke's "arbitrary proceedings."⁶⁴ The arrival of a newly prominent figure to the opposition's ranks provided an additional catalyst for the debates. John Perceval, 2nd Earl of Egmont, had succeeded to his late father's title the preceding year, after spending the better part of eighteen years in the Irish House of Commons. As Lord of the Bedchamber to Frederick, Prince of Wales, Egmont was perfectly positioned through heritage and clientage to lead the Tory assault on the Mutiny Bill.⁶⁵ In contrast to 1748, the Tories and opposition Whigs began the 1749 debates ready to challenge the ministry and attempt to reverse all of Cumberland's reforms.

The first attack of the 1749 debates in the Commons came in the form of a proposed amendment requiring courts martial to be composed "only of such officers then on duty in their respective regiments." This seemingly-innocuous measure, designed to bring courts martial to closer "conformity with juries in civil cases" would have created severe complications for holding military tribunals at all. The requirement for thirteen

⁶³ Whitworth, *William Augustus, Duke of Cumberland*, 136–138.

⁶⁴ Cobbett, 14:396; Whitworth, 1-3.

⁶⁵ Sedgwick, "Introductory Survey," 57–58.

officers to serve on each court martial (fourteen counting the deputy judge advocate) combined with the disbursed cantonments of the army and continued officer absenteeism created a potentially impossible logistical situation for holding these tribunals. Though defeated by a division of 223 to 130, the absence of compelling arguments from the ministry (whose supporters held that the modification would “intrench too much upon the powers of commanders in chief”) did nothing to discourage a second attack.⁶⁶

After calling for copies of all Articles of War issued since the reign of Charles II and searching for every clause that seemed to invest dangerous power in the commander-in-chief, the opposition focused their second attack on revising court martial proceedings. The monarch, commanders-in-chief, and governors of far-flung garrisons customarily reviewed court martial proceedings for accuracy and legality, and could order the members to revise their proceedings or alter their verdict or sentence to correct mistakes or inconsistencies. The opposition argued that this power amounted to double-jeopardy, particularly if the commander-in-chief ordered the court to hand down a more severe sentence. Opposition MPs thus called for a change in wording that would block revisions in cases where the verdict and sentence were in accordance with the Mutiny Act and the Articles of War. In defense of the bill as-written, ministry MPs pointed to instances in civil cases where judges had ordered the jury to reconsider their verdicts, often resulting in severer judgments. They also noted the absence of reported abuses and that the proposed clause, which would have eliminated this power, “intimated a kind of indecent

⁶⁶ Cobbett, 14:396;

reflection upon the heads of the army.” The vote returned a division of 211 against the clause and 123 in support.⁶⁷

The final challenge to the Mutiny Bill in the Commons debates of 1749 centered on the new clause extending military law over the officers and men of the artillery and all officers on half-pay. In objecting to this clause, the opposition pointed to the dangers posed by the perceived expansion of the military jurisdiction. In response, ministerial MPs argued that the half-pay officers were still in the King’s employ, even though they were not on active service, and should be subject to military discipline. William Pitt, then Paymaster General of the army, effectively ended the debate with a speech arguing that the “virtue of the army” was the single guarantee against a military threat to the constitution, since Englishmen could “intrench themselves behind parchment up to the teeth, [and] the sword will find a passage to the vitals of the constitution.” On March 1, an attempt to introduce a clause limiting the application of martial law to half-pay officers only “in case of actual war, insurrection, rebellion, or invasion” failed, 137 votes for and 203 against. Five days later, the opposition attempted to modify the strict confidentiality clauses in the oaths taken by court martial judges and the deputy judge advocate so that the proceedings could be shared if required by a civilian court or by either house of Parliament. The ministry defeated the measure in two votes, the first by a narrow margin of 153 to 126 and the second by 175 to 103. This issue would return for debate in the future. On March 7, the opposition offered a new clause barring commanders-in-chief from requiring more severe sentences when directing judges to

⁶⁷ Cobbett, 14:396.

revise a court martial proceedings. It was rejected by 158 to 100. After several additional attempts on the same heads, the bill came up for a final vote and passed to the House of Lords on March 9.⁶⁸

According to Horace Walpole the subsequent debate in the House of Lords was “so tedious, that they have rather whittled down the Opposition than increased it” and the house “never divided above sixteen in the minority.”⁶⁹ As with the 1718 debates, the arguments in the Lords went beyond the detailed operations of military justice, focusing largely on the constitutionality of the army and the political implications of military law, re-hashing many of the classic anti-standing army rhetoric. Where the debate touched on the actual mechanisms of the military justice system, the lords focused upon two key topics: a motion to insert a clause banning punishments extending to “life and limb” and the extension of military law over half-pay officers.⁷⁰ The Earl of Westmorland and the Earl of Bath (William Pulteney, former secretary-at-war) presented the key points for the opposition. For Westmorland, the key issue regarding punishments was the abrogation of English liberties due to “the little security an innocent man has for his life, who is to be tried by such a court upon a false accusation, spirited up, perhaps, by some one who can command the court to condemn.”⁷¹ In a swipe at both the revised Articles of War and the

⁶⁸ Cobbett, 14:397.

⁶⁹ Walpole to Sir Horace Mann, Arlington Street, March 23, 1749, in Horace Walpole, *The Letter of Horace Walpole, Fourth Earl of Orford*, ed. Peter Cunningham, vol. 2 (Edinburgh, UK: John Grant, 1906), 263–264.

⁷⁰ Cobbett, 14:436, 461–493. William Pulteney’s prior service as George I’s first Secretary at War from 1715–1717 left him well-equipped to oppose the Mutiny Bill’s passage

⁷¹ Cobbett, 14:427.

extension of military law over half-pay officers, Bath told the lords that these measures would “reduce your army to a slavish dependence upon the commander in chief; and by the last clause of this Bill you are to involve all our half-pay officers in the same slavery.”⁷² The only responses offered by the ministry lords were to repeat the absolute necessity of “always subject to military law, and to articles of war” to insure the army’s effectiveness, the role of royal pardons in introducing mercy to the system, and an accusation from Chancellor Hardwicke that anyone opposing the bill must be a Jacobite.⁷³ Nevertheless, the motion failed 88 to 15.⁷⁴

The attacks on the extension of military law over half-pay officers focused on political implications tied with the commander-in-chief’s power, a thinly-veiled stab at the Duke of Cumberland. Lord Bathurst objected to this new clause because it would make the half-pay officers subject to any order from the Secretary at War or the Commander-in-Chief, including immediately going on duty to far-flung locations without pay or support. Bathurst went so far as to suggest that the government might use those officers to intervene in the general elections.⁷⁵ The Earl of Cadogan replied that this extension was necessary if for no other reason than to prevent half-pay officers from joining future rebellions, as they had in 1715 and 1745.⁷⁶ In the final vote, the clause

⁷² Cobbett, 14:434.

⁷³ Ibid., 439-440, 452.

⁷⁴ Ibid., 461-462 (footnote).

⁷⁵ Ibid., 466

⁷⁶ Ibid., 471

carried by 72 to 15.⁷⁷ While the opposition failed again in their attempts to weaken the military justice system in 1749, the overall result of the debates was to confirm government support for the system and to strengthen it by ironing out the half-pay officer issue.

Debate resumed in 1750 when the Mutiny Act came up again for its annual renewal, though only in the House of Commons. The opposition focused on three core issues: the commander-in-chief's right to order revisions of general court martial proceedings, the oath of secrecy sworn by court martial judges, and the power of colonels to demote non-commissioned officers at will. The Earl of Egmont opened up the assault by proposing to alter the clause permitting the commander-in-chief to order general courts martial proceedings revised. In the key phrase "and no Sentence given by any Court-Martial and signed by the President, shall be liable to be revised more than once," Egmont proposed that "more than once" be struck out.⁷⁸ His attack quickly failed when MPs voted to leave the phrase as it was, 177 to 125. John Morton of Tackley launched the second attack, aimed at the oath of secrecy that courts martial judges sworn not to divulge the votes or proceedings of the court until after the king confirmed them. He argued that having the deliberations and votes veiled in secrecy allowed the judges to vote against their consciences and provided a screen for nefarious activities. The oath also provided a dangerous precedent, for "having once established such a secret military tribunal, it will be a precedent for establishing such secret tribunals in all trials at

⁷⁷ Cobbett, 14:491.

⁷⁸ *Ibid.*, 621-622.

common law.”⁷⁹ To solve this issue, Morton moved that the clause be changed to require officers to divulge details of the proceedings and votes to Parliament if so requested. Secretary at War Henry Fox replied for the ministry, stating that the amendment was unnecessary, since a bill requiring courts martial judges to reveal those details could be passed if the issue ever arose. In the meantime, passing this amendment would lead to many others of a vexatious nature. As to the oath of secrecy providing grounds for secret tribunals spreading into the civilian justice system, Fox stated that “the nature of the military law is so very different from that of the common law...that no regulation in the one can ever be made a precedent for any regulation in the other.”⁸⁰ Morton dropped the amendment, ending the contest.

Colonel George Townshend, formerly a member of the Duke of Cumberland’s staff who had been dismissed in disgrace, introduced the final point of contention, a new clause preventing non-commissioned officers from being reduced in rank except by the sentence of a court martial. Standard practice at the time was for colonels of regiments to promote and demote non-commissioned officers at will, rather than through any formal process: a reflection of the army’s as-yet nascent centralized administrative capability. Townsend offered several examples of sergeants and corporals being reduced to serve as common soldiers for seemingly minor offenses and argued that “no set of men in the kingdom whose liberties and properties we ought to be more careful of, than those of our soldiers.” If once “brought into slavery,” these men could be used to bring the rest of the country into a similar condition. Townsend made the case that a soldier should not be

⁷⁹ Cobbett, 14:626.

⁸⁰ Ibid., 627.

“subjected to the arbitrary will and pleasure of his commanding officer” and that a non-commissioned officer’s rank was his “property,” along with the pay that belonged to it, “which we are to suppose he has purchased by his service.”⁸¹ Colonel Henry Conway responded for the ministry, stating that the qualities requisite in a good non-commissioned officer could only be assessed once a man had been appointed. If the soldier was unable to fulfill his duties, it was “absolutely necessary for the good of the service, that the colonel should have an unlimited power to reduce him again to a private sentinel.” Conway further noted that it might be impossible to demonstrate a man’s incompetence with proof that would satisfy a court martial. Conway also raised the specter of non-commissioned officer rank becoming “a sort of civil payment” to be bought and sold like officers’ commissions. The existing system, he observed, had functioned properly for sixty years.⁸² From a purely technical standpoint, the amendment would produce havoc within the military’s command and control structure. After further posturing from both sides, the amendment was defeated 178 to 109.⁸³

The third and final session of heated debates over the Mutiny Bill began on February 19, 1751, though this time the results were markedly different for the opposition. As in 1750, the challenge to the Mutiny Bill’s passage was confined to the House of Commons, where MP’s debated regimental court martial procedure and, for the third time in as many years, the commander-in-chief’s power to order revision of court martial sentences. In a move that echoed Edward Hughes’s determined lobbying from

⁸¹ Cobbett, 14:642-643.

⁸² Ibid., 647-650.

⁸³ Ibid., 668.

two decades earlier, the Earl of Egmont moved that regimental courts martial be empowered to swear witnesses and employ the same oaths for judges as found in general courts martial. The motion failed by a vote of 137 to 74. On February 26, the opposition challenged the revision clause, proposing to eliminate it altogether. The ensuing debate produced a compromise, whereby commanders-in-chief would retain the right to order a single revision of the court martial proceedings, the final result of which they would be forced to accept. This compromise carried by the same division, 137 to 74.⁸⁴ While Egmont would lead attacks against the Mutiny Bill in 1754, opposing the extension of military law to East India Company forces and provincial forces in North America, the debates were one-sided, brief, and failed to touch on any particular mechanism of military justice.⁸⁵ By the conclusion of the Seven Years War, the Mutiny Act became just another routine piece of legislation, a non-issue due to George III's rapprochement with the Tories in the 1760s.

The crystallization of Military Justice

The Mutiny Bill debates of the mid-eighteenth century ushered in a period of relative tranquility, during which the procedures and legislative basis of the military justice system were consolidated and crystalized. In the absence of party turmoil, the Mutiny Bill's prominence diminished, the only changes proposed being intended to clear up minor vague points. No great procedural innovations or controversies arose, while the

⁸⁴ Cobbett, 14:973

⁸⁵ William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 15 (London: T. C. Hansard, 1813), 256, 375.

first books codifying the practice of military law appeared to aid officers in their duties. In contrast to preceding decades, the latter half of the eighteenth century was a period of routine business at the judge advocate general's office.

Aside from the removal of party tension and the years afforded the officer corps to familiarize themselves with the procedural innovations from Hughes's tenure, credit for the relative calm belongs to the longest serving and steadiest of the eighteenth-century judge advocate generals: Charles Gould. The son of King Gould, deputy judge advocate general to the three preceding judge advocate generals, Charles continued the Welsh line of succession in the office. Born in 1725, Charles Gould gained a formal education in the law at Doctors Commons, taking the degree of D.C.L. and became King's Counsel in 1754. At approximately this time, he also joined the staff of Judge Advocate General Thomas Morgan, whose daughter he would marry in 1758. Gould succeeded Morgan as judge advocate general after the latter's retirement in 1768, remaining in that post until 1806. Having received formal training in civil law and a long apprenticeship alongside his father and Morgan, Charles Gould was the single best-prepared judge advocate general of the century.⁸⁶

While continuing the steady flow of routine work that had characterized the judge advocate general's office under his predecessors, Gould would complete Hughes's

⁸⁶ Poole, *The Illustrated History and Biography of Brecknockshire from the Earliest Days to the Present Day*, 400; H. C. G. Matthew and B. Harrison, eds., "Morgan, Sir Charles," in *The Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), accessed April 23, 2016, <http://www.oxforddnb.com/view/article/11149>; "GOULD (afterwards MORGAN), Charles (1726-1806), of Ealing, Mdx. | History of Parliament Online," accessed April 23, 2016, <http://www.historyofparliamentonline.org/volume/1754-1790/member/gould-%28afterwards-morgan-%29-charles-1726-1806>. In 1792, after Thomas Morgan's death, Charles Gould would take his father-in-law's name as a condition of the former's will.

mission of transforming the office into the supreme authority on British military law. In contrast to Hughes, though largely made possible by the former judge advocate general's accomplishments, Gould established himself as an authority of reference for officers and deputy judge advocates, rather than as a campaigner for reform. The surviving correspondence from the judge advocate general's office during Gould's tenure is filled with questions on the finer points of military legal procedure, the answering of which seems to have filled much of Gould's time.

Officers and civilians involved in the military justice system wrote to Gould on a regular basis with requests for his input on various unclear points of military law. A sample of in-letters from the Judge Advocate General's Office courts martial series offers an indication of the extent of Gould's impact. Lieutenant-Colonel John Darby exchanged a lengthy correspondence with Gould over the course of May and June 1768 with regards to the trial and disposition of Private Patrick Ryan, a deserter from the 17th. Darby initially wrote to Gould for clarification on implementing the general court martial warrant, observing that since he could not locate information from other sources on how to proceed, he knew that no one could answer his questions "more clearly or candidly than" Gould. By the end of the correspondence, Gould managed to convince Darby to advocate for Ryan's pardon, on the condition that the soldier join the 70th Regiment of Foot, at that time serving abroad. Darby would consult Gould again in 1770 on whether a deserter who claimed to be an apprentice could be tried at a general court martial.⁸⁷ On

⁸⁷ John Darby to Charles Gould, Wells, England, May 23, 1768, NA WO72/6; John Darby to Charles Gould, Wells, May 28, 1768, NA WO72/6; John Darby to Charles Gould, Wells, May 30, 1768, NA WO72/6; John Darby to Charles Gould, Wells, June 12, 1768; John Darby to Charles Gould, Wells, June 28, 1768, NA WO72/6; John Darby to Charles Gould, Chatham Barracks, March 3, 1770, NA WO72/6.

September 22, 1770, Gould wrote to Captain Henry Schomberg, Judge Advocate for Minorca, in response to a letter from Schomberg with questions including the extent to which Schomberg could administer oaths, whether Schomberg's appointment as judge advocate permitted him to enter pleas in the Minorcan courts, and whether a general court martial could try a soldier's wife who assisted the soldier in committing murder.⁸⁸

Thomas Waite, Secretary to the Lords Justice in Ireland, conducted a lengthy correspondence with Gould throughout the late 1760s, touching on topics from the responsibilities of deputy judge advocates to where certain offenses fell within the line between civilian and military jurisdictions.⁸⁹ Gould also received inquiries from Major-General Thomas Gage, commander-in-chief in North America, and Brigadier-General Ralph Burton, commander of British troops in Quebec after the Seven Years War.⁹⁰

Gould's correspondence with authorities in Ireland provides two key examples of the judge advocate general's status as a legal expert. In a letter from August 22, 1770, Gould offered opinions on two questions from Thomas Waite, Secretary to the Lords Justices in Ireland: how the appeals system for moving from regimental to general courts martial functioned and the legality of regimental courts martial sentencing soldiers to receive 1,000 lashes. With regard to the appeals system, Gould noted that there was not

⁸⁸ Charles Gould to Henry Schomberg, Stratham, Cambridgeshire, September 22, 1770, NA WO72/6.

⁸⁹ Thomas Waite to Charles Gould, Dublin Castle, September 5, 1767, NA WO72/6; Charles Gould to Thomas Waite, Horse Guards, September 15, 1767, NA WO72/6; Thomas Waite to Charles Gould, Dublin Castle, October 1, 1767, NA WO72/6; Thomas Waite to Charles Gould, Dublin Castle, August 6, 1770, NA WO72/6; Charles Gould to Mr. Thomas Waite, Horse Guards, August 22, 1770; Charles Gould to Thomas Waite, Post Script, Horse Guards August 22, 1770, NA WO72/6; Thomas Waite to Charles Gould, Dublin Castle, August 24, 1770, NA WO72/6; Charles Gould to Thomas Waite, Horse Guards September 3, 1770, NA WO72/6.

⁹⁰ Thomas Gage to Charles Gould, New York, April 18, 1764, NA WO72/6; Ralph Burton to Charles Gould, Montreal, Canada, July 5, 1764, NA WO72/6.

much agreement on the topic in the official codes. The Articles of War specifically permitted an appeal when “an Officer or Soldier complaining of, or thinking himself wronged by his Superior officer and upon an [sic] hearing before a Regimental Court Martial, not being Satisfied with their determination.” The Mutiny Act’s prohibition on a soldier being tried twice for the same crime included an exception for appeals, but did not offer specific grounds for when an appeal was justified. Gould thus concluded that there was no general right of appeal, and if one was to be granted based on the implications of the Mutiny Act, “it would go farther than those who argue in favor of Appeals would wish to allow,-- it would give to the Prosecutor as well as the Defendant, such Right of Appeal in all cases.” With regards to soldiers receiving sentences of 1,000 lashes from regimental courts martial, Gould admitted that it had been done, but infrequently, with no proper grounding in the military law, and without being reported to the crown. If such cases had been reported, the judge advocate general opined that it would “furnish the Strongest Argument in favour of a general Right of Appeal” and the crown would mitigate the sentence or pardon the offender.⁹¹

On April 14, 1768, Joseph Sirr, Deputy Judge Advocate General for Ireland, wrote to Gould with a less technical questions involving the public implications of general courts martial. Sirr enclosed copies of Dr. Charles Lucas’s *Mirror for Courts-Martial* pamphlet, a pamphlet written by British officer in response to Lucas’s allegations, and a copy of David Blakeney’s general court martial. He then informed Gould “a Subscription is open’d in favor of Blakney, to prosecute the Presidt. &

⁹¹ Charles Gould to Thomas Waite, Horse Guards, August 22, 1770, NA WO72/6. Words underlined as in original text

members” of the court martial. None of the officers could afford to pay for a legal defense and the Irish government was eager to assist them, but desired to know if there was some sort of precedent upon which they could act. Sirr requested Gould to “to favor me with your opinion on this Subject” as soon as possible.⁹² Gould’s response, on April 28th, began with confirmation that no precedent existed for an issue of this sort, and that he was in complete agreement with the court’s opinion that Blackeney had a “litigious and troublesome disposition.” He noted, however, two points upon which “the Prosecutor may make his Attack.” First, the judges had failed to provide any compensation for the one part of Blakeney’s list of grievances that they found valid. Secondly, the judges included their personal opinions that “that the said Blakeney, was a Seditious and litigious Man” in the verdict, which did not address any of the charges against him. While Gould understood that the judges were intent on emphasizing the groundlessness of the appeal. However, Gould note, including that language in the verdict could “furnish a Specious Argument of some Circumstances having been taken up by the Court extraneous to the Appeal.” Gould recommended that the officers from the court martial appeal to the Lord Lieutenant for aid.

Correspondence interspersed within these consultations revealed that officers now wrote to Gould regularly on routine matters, marking a much closer engagement with the Judge Advocate General’s Office than during Edward Hughes’ tenure in office. In July 1768, Lieutenant Colonel John Campbell of the 22nd Regiment of Foot reported to Gould that the proceedings from a recent general court martial were inbound and requested that

⁹² Joseph Sirr to Charles Gould, Dublin Castle, April 14, 1768, NA WO72/6. Words underlined as in original text

they be speedily processed so that he could dispatch the officers involved to other duty stations. Campbell apologized for “any Want of Form or Method” in the proceedings, attributing it to the officers being “less versed in This, than I hope in any other Part of our Duty.”⁹³ Lieutenant Colonel John Parr of the 20th Regiment of Foot asked Gould “if any other order or instructions are necessary to receive from you” prior to trying a deserter at a general court martial, to proactively prevent any difficulties with the trial.⁹⁴ The change was a testament to the greater frequency with which officers participated in the centralized administration of the military justice system in the last half of the eighteenth century.

Gould’s tenure in office also coincided with the first codifications of courts martial practice in the form of privately-printed manuals for officers, marking a break with the previous fifty years of developments. Stephen Payne Adye, lieutenant in the Royal Artillery and deputy judge advocate for the British garrison in New York, wrote the first, and most influential, manual on courts martial practice. Payne published his *Treatise on Courts Martial* in New York in 1769, in part based on his lengthy correspondence with Gould as well as his own experiences as deputy judge advocate. The volume set out in three parts to describe the history and legal foundation of courts martial, offer detailed explanation and instruction on standard procedures involved in courts martial proceedings, and (in a separate essay) discuss punishment options available to officers.⁹⁵ While Adye’s work presented a standardized approach to courts martial, it

⁹³ John Campbell to Chas. Gould Esqr, Plymouth Barracks July 30, 1768, NA WO72/6.

⁹⁴ John Parr to Gould, Plymouth Barracks 1st Nov 1771, NA WO72/6.

⁹⁵ Stephen Payne Adye, *A Treatise on Courts Martial* (New-York: Printed by H. Gaine, 1769).

also represented a reinvention of the history of the British legal justice system. Instead of recognizing the decades of work undertaken by the successive judge advocate generals and their staff, Adye proposed that courts martial descended from the medieval court of chivalry, which has since been debunked. Adye's purpose in seeking this alternative source for courts martial outside of the Articles of War is clear from his statements in the introduction. Beginning with a scene of civilian lawyers mocking him for undertaking "to lay down the Law," Adye informed his readers that his rules for courts martial proceedings were "compiled from the best Law Authors."⁹⁶ It was therefore in Adye's interest to portray courts martial as having a root in medieval law, thereby making the opinions of civilian legal experts relevant, rather than admitting that the real historical root of military justice lay far outside of the law. In promulgating his new vision for the military justice process, Adye melded military and civilian law together in a way that likely would have pleased Judge Advocate General Edward Hughes, but which nevertheless reimagined the actual formation of the contemporary military justice system. The true confirmation of Adye's success in having his vision of military justice accepted came when John Williamson included significant portions of Adye's text in his *Elements of Military Arrangement*, published in 1781 as a general manual for officers.⁹⁷ Williamson's work represented the introduction of formal consideration of military justice into the set of knowledge every officer was expected to know, achieving a level of

⁹⁶ Adye, i–ii.

⁹⁷ John Williamson, *The Elements of Military Arrangement Comprehending the Tactick, Exercise, Manoeuvres, and Discipline of the British Infantry, with an Appendix, Containing the Substance of the Principal Standing Orders and Regulations for the Army* (London: Printed for the author, 1781).

engagement between the officer corps and the legal-military state that could have only been dreamed of in 1715.

Conclusion

The British military justice system underwent significant development between the Jacobite Rising of 1715 and the publication of the first manual on courts martial in 1769. The political threats presented by the domestic rebellions favor of the Stuart dynasty provided the impetus for reform efforts intended to centralize and institutionalize the military justice system as a tool for insuring the army's loyalty to the civilian government and effective operation. These internal development, accomplished with the active support of the crown, alarmed opponents of the centralized British state, who attempted to return the military justice system to its status immediately after the Treaty of Utrecht, when the absence of authorization for capital punishment had effectively shut down the Judge Advocate General's Office. The ministry's victory in the Mutiny Act Debates of 1718 guaranteed the system's survival as a state institution. Judge Advocate General Edward Hughes, the first man appointed to the office under the Hanoverian dynasty, created a new set of guidelines for the conduct of general courts martial and enforced officers' compliance with them, issuing in a new period of central administration of military justice. Hughes' attempts to extend his office's control to regimental courts martial failed, however, liming the legal-military state's institutional capacity for the remainder of the century.

At mid-century, the Duke of Cumberland led a reform drive that reformatted the Articles of War and introduced vital improvements to the Mutiny Act, extending the

military legal jurisdiction over half-pay officers and combatting other excesses. A strong Tory-Whig coalition, led by the 2nd Earl of Egmont, fought three hard debates over the Mutiny Act between 1749 and 1751, succeeding in limiting the commander-in-chief's power to order general courts martial to revise their sentences, but otherwise failing to return the military justice system to its 1713 status. Their attacks, like those of the opposition MPs and lords in 1718, revealed strong elements of Neo-Harringtonian thought, along with an alternative vision for a significantly less-centralized state than their ministry opponents proposed. The Seven Years War, combined with the rapprochement between George III and the Tory party ended the party tension that had hitherto driven the debates over the Mutiny Act.

The third quarter of the eighteenth century was a period of relative calm for the military justice system, as Judge Advocate General Charles Gould consolidated earlier institutional gains. The first judge advocate general with formal legal training, Gould established his office as a true authority on military law, fielding questions from officers and civilians involved in the military justice system from across the empire. Gould's contact with Lieutenant Stephen Adye of the Royal Artillery, who served as deputy judge advocate in New York during the last 1760s, in part led Adye to write his *Treatise on Courts-Martial*, the first formal manual on the military justice process. Though founded on a reimagining of the military justice system's history that did not take the previous fifty years of developments into account, Adye nevertheless succeeded in increasing officers' engagement with military justice beyond what the Judge Advocate General's Office had accomplished along. John Williamson's inclusion of elements from Adye's treatise in his own military manual, *Elements of Military Arrangement*, published in

1781, signaled the acceptance that an understanding of the military justice process was a core element of every officer's knowledge base. By 1781, the military justice system and the legal-military state had achieved a level of acceptance by and engagement with the officer corps that was undreamed of in 1715.

CHAPTER FIVE: THE LIMITS OF MILITARY JUSTICE IN THE EMPIRE

On December 28, 1757, Lieutenant-Colonel Simon Fraser, commanding the 2nd Highland Battalion, wrote to Adjutant General John Forbes with news of a murder that occurred in a detachment at Stratford, Connecticut. Sergeant Alexander Fraser and Corporal James Macky had exchanged blows while on guard duty, resulting in Macky's death. Since the incident occurred in an area of the colony where a civilian court was in operation, Lieutenant-Colonel Fraser sought clarification on whether Sergeant Fraser should "be try'd by civil or Military Law."¹ The local civilian authorities manifested no interest in trying the sergeant themselves, but in the absence of directions from the British commander-in-chief, both Lieutenant-Colonel Fraser and the Stratford authorities worked together to investigate the case. By January 3, 1758, the local coroner had held an inquest while Fraser had presided over a court of inquiry, both of which returned the same findings: that Fraser had killed Macky and should stand trial. The situation lingered, with Sergeant Fraser confined to the guard house and the civil authority showing no signs of demanding him for trial. By January 23, the Stratford town fathers received directions from the colonial governor to proceed at their discretion, but to assure that "there was no guilt to come upon the land."² Lieutenant-Colonel Fraser assured Forbes that the local authorities would be content with a court martial, but no warrant for one followed. On February

¹ Simon Fraser to John Forbes, Fairfield, December 28, 1757, NAS GD 45/2/29/1.

² Fraser to Forbes, Stratford, January 23, 1758, NAS GD 45/2/29/3.

10th, Fraser reported that the local authorities “declare all they desire is that he shou’d have a fair tryal, & that they woud chuse it shoud be a Military rather than a Civil one,” but were increasingly convinced no such trial would occur.³ Finally, on February 24th, Sergeant Fraser was indicted for murder and tried by the Superior Court of Connecticut. The jury returned a verdict of not guilty, and so impressed Colonel Fraser with their “moderation decency & propriety” that he declared “The Colony of Connecticut & the 2^d highland Battalialion are hand & glove.”⁴ Ten years later, the civilian authorities in the North American colonies would unhesitatingly use the Mutiny Act against the British Army, tearing the legal-military state apart as part of the larger imperial crisis leading to the American Revolution.

British civilian authorities envisioned the military justice system’s operations abroad as a distinctly separate category from its functions within Great Britain from the beginning of the eighteenth century. Article 41 of the Articles of War of 1718 authorised general courts martial held in the “Garrison of Gibraltar, Island of Minorca, forts of Placentia, and Annapolis Royal...or in any other place beyond the Seas” where British troops might go and no British civilian courts existed, to “punish Criminals by their Sentence, as has been Practiced heretofore.” Subsequent editions of the Articles of War issued throughout the century would preserve this recognition that in most of its foreign operations, the British Army was beyond the reach of civilian government. With no civilian courts to threaten, the British government left army commanders to proceed as they pleased in applying military law to offenders. From this beginning in four isolated garrisons, the military justice system would expand along with the increasingly frequent expeditions throughout the empire, driven by the

³ Fraser to Forbes Stratford February 10, 1758, NAS GD 45/2/29/4.

⁴ Fraser to Forbes, Stratford February 25, 1758, NAS GD 45/2/29/5.

burgeoning pace of warfare throughout the eighteenth-century. At the close of the Seven Years War, the military and civilian jurisdictions that had largely been separate in the imperial context would come into close contact, with disastrous results. A situation that offered the opportunity of replicating the strong bonds between civilian and military authorities seen within Great Britain instead led to the demise of the legal-military state abroad.

Previous work on the British military justice system has generally failed to recognize any significant distinction between operations within Great Britain and operations abroad. Aside from Arthur Gilbert's recognition that general courts martial held in Great Britain tended to inflict less severe corporal punishment sentences than those held abroad, no scholar of military justice has recognized any remarkable differences in the operation of military justice abroad.⁵ Yet many of the key existing studies in the field depend significantly or entirely on courts martial held within the empire, or entirely within America, for their data sets.⁶ Historians of the Imperial Crisis and the American Revolution, along with scholars of legal geography, have recognized the distinction between the military experience in Great Britain and abroad, providing important contextual information for understanding the military justice system's operations in the empire. Eliga Gould and Lauren Benton have established the patchwork of legal enclaves within the British Atlantic, which

⁵ Arthur N. Gilbert, "The Changing Face of British Military Justice, 1757-1783," *Military Affairs* 49, no. 2 (1985): 80-84.

⁶ Sylvia R. Frey, "Courts and Cats: British Military Justice In the Eighteenth Century," *Military Affairs* 43, no. 1 (1979): 5-11; Stephen Brumwell, *Redcoats: The British Soldier and War in the Americas, 1755-1763* (Cambridge: Cambridge University Press, 2002); Sylvia R. Frey, *The British Soldier in America: A Social History of Military Life in the Revolutionary Period* (Austin: University of Texas Press, 1981); Arthur N. Gilbert, "Law and Honour among Eighteenth-Century British Army Officers," *The Historical Journal* 19, no. 1 (1976): 75-87; Arthur N. Gilbert, "British Military Justice during the American Revolution," *The Eighteenth Century* 20, no. 1 (1979): 24-38; Arthur N. Gilbert, "Why Men Deserted from the Eighteenth-Century British Army," *Armed Forces & Society* 6, no. 4 (July 1, 1980): 553-567; Gilbert, "The Changing Face of British Military Justice, 1757-1783."

permitted civilian and military jurisdictions to spring up separately and remain out of meaningful contact with one another until mid-century. Benton offers two particularly vital ideas for understanding civil-military relations in the British Empire. First, “the portability of subjecthood and the delegation of legal authority” generated distinct legal enclaves that sought to extend their control over surrounding areas. Second, successful interactions between these enclaves depended on a shared “legal matrix” that supported “both parallel and independent adjudication” along with a central body of state law to which appeals could be made.⁷ Scholars of the Imperial Crisis and the causes of the American Revolution have established how the army’s presence within the core populated areas of the North American colonies created significant civil-military tension. The Mutiny Act’s quartering requirements, eventually embodied in the special Quartering Act for America, generated significant legal turmoil for the army in the thirteen colonies. As John Philip Reid has demonstrated, by the occupation of Boston in 1768, colonial authorities had learned how to use the Mutiny Act’s provisions against the army.⁸

⁷ Lauren A Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, UK; New York, NY: Cambridge University Press, 2002), 77–78, accessed April 24, 2016, <http://hdl.handle.net/2027/heb.30961>; Eliga H. Gould, “Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772,” *The William and Mary Quarterly* 60, no. 3 (2003): 471–510; Lauren A Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge; New York: Cambridge University Press, 2010), 3.

⁸ Alan Rogers, *Empire and Liberty: American Resistance to British Authority, 1755-1763* (Berkeley: University of California Press, 1974); John W Shy, *Toward Lexington: the Role of the British Army in the Coming of the American Revolution*, (Princeton, N.J.: Princeton University Press, 1965); Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill: University of North Carolina Press, 1982); John Phillip Reid, *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (University Park: Pennsylvania State University Press, 1977); Fred Anderson, *A People’s Army: Massachusetts Soldiers and Society in the Seven Years’ War* (Chapel Hill: Published for the Institute of Early American History and Culture, Williamsburg, Va., by the University of North Carolina Press, 1984); Richard Archer, *As If an Enemy’s Country: The British Occupation of Boston and the Origins of Revolution* (Oxford; New York: Oxford University Press, 2010).

In the imperial context, the period from 1715 to 1768 comprised the rise and fall of the legal-military state abroad, highlighting the institutional limitations and liabilities inherent in the British approach to ensuring civilian control over the military. To understand these developments, analysis will focus on North America, the one place within the British Empire where civilian and military legal enclaves interacted most closely after mid-century. In other areas of the empire during this period, one enclave or the other tended to dominate, including in the Caribbean, where troops were spread thinly across islands characterized by a small Anglo-American presence and a large African-American presence throughout most of the century. As the differences between the civilian responses to Sergeant Fraser's accidental killing of Corporal Macky and to the British military occupation of Boston in 1768 demonstrate, the attitudes of colonial American authorities towards regular military forces shifted from attempting to control army units within their jurisdictions to reclassifying those detachments as a threat to the government that needed to be expelled. As Lieutenant-Colonel Fraser observed in his dispatches to Forbes, the residents of Stratford seemed to prefer avoiding entanglements with the military authorities, acting only when the army threatened to disrupt the local political situation by leaving Sergeant Fraser untried. By 1768, any such sense of separation had dissipated, with colonial authorities acting quickly to exert their authority over the soldiers in their midst, with the intention of driving out any military authority that threatened their dominance. As this chapter will demonstrate, the events of the Imperial Crisis, which occupied the years between Macky's murder and the occupation of Boston, would witness a marked change in the legal parameters of the civil-military relationship in the colonies, which would signify the legal-military

state's failure and which offers a more nuanced understanding of the army's role in provoking the American Revolution.

This chapter will explore the expansion of the military justice system and the limits of the legal-military state in three sections. The first will trace the expansion of the military justice system abroad, beginning with the four key enclaves of Gibraltar and Minorca in the Mediterranean and Placentia and Annapolis Royal in Canada. Due to the British government's limited commitment to imperial policing prior to the conclusion of the Seven Years War, military justice was a temporary phenomenon across most of the empire, present only as long as troops were in the vicinity. The key element for this period was the gradual establishment of additional permanent garrisons, culminating in the decision to maintain a strong military presence in America after 1763 and to keep those troops in populated areas rather than posting them to the frontier.

The second section will examine military justice in the empire at mid-century, focusing on the American experience during the Seven Years War. Prior to the arrival of Major-General Edward Braddock's expedition, the American experience with British regulars had been fleeting at best. The interplay between the British Army, the American provincial forces, and the colonial governments that occurred throughout the Seven Years War would lay the groundwork for the fall of the legal-military state that was to come during the imperial crisis. The key element in this equation, as historians have recognized, was the quartering issue. The Mutiny Act's provisions requiring colonial governments to provide lodging for British regulars added expense and strain to government operations, as well as challenging local government control over military forces. Royal governors' and colonial assemblies' experiences with British generals, particularly Braddock and Lord Loudoun, the commander-in-chief in

1757, further soured civil-military relations.⁹ The American military experience with British military justice re-affirmed anti-Standing Army bias, due to the disjuncture between the British emphasis on corporal punishment and the general avoidance of it with the colonial military establishment.¹⁰ By 1763, colonial governments in America were ready to see British forces withdrawn abroad or sent to the frontiers, where the soldiers would be of minimal expense and inconvenience to civilians.¹¹

Section three will probe the breakdown of the civil-military relationship that occurred when British troops were not withdrawn from core civilian areas. The pressures that had been held in check for the good of the war effort exploded from 1764 onwards, as strife between civilian and military authorities quickly blossomed. While scholars have focused attention on the Quartering Act of 1765 and the subsequent New York Restraining Act as the means to understand the army's role in the imperial crisis, this section will turn to examine the key case study of West Florida, where civil-military relations broke down beginning in 1764.¹² While John Shy, R.F.A. Fabel, and Cecil Johnson have examined the West Florida situation, where Governor George Johnstone faced off against local military commanders, none of these scholars have discussed the implications of the disorder in that colony for the military justice system in America. West Florida provides an even more pointed example of how colonial civilian authorities were able to use the legal-military state

⁹ Stanley McCrory Pargellis, *Lord Loudoun in North America* (New Haven; London: Yale University Press, 1933); Rogers, *Empire and Liberty*.

¹⁰ Anderson, *A People's Army*.

¹¹ Shy, *Toward Lexington; the Role of the British Army in the Coming of the American Revolution*.

¹² Ibid.; Nicholas Varga, "The New York Restraining Act: Its Passage and Some Effects, 1766-1768," *New York History* 37, no. 3 (1956): 233-258.

against the army in a way that nullified the military's ability to operate effectively in America during peace time.

The expansion of military justice abroad

Despite being located on the far-flung edges of the British Empire, the key imperial outposts of Gibraltar, Minorca, Annapolis Royal, and Placentia were integrated into the legal-military state to varying degrees from the beginning of the eighteenth century. The first deputation to feature Judge Advocate General Edward Hughes' new instructions for recording general courts martial proceedings went to John Beaver, judge advocate for the garrison at Gibraltar, integrating that post within Hughes' drive to extend central control over general courts martial.¹³ While the Judge Advocate General's Office maintained closer communications with Gibraltar and Minorca than with the Canadian posts, all four garrisons were part of the same system. Each came into British hands permanently as a result of the Treaty of Utrecht in 1713, and constituted the primary enclaves for military justice within the British imperial positions. Free from interference from any local civilian courts, the four garrisons served as laboratories for the application of military justice abroad.

Despite being located in markedly different areas of the world, the Mediterranean and Canadian posts offered a basic uniformity of experience of military justice for their garrisons. Surviving orderly books from Gibraltar and Canso, an outpost on the north-eastern coast of Newfoundland, provide the opportunity to compare the experience of military justice at each garrison.¹⁴ Each set of orders

¹³ NA WO71/14, 72.

¹⁴ Archibald Cunninghame, "General Orders of the Garrison of Gibraltar from the 2^d February 1726/7 to 28th October 1745," NAS GD21/1/625; "Orders and Paroles of Major Paul Mascarene at Canso 1735-36," BL ADD 19068. Although the Canso Orderly Book only covers the period of September

addressed neglects of duty, drunkenness, property crimes, and restrictions placed on soldiers' movements. Though the differences in climate and social context between the posts provided some contrasting points, in general the disciplinary concerns and solutions implemented at Canso and Gibraltar proceeded from a common perspective on the implementation of military justice.

Mascarene's orders for Canso reflected a focus on guard duty that was comparable to that seen in the Gibraltar orders. The Canso Orderly book began with a lengthy set of guard regulations issued on September 3, 1735, that detailed rally points in case of attack and procedures for addressing a variety of possible scenarios, similar to orders that Governor Joseph Sabine issued at Gibraltar on August 10, 1735 and July 11, 1739.¹⁵ Mascarene additionally threatened to punish any men who failed to attend training for the new musket drill on June 28, 1736, and directed that sentries were expected to prevent all prisoners consigned from their care from acquiring "strong drink" on July 10, 1736. Sentries at Gibraltar received a similar instruction on April 8, 1732.¹⁶ Other orders relating to guard duty addressed the recurrent issue of men appearing in a state of drunkenness when assembling to mount guard. Mascarene issued three separate orders threatening confinement and punishment for any man who attempted to mount guard while drunk between October 1735 and June 1736, and ordered the officer of the guard to insure that "no disorder or drunkenness happen att" watch-setting.¹⁷ The Gibraltar orders reflect a comparable concern with soldiers appearing drunk for duty. On May 3, 1727, the governor ordered unit commanders "to

1735 to January 1737, while the Cunninghame Orderly Book runs from 1727-1745, it is still possible to gain a general impression of the flavour of military justice at each post.

¹⁵ Cunninghame Orderly Book, 93, 94.

¹⁶ Cunninghame Orderly Book, 73.

¹⁷ Canso Orders, October 1, 1735; May 24, 1736; and June 28, 1736.

have drunkenness supprest, especially in regard to the Men for duty.”¹⁸ On December 9, 1739, the governor instituted new procedures for punishing men found drunk on duty, likely with an intention to make a dissuasive example. He ordered any captain who found a soldier drunk “on the parade when for duty” to call four subaltern officers to examine the man and establish his drunken state. If the four subalterns concurred that the man was drunk, drummers were to immediately administer 50 lashes, then the drunk man was to be sent to the provost-marshal to be confined and subsist on bread and water for a day, then brought back to mount guard again.¹⁹ The similarities between the Canso and Gibraltar orders indicates that suppressing drunkenness and maintaining alert guards were serious concerns across the imperial posts, which was sensible in light of their isolated positions surrounded by potential enemies.

Drunkenness also appeared as a contributing factor to property crime at Canso, particularly with regard to soldiers selling their equipment and provisions to buy liquor.²⁰ On October 21, 1735, Mascarene warned anyone who attempted to buy soldiers’ rations or encouraged soldier to “truck their provisions generally for Strong drink” would be forced to return those provisions for no compensation and be subject to additional punishment. While no orders issued at Gibraltar specifically linked soldiers selling their equipment and rations with soldiers purchasing alcohol, there are examples of warning to sutlers not to buy military items from soldiers and not to sell liquor to soldiers.²¹ Other orders touched on thefts more generally: on February 4,

¹⁸ Cunninghame Orderly Book, 18.

¹⁹ Ibid., 110-111.

²⁰ Canso Orders, September 29, 1735; October 24, 1735.

²¹ Cunninghame Orderly Book, 89, 121.

1736, Mascarene offered amnesty to any person who came forward with information on a series of thefts committed the previous summer and fall. In November of that same year, the major observed that “Several Sheep [were] missing out of the flock” that the garrison maintained and forbade any soldier from stealing or killing the animals, or traveling to the nearby island where the flock lived. A month later, Mascarene directed soldiers to arrest a young man thought to be involved in several robberies.²² The governors of Gibraltar adopted a similarly hard-line approach to theft and illicit sales of military goods. Orders for July 20, 1740 warned that any soldier who sold or otherwise disposed “of any of his things, such as Shirts, Shoes, Stockings &c.,” would be put to work until the debt for replacing the articles was repaid.²³ While the Gibraltar orders did not address theft of livestock, the governor did forbid soldiers to set their dogs on the cattle that local civilians brought to town for sale.²⁴

Both the Gibraltar and Canso orders address wilful destruction of property, though the differences in the approaches reflected in the orders provides an example of contrast between the two posts. Destruction of civilian houses was another form of property crime that concerned Canso’s commander. Newfoundland’s primary value to the British empire was as a base for North Atlantic fishermen, many of whom built houses and work buildings near Canso. In September 1735, Mascarene observed that “the late rumors of Warr” had led the fishermen not to leave any of their crews behind to watch after the buildings during the winter. Enterprising soldiers had taken to stripping the structures, probably to use as firewood. Mascarene forbade the soldiers

²² Canso Orders, November 17, 1736; December 11, 1736.

²³ Cunninghame Orderly Book, 120.

²⁴ *Ibid.*, 106

from harming any of the fishermen's properties, repeating the order in March 1736 and directing an officer of the guard to visit the civilian settlements regularly from November 1736 to insure no one was "making use of any timber or boards belonging to any of the houses."²⁵ No similar examples of wanton destruction of civilian homes or buildings occurred at Gibraltar, probably in part due to the differences in climate and the year-round presence of the civilian inhabitants. Nevertheless, the governors issued orders against such forms of defacing property as cutting down trees and brush, removing stones from breakwaters, damaging partridge nests, and removing structural elements from barracks when changing quarters.²⁶

Like the governors of Gibraltar, Mascarene was keen to restrict his soldiers' movements within the garrison, likely as a measure to prevent them from committing disorders. Of the six orders Mascarene issued between January and July 1736, three directed men to stay in their barracks after dark and not to be absent from roll call, which took place several times per day. Two other orders forbade the men from leaving the garrison on the pretence of cutting wood or visiting the nearby fishermen's villages without permission. Mascarene forbade the woodcutters from going in numbers less than 4-5 men and required them to take a corporal or sergeant with them, likely both for supervision and for security in case the party was attacked by French or Indians. The final order barred soldiers from visiting the home of a local resident whom officers had reported as engaging in "Several evil practices."²⁷ These orders matched similar directives at Gibraltar. On 12 August 1727, the Governor

²⁵ Canso Orders, September 30, 1735; March 22, 1736; November 20, 1736.

²⁶ Cunninghame Orderly Book, 44, 49, 98.

²⁷ Canso Orders, January 13, 1736; March 24, 1736; May 8, 1736; May 13, 1736; May 22, 1736; July 6, 1736.

ordered sentries to allow neither “Soldiers nor Inhabitants [to] pass in or out at Southport after Taptoo,” which occurred at around 8 pm every day. By 29 March 1731 only “Officers, their wives and Children, Men employ’d in the King’s works, fishermen, or such as have written leave from the Gove” were permitted to pass through the Landport into Spain. Numerous other orders specified times for gate closures or otherwise regulated the comings and goings of soldiers and inhabitants through the fortifications. The governor further banned soldiers from certain areas, including the parapet and glacis of the main defenses, the hospital, and the Catholic Church in the town, without specific permission.²⁸ Overall, the marked similarities between the Gibraltar and Canso orders speak to a shared experience of military justice and discipline among the early eighteenth century imperial garrisons.

As Table 5.1 demonstrates, the expansion of the military justice system through the empire was a slow process, increasing markedly after 1750 with the establishment of additional permanent garrisons and more sustained fighting on the imperial frontiers. Although the general court martial data represents a random sampling at intervals across the period 1715-1777 rather than a comprehensive survey of general courts martial proceedings, the results do reflect several key points regarding this process of expansion. First, the expansion of the military justice system abroad did not lead to a decline in the frequency of general courts martial held in Britain. This absence of decline demonstrates that the legal-military state was capable of maintaining steady operations at home while also policing an increasing military presence abroad. A steady growth in the size of the army across the eighteenth century accounts for the continuity in activity in Britain with an expansion abroad.

²⁸ Cunninghame Orderly Book, 33-35, 39, 43, 49-50, 65, 104, 119, 120-121, 123-125; 132, 137, 144, 146-148, 151, 157, 188, 192-193, 199-200.

Second, the data reflects the impact of military expeditions abroad. The 41 cases held at sea during the 1726-1750 period all resulted from a raid on the French coast in the autumn of 1746.²⁹ Third, the creation of new garrisons and enclaves of military justice is clear in some of the smaller points in the data set. The four general courts martial held in the Caribbean during the 1726-1750 period reflect the raising of Governor Trelawney's Regiment of Foot in Jamaica, which marked the establishment of a new regular garrison on the island in 1748.³⁰ Likewise the three general courts martial held in Africa indicate the establishment of Fort Lewis in Senegambia.³¹ Of the 63 trials in the sample held before 1750 and outside of Great Britain, the series of courts martial from the doomed L'Orient Expedition of 1746, held at sea, accounted for 41, all of which focused on charges of misbehavior before the enemy. The remaining 22 trials dealt with a variety of crimes, but focused on instances of violence, ranging from murder to dueling. These charges indicate that officers made full use of their permission to try soldiers for crimes that in Britain would have been sent before a civilian court.

Location	1715-1725	1726-1750	1751-1775	Total
Africa			3	3
American Colonies			196	196
At Sea		41		41
Great Britain	87	115	159	361
Canada			17	17
Caribbean		4	23	27
Germany			37	37
Gibraltar	1	9	76	86
Indian			29	29
Minorca	2	6	84	92
Total	90	175	624	889

Table 5.1 Spread of military justice abroad by location of general courts martial trials

²⁹ NA WO71/39, 187-215.

³⁰ Ibid., 26-39, 133-137.

³¹ NA WO71/76, 22-48.

Military justice in the empire at mid-century

The mid-eighteenth century witnessed a dramatic surge in the military justice system's expansion due to the imperial implications of the Seven Years War. The struggle between the great powers of Europe that began in America in 1754 expanded British territorial claims across the globe, as Fred Anderson has most recently and comprehensively chronicled.³² While Anderson has focused on the overall implications for the future of British America, Table 5.1 reflects the impact of this war on the military justice system. From small beginnings, the British legal-military state's reach had extended across the globe. The appearance of general courts martial in India and the surge in numbers of trials held elsewhere largely reflected the presence of British troops for the duration of that conflict. Of the 465 trials in the general court martial sample held after 1750 outside of Great Britain, 251 occurred between 1755 and 1759. General courts martial held in America accounted for 145 of the 251 trials, or 57 percent. These numbers reflect the concentration of global British military forces in America: while that theatre of operations was not the only one, it was a dominant focus for the military justice system.

The Seven Years War represented the peak of the legal-military state's expansion prior to the Revolutionary War and demonstrated that it could guarantee the military justice system's operation as intended in the Mutiny Act and Articles of War. General courts martial held in every arena of the conflict tried the full range of crimes authorized by the Articles of War, ranging from desertion to murder. Desertion charges accounted for 157, or 63 per cent, of the 251 trials held outside of Great Britain during the war. While desertion was represented to a much higher degree in

³² Fred Anderson, *Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766* (New York: Alfred A. Knopf, 2000).

general courts martial held within Britain during the same period—92 or 87 per cent of the 106 general courts martial—both statistics indicate a predominant focus on a purely military crime. The most important difference between the two data sets, however, lay in the crimes that the Articles of War permitted general courts martial to try in places no British civilian courts were in operation, particularly murder. The general court martial sample contains six murder trials that took place during the Seven Years War: three in Germany, one in India, and two in New York. Peter Bissett, the first defendant in the trials held in Germany, was a servant in the army and stood accused of killing another servant while the two were fencing. The court ruled that it was a case of accidental death and set Bissett free.³³ The two other cases from Germany involved the joint trial of Dragoon James Dodds and George Steel, another servant, both from the Royal North British Dragoons, accused of murdering a peasant family while foraging for food. The court convicted Dodds and sentenced him to death while acquitting Steel.³⁴ Private George Bishop stood trial in 1756 in India for stabbing a butcher to death after the man sold the cut of meat Bishop wanted to another buyer.³⁵ The final two general courts martial for murder, convened at the garrison of Oswega, New York, in August and September 1755, chose to surrender Privates James Smith McBride and John Atterbury over to the colonial authorities because the crimes occurred in the “Province of New York where a Civil Court of Judicature is held once a Year.”³⁶ While the officers comprising the court could have

³³ Trial of Peter Bissett, Germany, Adinhouser Camp, Germany, August 16, 1759, NA WO71/67, 212-214.

³⁴ Trials of James Dodds and George Steel, Munster, Germany, May 12, 1759, NA WO71/67, 94-103.

³⁵ Trial of Private George Bishop, NA WO71/43, 419-425.

³⁶ Trial of Private James Smith McBride, Oswego, NY, August 26, 1755, NA WO71/42, 213; Trial of John Atterbury, Oswego, NY, September 10, 1755, NA WO71/42, 238.

easily ignored the dictates of the Articles of War and the Mutiny Act with regard to surrendering soldiers to the civilian authorities, since the closest courts were over 100 miles away in Albany and Schenectady, they nevertheless complied with the core regulations of the legal-military state.

The seeds of the legal-military state's failure in America, however, were not sewn in courts martial trials, but in colonial capitals. As both John Shy and Alan Rogers have established, Major-General Edward Braddock's arbitrary approach to forcing colonial assemblies to quarter his troops laid the groundwork for later resistance to quartering during the Imperial Crisis.³⁷ The Seven Years War in America presented colonial governments with their first experience working with significant British expeditionary forces and high-ranking British officers. Instead of cultivating a cooperative arrangement akin to the state of affairs in England, Braddock and his successors employed the power of their commissions and the troops they commanded to force colonial authorities to arrange quarters, in compliance with the Mutiny Act's quartering provisions, despite the fact that those provisions did not officially apply in the colonies. Worse yet, American towns and cities lacked the number of inns, taverns, and alehouses that supplied quarters for British troops moving between garrisons in England. While Braddock did not live to fulfil his threat of quartering his army, including two regiments of regular infantry, on Philadelphia, Pennsylvania, his second-in-command, Colonel Thomas Dunbar, did in the summer of 1755. When Major-General John Campbell, Lord Loudoun, arrived in July 1756 to assume command of all British forces, he took an equally hard-line approach with Philadelphia, as well as Albany, New York, and Boston, Massachusetts. By the

³⁷ Rogers, *Empire and Liberty*, 75–89; Shy, *Toward Lexington; the Role of the British Army in the Coming of the American Revolution*, 3–45.

conclusion of his time as commander-in-chief in the December 1757, Loudoun had succeeded in alarming many Americans with his forcible quartering of soldiers in private homes and outright bullying of colonial assemblies. While the widespread construction of public barracks to house soldiers relieved the quartering pressure from 1758 onwards, the lessons gleaned from experience with Braddock, Dunbar, and Loudoun would not be forgotten. Nor would the fact that Americans had been subjected to a degree of arbitrary military government that had been illegal in Great Britain since 1689.

The Imperial Crisis and the limits of the legal-military state

The problems with quartering that continued through the Imperial Crisis presented colonial civilian authorities with the opportunity to turn the legal-military state's institutional machinery against the army. As John Shy has observed, the standard narrative for the army's role in the Imperial Crisis that precipitated the American Revolution focuses on the problems of quartering the North American garrison and Parliament's attempt to address these problems through the Quartering Act of 1765 and the subsequent Restraining Act for New York.³⁸ Scholarly focus on these acts as part of the larger efforts by the British government to establish greater control over the American colonies and distribute the fiscal burden of imperial expenses works well for integrating the army's story within the larger discussion of the political and economic causes of the subsequent revolution.³⁹ This approach,

³⁸ Shy, *Toward Lexington; the Role of the British Army in the Coming of the American Revolution*, 250–258.

³⁹ Robert J. Chaffin, "The Townshend Acts of 1767," *The William and Mary Quarterly* 27, no. 1 (1970): 90–121; Varga, "The New York Restraining Act."

however, overlooks certain key nuances to the quartering crisis and its interplay with civil-military relations during the 1760s.

Events in the new colony of West Florida provide an interpretive foil for conventional conversations focusing on resistance to the Quartering Act in the older colonies and highlight the manner in which colonial civilian authorities could twist the legal-military state, and its overall philosophy of the military's subordination to the civilian government, to their own purposes. While the situation in West Florida has been chronicled before, its larger connections to and significance for the British military justice system in America have been overlooked.⁴⁰ Between October 1764 and January 1767, civil-military relations broke down in that colony to an unprecedented degree, resulting in Royal Governor George Johnstone employing the Quartering Act to prosecute and attempt to cashier Lieutenant-Colonel Ralph Walsh in December 1766. As R.F.A. Fabel has established, Johnstone was a problematic figure with a troubled past. The son of a poor Scottish baronet, the future governor of West Florida initially attempted to secure a career in the Royal Navy, where he slowly ascended to the rank of post captain. His period of service encompassed both the War of the Austrian Succession and the Seven Years War, but his record was marred by repeated instances of poor relations with his superiors, including fighting one duel and being brought to a court martial by one of his captains. A strong aggressive streak combined with a naturally irascible personality made Johnstone extremely sensitive to any attempts to diminish his status.⁴¹

⁴⁰ R. F. A. Fabel, "Governor George Johnstone of British West Florida," *The Florida Historical Quarterly* 54, no. 4 (1976): 497–511; Cecil Johnson, *British West Florida, 1763-1783* (New Haven; London: Yale University Press, 1943).

⁴¹ Fabel, "Governor George Johnstone of British West Florida," 497–500.

While Johnstone's experience in West Florida would prove to be an especially severe example of a breakdown in the civil-military relationship, friction between royal governors and military officers was nothing new. In some previous instances, a breakdown in communications and neglect of responsibilities had led royal governors to level charges against officers at a general court martial. The trial of Lieutenant Henry Threlfal on October 30, 1755, at Jamaica provides a vivid examples of what problems could arise when civilian and military officials did not cultivate a good working relationship. Royal Governor Sir Charles Knowles charged Threlfal with leaving his guard without permission the previous week. On the evening of the incident, Threlfal was in command of the royal governor's guard when a fight broke out in the nearby colonial assembly. Several assembly members came to the governor's house with swords in their hands, leading Knowles to call for Threlfal, as officer of the guard, to assemble his sentries twice. As the governor deposed, he called for the guard first to protect him from the assemblymen, then discovering them to be friends, called the guard a second time to assist in breaking up the riot at the assembly chambers. Due to Threlfal's absence, the guards did not respond to the governor's calls: fortunately for him the armed assembly members were on his side and assisted him in suppressing the riot, otherwise Knowles could well have been killed. In his defense, Threlfal stated that it was the custom "of all Guards and Garrisons" whereby an officer could leave his guard post to have dinner a distance away. The court convicted Threlfal and sentenced him to suspension from duty and pay for two months—a socially embarrassing punishment that would have made him an object for ridicule amongst his fellow officers.⁴²

⁴² NA WO71/42, 250-257.

Johnstone had no such excuse for the friction that erupted between him and local military commanders upon his arrival and which would remain the salient feature of his tenure in office. Surviving sources suggest that Johnstone began exerting his perceived authority over the local military establishment soon after his arrival. On November 9, 1764, Johnstone wrote to the Board of Trade, complaining that Captain Robert Mackinen, commanding the 35th Regiment of Foot at Pensacola in the absence of its major and lieutenant-colonel, disputed his government of the colony. The governor stated that Mackinen would not permit him to set the password for the sentries nor that other officers in the garrison should submit reports to Johnstone, despite recognizing that Johnstone was “Governor of the Fort & answerable for its defence.” Johnstone suggested that the army failed to recognize his “Command within the Fort” because he stopped the officers from charging fees to sailors and local inhabitants for occupying huts inside the defensive works. In seeking redress of his grievances, the governor referred to a report he had heard that Governor Thomas Graves of Newfoundland had encountered similar obstinacy from a captain commanding a garrison there when he took office in 1761. In that case, an appeal to the War Office resulted in the secretary at war dispatching orders rebuffing the captain in front of the garrison. While he did not request a similar measure in his case, Johnstone did observe that upon hearing that story, Captain Mackinen became significantly more respectful.⁴³

Johnstone dispatched copies of several letters between Captain Mackinen and himself as supporting evidence for the Board of Trade, among them a note that Mackinen had written on November 6, 1764, stating his position on the command issue. The captain began by observing that his original orders from the Secretary at

⁴³ George Johnstone to the Board of Trade, Pensacola, Florida, November 9, 1764, NA CO5/574.

War directed him to proceed with the 35th Regiment to Florida and to follow “all such Orders as you Shall from time to time Receive from the Commander in Chief of His Majesty’s Forces in North America.” Mackinen interpreted these directions as placing him under Major-General Thomas Gage’s command and pointed to a letter from Gage, received on March 31, 1764, stating that “All Orders I send you relative to the Military only you will please at all events to obey.” To the captain, these orders meant that he was under Gage’s sole command and was entirely responsible for the military forces in Pensacola. Mackinen stated that he was “not at Liberty to cede any Point relative to the command of the Military, until it shall be properly Determined.” In the remainder of his letter, Mackinen took pains to assure Johnstone that he and the 35th Regiment would happily cooperate with any measures and follow any orders that Johnstone proposed for the “benefit of the province.”⁴⁴

The exchange between Johnstone and Mackinen, along with the British government’s response to Johnstone’s appeal for help, reveals the significant level of authority that colonial governors could wield over the military units in their jurisdictions. On the surface, the contest between the two men for status seems ridiculous. Johnstone’s letter to the Board of Trade, along with his half of the correspondence included in the packet, portrays him as egotistically reaching for authority that he had no need to wield. Other royal governors made no such attempts to exert direct command over the troops in their colonies, hinting that Johnstone’s background as a frustrated Navy officer—he received command of a small sloop just as the Seven Years War ended—may have left him desperate to exercise military authority. Far from being a matter of the military attempting to interfere with civilian government, the episode smacks of the frustrations of one man projected to an

⁴⁴ Robert Mackinen to George Johnstone, Pensacola, Florida, November 6, 1764, NA CO5/574.

unprofessional level. Mackinen's response, in contrast, was measured and set out clearly defined points. The captain did not debate or challenge Johnstone's status as governor of West Florida, instead readily recognizing Johnstone's authority and pledging the 35th Regiment's cooperation on all accounts. Mackinen provided a measured rationale for refusing to surrender basic day-to-day operational control over his troops, citing specific orders from his superiors and the inflexible position in which they placed him. At no point did Mackinen observe that Johnstone had no right to exercise the level of control he demanded Mackinen to surrender to him. The captain stayed true to the ideals of the army's subordination to the civilian government that constituted the cornerstone of the legal military state, while also discharging his duty as an officer and local senior commander. Johnstone would go on to send another letter to Mackinen on November 7, asking the captain "Who now Governs in this Garrison?" to which Mackinen replied on the same day recognizing Johnstone as governor. Recognizing the supremacy of civilian authority was not the same as surrendering direct operational control to a civilian governor, particularly during peace time.⁴⁵

Johnstone's complaint made its way directly to the crown, resulting in a War Office circular dated February 7, 1765, that expressed the king's decision on the jurisdictional divide between civilian governors and military commanders in America. George Montagu-Dunk, 2nd Earl of Halifax and Secretary of State for the Southern Department dispatched the instructions to General Gage two days later, along with an explanatory letter. In his letter, Halifax stated that the king issued the instructions in response to the "misunderstanding" between Johnstone and Mackinen, and intended

⁴⁵ Johnstone to Mackinen, Pensacola, Florida, November 7, 1764; Mackinen to Johnstone, Pensacola, Florida, November 7, 1764; NA CO5/574.

the new regulations to “prevent the like Disputes in that or any other Colony,” an indication that the monarch perceived the possibility of similar occurrences in the increasing tense atmosphere of imperial relations.⁴⁶ The instructions themselves charted a middle ground between Johnstone’s and Mackinen’s positions, with concessions to both. In the first section, the king established that the commander-in-chief was the supreme military authority in America, followed by the brigadier generals commanding in the northern and southern departments. Soldiers were expected to obey their orders “in all the Civil Governments of America.” In cases where neither the commander-in-chief nor the district brigadier general had issued specific orders, the king authorized the civil governor to issue his own directions for the disposition of the troops to the local military commander, who would in turn implement them. If any disagreement occurred between the governor’s orders and the commander-in-chief’s or brigadier-general’s directives, the orders from the military authorities would take precedence. In the commander-in-chief’s or brigadier-general’s absence, the civil governor was authorized to choose the daily password. Local military commanders would submit reports on the troops and facilities under their supervision to the commander-in-chief, the brigadier-general, and the governor. The final section of the instructions carried a stinging rebuke for Johnstone: the king ordered governors “not to interfere with the detail of the military Regimental duty and discipline,” matters regarding which were the local commander’s sole purview. That commander would include such details in his regular reports to both military and civilian authorities.⁴⁷ The presence of a copy of this circular in the Judge Advocate

⁴⁶ Halifax to Gage, St. James, February 9, 1765, Thomas Gage, *The Correspondence of General Thomas Gage with the Secretaries of State 1763-1775*, ed. Clarence Edwin Carter, vol. 2 (New Haven, CT: Yale University Press, 1933), 23.

⁴⁷ War Office circular, War Office, February 7, 1765, NA WO72/6.

General's Office records hints at the perceived significance of these instructions for the military justice system.

Despite these explicit instructions from the crown, civil-military friction continued in West Florida. On December 14, 1764, Johnstone convened a meeting in Mobile to discuss disputes with Major Robert Farmar of the 22nd Regiment of Foot and commander of the garrison in that settlement concerning "the different power vested in Each by their several Commissions. Johnstone began the meeting by stating he merely wished to clarify "Matters in some certain Channels, which the very nature of Government required." The remainder of the meeting proceeded with Johnstone asking questions and Farmer offering answers. Johnstone asked if he was entitled to a report on the king's troops in the province, what Farmer saw his standing as in the province, who was responsible for contracting for rations and supplies for the troops, who commanded the artillery and their stores, and other related military questions. Farmar stated that he was the senior officer commanding all British regular troops in the colony and had sole command over all military-related issues. When Johnstone asked if his commission as governor entitled him to give orders to the military forces, Farmar replied that the governor had authority only in matters of billeting troops.⁴⁸ Nine days later, while still at Mobile, Johnstone sent a lengthy list of demands to Farmar, including reports on the state of all troops under Farmar's command, how they were quartered, the condition of the fortifications inherited from the French and any newly built installations, and a variety of details touching on relations with local native groups. Johnstone accused Farmar of attempting to "retard the Government of this Country" for not having supplied this information to the governor sooner.⁴⁹ In his

⁴⁸ "Minutes of a first meeting with Major Farmar concerning disputes relating to him," December 14, 1764, NA CO5/547.

⁴⁹ George Johnstone to Robert Farmar, Mobile, December 23, 1764, NA CO5/547.

dispute with Farmar, Johnstone was in a far stronger situation than in his previous fracas with Mackinen, claiming no power or authority over specific regimental duties. Johnstone had instead confined himself to asking for information that should have been in his purview as royal governor and which Farmar had a duty to provide. The major would face a general court martial on eight charges from Johnstone, levelled in 1768 after both men had left the province.⁵⁰

The tension between the civil and military authorities in West Florida would continue to increase over the coming years, as Johnstone continued to face off against a series of military commanders. The governor's exchanges with Farmar would provide yet another packet of materials accompanying complaints to the Board of Trade and Major-General Gage's headquarters in New York. Gage responded in his general orders for February 20, 1765, which were circulated to all army units serving in North America. Gage addressed reports that officers and soldiers had offered "various Obstructions... to the Establishment of the Civil Government" in West Florida and directed that officers and soldiers "shew all the Esteem and respect which is due to Civil Authority" of West Florida and provide assistance and support "as the laws and the good of His Majestys Service shall require."⁵¹ A few weeks later, Halifax would write to Gage from London his "great Concern and Surprize" at the "Spirit of animosity and Disagreement" between the governor and army officers in West Florida, which had led both sides to complain to Halifax. The Earl noted that the instructions of February 9, 1765, should satisfy the officers, while informing Gage that Halifax had advised Johnstone to "cultivate...that Harmony and good

⁵⁰ Barrington to Gould, War Office, August 9, 1768, NA WO72/6. This letter stated that the king had reviewed the court martial and dismissed all charges against Farmar.

⁵¹ Orders of the 38th Regiment of Foot, Sir Henry Clinton Papers, Vol 265, 4, William L. Clements Library, University of Michigan, Ann Arbor, Michigan

Understanding, which are so essentially necessary to the Good of His Majesty's Service."⁵² Johnstone would ignore Halifax's sound advice and proceed to further damage relations by first seizing control of the victualing contracts in April 1765 and refusing to issue provisions to a regiment slated to leave his province, which otherwise could not secure food.⁵³ The governor's next step was to convince the storekeepers of the Royal Artillery that the local brigadier general had no authority to requisition ammunition, which he accomplished by December 1765 through complaints to the Board of Ordnance, the governing department for the Royal Artillery.⁵⁴ In a letter to Barrington the following autumn regarding the possibility of rotating new regiments into West Florida to improve the situation, Gage remarked that it was difficult to "say what Regiment the Governor is most likely to agree with; He has already had no less than five...and disagreed with all."⁵⁵

By March 1766, Johnstone had grown sufficiently frustrated with his latest military counterpart, Lieutenant-Colonel Ralph Walsh of the 31st Regiment, to attempt using his legal powers against the officer, thereby bringing the institutional machinery of the legal-military state into play. In a letter to Barrington written in that month, Gage reported that Johnstone had applied to the secretary of state for the southern department and to Gage himself for a warrant to try Lieutenant-Colonel Walsh by a general court martial, on seven charges. Based on Walsh's purported crimes, Gage estimated that the argument lay over who had the right to appoint the brigade major, a

⁵² Halifax to Gage, St. James's, March 9, 1765, Gage, *The Correspondence of General Thomas Gage with the Secretaries of State 1763-1775*, 2:24.

⁵³ Gage to Welbore Ellis, New York, April 26, 1765, *Ibid.*, 2:281.

⁵⁴ John Boddington to Respective Officers of West Florida, Office of Ordnance, December 6, 1765, enclosed in Gage to Barrington, New York, August 27, 1766, *Ibid.*, 2:369.

⁵⁵ Gage to Barrington, New York, September 12, 1766, *Ibid.*, 2:372.

staff position within the army, and to assign barrack huts at Pensacola. Johnstone had arrested Walsh “on the Crime of High Treason,” from which the chief justice of the colony had released the colonel. Though frustrated in this attempt to remove his military enemy, Johnstone would not cease his attempts to use the military justice system against Walsh.⁵⁶

In December 1766, weeks before he was relieved of his post, Governor Johnstone managed to successfully turn the legal-military state against the army. Gage reported to Barrington on December 18 that Johnstone had “twisted, and perverted” the Mutiny Act “to serve private Revenge” by trying Walsh for violating the clause forbidding officers from quartering their soldiers without the assistance of the local civil authority. Gage observed that there had been “a concerted Resolution to attain the end proposed, Vitzt That of cashiering Lieutenant Colonel Walsh” without much regard to legal niceties. Johnstone had secured two justices of the peace (one of whom the governor had subsequently appointed as attorney general) to take depositions from three witnesses, one of whom was the governor himself. Without offering Lieutenant-Colonel Walsh the opportunity of defending himself, Johnstone secured a certificate of the proceedings and submitted it to Gage. The governor carefully kept notice of the certificate of conviction from Walsh’s attorney until the period of appeal had closed, at which point the lieutenant-colonel was “deemed legaly [sic] cashiered.” Shortly thereafter, a junior officer refused to recognize Walsh as his commanding officer, precipitating the referral of the conviction back to England. Gage warned that Walsh’s conviction introduced a dangerous precedent in the quartering process: the Mutiny Act’s provisions had normally been considered to apply only to private buildings but the huts in which Walsh had supposedly illegally billeted troops were actually

⁵⁶ Gage to Barrington, New York, March 28, 1766, Gage Letters, 2:341.

government property. As a result, if Walsh's conviction stood, Gage suggested it would logically provide grounds for the civil magistrate to interfere with billeting troops in government barracks in England.⁵⁷

As Gage himself noted, Johnstone's success in employing the military justice system for his own purposes had wide-ranging impacts. While unlikely to actually change the method of quartering in England or elsewhere in America, this case demonstrated that the legal-military state was vulnerable to being inverted by civilian officials who were willing to take advantage of its institutional machinery for their own ends. A system intended for guaranteeing civilian control over the army could be used to destroy the military's ability to operate within civilian society just as it could guarantee the smooth integration of the army as a state institution. While the most extreme example of this process of employing the Mutiny Act's provisions against the army, Walsh's case is far from the only one. As John Reid has demonstrated, magistrates in Boston used the Mutiny Act's quartering provisions to stymie the army's initial occupation in September 1768, claiming that the barracks at Castle William in Boston Harbor had to be filled before soldiers had to be billeted in the city itself.⁵⁸ The proven ability for both crown-appointed and locally-elected colonial authorities to twist the Mutiny Act from a tool for integrating the army into the state into a weapon for alienating the army from the state constituted a definitive limit to, and in certain respects a failure of the legal-military state.

During the same period that civilian authorities in the thirteen colonies were employing the quartering provisions of the Mutiny Act against the army, civilian authorities in Canada tried a different approach to attack the military justice system,

⁵⁷ Gage to Barrington, New York, December 18, 1766, Gage Letters, 2:396–398.

⁵⁸ Reid, *In a Defiant Stance*, 107–108.

which in turn constituted another limit on the legal-military state. On September 8, 1766, Lieutenant-Colonel Valentine Jones, commander of the 52nd Regiment of Foot, wrote to Major-General Gage to report a fracas between the military and civilian authorities in the city of Quebec. The genesis of the incident lay in a regimental court martial held in the 52nd Regiment on August 19. Private Donald McKenzie had stood accused of breaking windows and beating and abusing his wife. After listening to the testimony of McKenzie's wife and the owner of the house whose windows had been broken, the court found the private guilty and sentenced him to receive four hundred lashes. The regimental drummers had inflicted 176 lashes, after which McKenzie was sent to the regimental guardhouse to await the rest of his punishment. The following morning the convicted soldier complained of feeling ill and went to the regimental hospital, where he died on August 31, supposedly from "an inflammation in his Bowels." Despite this professional medical opinion, rumors flew through the city that the drummers had flogged McKenzie to death, resulting in a demand from the Coroner to hold an inquest. After hearing testimony from several doctors that McKenzie's ailment was currently widespread in the regiment and from the drum major that McKenzie's punishment followed standard practices, the jury returned a verdict of willful murder against Captain Williams, the officer commanding the parade that day, and Adjutant Splein, who witnessed the punishment. Jones requested funds to support the officers' trials and that his report be sent to the King so "that it may be seen how the Army are treated in America."⁵⁹

⁵⁹ Valentine Jones to Thomas Gage, Quebec, 8 September 1766; "Proceedings of a Regimental Court martial held by the Officers of the 52nd. Regiment by Order of Lieu^t. Colonel Jones," Quebec, August 19, 1766, Thomas Gage Papers, Volume 56, William L. Clements Library, University of Michigan, Ann Arbor, Michigan.

Though claiming to be at a loss to explain how this apparent miscarriage of justice could occur, Jones suggested that a letter from Winchester, England, which had been published in the *Quebec Gazette* might have been the root cause. The letter detailed the fate of a sergeant in the 14th Regiment of Foot, who had been caught drunk upon guard duty, tried by a regimental court martial, and sentenced to receive 200 lashes. The punishment was delivered in an extremely unusual way: the drummers who wielded the cat of nine tails were ordered to take off their constrictive coats, to wait a minute between each lash, and to rotate every ten lashes instead of every twenty-five. The regimental surgeon who supervised the detail stopped the lashes at 190 and the sergeant was taken to the guardhouse, where he died several days later of a kidney infection supposedly brought about by his flogging. Due to the suspicious nature of the proceedings, the local coroner performed an inquest, returning a verdict of willful murder against the captain commanding the parade in Winchester that day. This story appeared in the 18 August 1766 issue of the gazette, the day before McKenzie's trial and punishment. The subsequent fortnight provided significant time for the idea of death-by-flogging to penetrate the city's populace, along with the example of how the authorities in England handled such issues. While no other sources have come to light that draw links between the Winchester case and the Quebec authorities' reaction McKenzie's death, a causal connection between the two seems highly probable.⁶⁰ Though this case did not present a twisting of the military justice system's inherent structure in the same manner as the quartering cases, it nevertheless represented civilian authorities using legal processes to limit, and by dissuading the corporal punishment upon which most of the military justice process relied on, damaging the legal-military state.

⁶⁰"Extract of a Letter from Winchester," *Quebec Gazette*, August 18, 1766, Gage Papers, Vol 56.

Conclusion

From the Treaty of Utrecht onwards, the military justice system stood on a significantly different footing within the empire than it did in Great Britain. The imperial experience of military justice was characterized by small enclaves of military law, free from outside interference by local civilian authorities, where commanders could apply the Articles of War as they saw fit. From garrison posts in the Mediterranean and Maritime Canada, the reach of the military justice system spread across the globe in the wake of expanding wars and the establishment of new garrisons. By mid-century, the army had begun sustained operations in colonial areas with established civilian courts, raising the possibility of replicating the legal-military state as it existed in Great Britain. The North American colonies provided the best opportunity for this arrangement, featuring long-standing courts, relatively stable civilian governments, and permanent garrisons in the wake of the Seven Years War. The tensions of the Imperial Crisis, fueled by concerns over quartering and traditional biases against the standing army, frustrated the potential for expanding the legal-military state abroad. Instead, both crown-appointed and locally-elected colonial officials developed ways to effectively invert the legal-military state, using its institutional machinery to punish and harm the army rather than to integrate it within the overall British state.

CONCLUSION

From 1868 to 1869, a special Royal Commission on Courts-Martial and Military Punishment sat in London to consider the British military justice system at that juncture and offer recommendations for improvement and reform.¹ As a result of their findings, the subsequent Army Regulation Act of 1871 required officers to study military law as “an essential qualification for promotion.” Charles M. Clode answered this need with his volume *The Administration of Justice under Military and Martial Law*, first published in 1872 with a second revised and enlarged edition in 1874, which carried the army’s official recommendation. The special preface to the second edition also carried the endorsement of General William Tecumseh Sherman, commanding general of the US Army, who acknowledged that American military justice was “based on the English Mutiny Act, so that your book will be as applicable to us as to your Colonies.” To justify “the confidence with which the first Edition has been received by the Military authorities,” Clode added information from general orders and dispatches, decisions on military law and court martial procedure, along with the opinions of legal authorities in

¹ *Royal Commission on Courts-Martial and Punishments for Military Offences 1868-1869*, 21421 (London: HM’s Stationary Office, 1869).

England and America. His goal, however, remained the same: to rehabilitate “the dry bones...of the Mutiny Act and Articles of War, otherwise so distasteful to the Student.”²

This volume, along with Clode’s other books, completed Judge Advocate General Edward Hughes’s work to standardize the practice of military law within a framework defined by both royal prerogative and Parliamentary act. In so doing, Clode provided the first thorough treatment of the history of Britain’s legal-military state, demonstrating its importance both to the British Empire and to its successor states, first among them the United States of America. The struggles of successive judge advocate generals, officers, soldiers, and members of Parliament was finally recognized in a volume that documented their achievements and presented a rational background for the modern practice of military law.

The years between 1715 and 1782 witnessed the formation of the system that lay at the crux of Clode’s volume. The combination of the Hanoverian accession, the Jacobite rebellion, and the realignment of the political landscape brought the need to control the army to the forefront of government affairs far more than the Glorious Revolution had done 26 years earlier. In 1689, Parliament had employed the Mutiny Act as the means by which to wrest the army’s loyalty away from the deposed James II. In 1715, a combination of the Mutiny Act and internal reforms promulgated by the crown through the judge advocate general’s office performed the same function. In contrast to 1689, the crisis of political sovereignty continued for decades, creating a need to fundamentally re-define the military justice system in order to maintain control over a now permanent standing army.

² Charles M Clode, *The Administration of Justice under Military and Martial Law: As Applicable to the Army, Navy, Marines, and Auxiliary Forces*, 2nd ed. (London: J. Murray, 1874), iv, vi.

The judge advocate general's office constituted the most significant force for explaining the transformation of the pre-modern military justice system, based entirely on the royal prerogative expressed through the Articles of War, to the modern system, based on a combination of royal prerogative and Parliamentary statute. Edward Hughes, the first judge advocate general of the Hanoverian era, was largely responsible for implementing these changes. Beginning with his appointment in 1715 and continuing until his death in 1734, Hughes instituted a number of reforms designed to strengthen the civilian administration's control over army officers and courts martial. Beginning with a new format for general courts martial proceedings, which allowed the crown to properly review the evidence presented in the case, Hughes began enforcing observance of the Mutiny Act's provisions. Subsequent years of effort slowly moved the military justice system's operations onto the dual foundation. Hughes had insured that the era of semi-autonomous courts martial was at an end.

Of the many problems Hughes faced during his tenure in office, one of the more challenging early on was the question of what constituted military crime. The answer was tied up in the jurisdictional divide between military and civilian courts, the diminution in the authority of one signaling a weakness in the other. Parliament sought to curtail the military jurisdiction through the Mutiny Act, enumerating a severely curtailed list of offenses that courts martial were permitted to try and ordering the rest to be addressed in common law courts. Crown authorities exercised slightly more detailed control through the Articles of War, listing a larger number of offenses along with recommendations for punishment. Neither code provided actual definitions of the crimes they enumerated, providing space within which officers could relabel criminal activity to fit the officially-

recognized categories. While creating an accurate detailed typology of military crime from officers' perspectives is not possible with the evidence on hand, thematic categories clearly emerge from summary justice and court martial data: absence, drunkenness, property, duty, resistance, and violence. Absence and duty did not have immediate parallels in civilian courts, due to the special nature of military service. Drunkenness, while not a crime in civilian contexts nevertheless played a similar role as a multiplier of criminal activity. While the Articles of War contained a prohibition on drunkenness on duty, many of the charges involving drunkenness included a second charge from one of the other categories. Property crime and resistance appeared in similar forms to those encountered in civilian contexts, with resistance bleeding into acts of violence. For the most part, officers avoided trying any soldier for offenses cognizable in common law courts, with the exceptions of crimes occurring within the larger imperial context, where civilian courts were not in operation. Though officers certainly introduced significant latitude into how they employed the official categories of military crime, they observed the spirit of civilian control and supremacy.

Concerns over the military justice process were linked with defining military crime. After insuring that officers followed regulations in promulgating charges, the necessity still remained of monitoring how they conducted the military justice process. Hughes's December 1715 change to the format of general courts martial, which remained in place for the balance of the period under study, guaranteed that those courts would be subject to full review by the crown and its civilian administrators. Controlling general courts martial was key, since these were the courts authorized to hand down capital sentences. Summary justice and regimental courts martial, where officers addressed most

forms of disorder in the army, remained beyond the reach of the civilian administration, despite Hughes's best attempts to extend general court martial reporting procedures into regimental courts. These lower courts were not required to send reports of their proceedings back to the judge advocate general's office for review, turning them into spaces ripe for corruption. Officers could re-define capital crimes as more minor offenses, try the defendants at a regimental court martial, and inflict sentences of corporal punishment far in excess of what many soldiers tried by a general court martial could expect to face. Summary punishment authorized officers to use manual correction, ordinarily in the form of beatings, to address minor infractions and went completely unreported, save for the occasional general order, reference in a general court martial, or diary entry. Thus while officers managed to preserve their discretionary powers intact, civilian review of general courts martial insured that officers could not execute men on trumped up charges, securing government control where it mattered most in the process.

While officers occasionally appeared as defendants, the military justice system was primarily focused on maintaining control over the rank-and-file soldiers, whom officers and civilian elites alike tended to look down upon. Parliamentary debates expressed concern for the plight of soldiers, stripped of their rights as Englishmen after enlisting, yet also raised the spectre of armed masses of ill-disciplined men supporting tyrannical rule or otherwise running amuck. In reality, common soldiers had their own ways of using the military justice system to their advantage, by resisting it, cooperating with it, and employing it as a space for negotiation. While most existing work has focused on resistance, particularly in the form of mutiny and desertion, the courts martial cases themselves reveal the decisive role that cooperative soldiers played in arresting

malefactors, producing necessary evidence against them in court, and assisting in execution of punishments. Some soldiers employed the military justice system as a means of negotiation by presenting disciplinary problems that were more easily resolved through compromise than through the application of legal force. Altogether, the military justice system's operations testify to soldiers' agency and stake in the overall system, challenging the commonly-held view of soldiers as hapless victims.

The military justice system was far from a static institution, changing over the seven decades under study as civilian oversight of its core operations increased. These changes occurred over three phases: the first roughly encompassing Judge Advocate General Edward Hughes's tenure in office from 1715-1734, the second comprising the 1740s and 1750s, and the final period beginning in 1760. During the first period, Hughes implemented procedural changes that bound officers more closely to the civilian administration, while the first great Mutiny Bill Debates in 1718 resulted in significant votes in favor of the system Hughes created through the opposition party's defeat. The Duke of Cumberland's moves to further reform the system's operation kicked off intense Mutiny Bill Debates in Parliament between 1749 and 1751, as Hughes's successor judge advocate generals focused on routine operations rather than advocating for reform. While the debates were brutal, final votes confirmed government support of the system, though one of the commander-in-chief's customary rights, to order the revision of general courts martial sentences, was restricted to a single revision. The final phase, embodied in Judge Advocate General Charles Gould, witnessed the codifications of the improvements and reforms accomplished in previous decades. In addition, Gould's personality transformed

the judge advocate general from a functionary or advocate to a respected expert on all facets of military law, securing officers' full cooperation with the system.

The military justice system's operations were not limited solely to Great Britain and Ireland: from the beginning of the period under study, the institution was global and operated in the empire much as it did at home. Officers conducted the military justice process abroad operated under significantly different contexts than their colleagues at home. The Mutiny Act's provisions did not extend abroad until 1754, while the Articles of War permitted courts martial to try all offenses in areas where civilian jurisdictions did not exist. As colonial settlements developed, expanded, and erected civil establishments over the eighteenth century, the army encountered an increasing number of spaces where common law courts were in operation. Particularly in the North American colonies, military authorities treated these courts much like their counterparts in England: soldiers who offended against common law were handed over to the colonial courts, even when local authorities were not enthusiastic to try them. In areas where no courts existed, courts martial reluctantly tried civilian offenders, though ever mindful of potential ramifications from civil suits back in Britain. The procedural changes implemented in England carried over to regiments serving abroad, who generally observed them without complaint. The exigencies of service in the imperial zone nevertheless produced some idiosyncrasies in practice, with commanding general charged to supervise a process they did not always understand. Punishment also remained a constant across the empire, with a focus on corporal punishment of exemplary offenders to send a message to the rank and file.

This dissertation, through the examination of new source material, has argued for the existence of a legal-military state in eighteenth-century Britain, one that both supported and acted alongside of the fiscal-military state arrangements. The present work has intended to open avenues for future research into this concept, identifying the major questions that plagued statesmen, soldiers, and administrators as they transformed a medieval military justice system into a more modern form. Significant opportunities remain for exploring the nature of military crime, the idiosyncrasies of the military justice process, the development of the institutions key organs over time, as well as the relationship between the legal and fiscal structures that tied Britain's standing army to its civilian government.

Appendix A: Crimes abstracted from the Articles of War of 1718

Article Number	Crime	Punishment
1	Officer or soldier absence from Divine Service	Officers reprimanded at court martial; soldiers fined 12 pence for first offense, fined 12 pence and laid in irons for 12 hours on second offense, and so on for further offenses
2	Sutler selling liquor or merchandize during divine services	Delivered to the civil magistrate for punishment
3	Officer or soldier uttering unlawful oaths or execration	Same punishments as Article 1
4	Officer or soldier blaspheming	Delivered to the civil magistrate for punishment
5	Officer or soldier vandalizing places of worship or assaulting clergy	Penalty or corporal punishment according to court martial
6	Officer or soldier uttering treasonous or disrespectful words against the Royal Family or the General/Commanding Officer	Punished according to nature of offense by regimental or general court martial
7	Officer or soldier exciting, causing or joining in any mutiny or sedition	Death or other punishment inflicted by General Court Martial
7	Officer, non-commissioned officer, or soldier not suppressing or reporting mutinous or seditious expressions	Officer cashiered, non-commissioned officer or soldier severely punished at discretion of court martial
8	Officer or soldier refusing to obey lawful orders from superior officer	Death or other punishment inflicted by General Court Martial
9	Officer or soldier resisting officer in execution of his duty or assaulting superior officer	Officer cashiered, soldiers receive corporal punishment inflicted by General Court Martial

10	Officer or soldier deserting	Death or other punishment inflicted by General Court Martial
11	Soldier leaving his unit and enlisting in another unit with a discharge from the first unit	Declared a deserter and punished accordingly
11	Officer enlisting a soldier already serving in another unit	Cashiered
12	Officer or soldier persuading other officer or soldier to desert	Punishment inflicted by General Court Martial
13	Non-commissioned officer or soldier breaking prison	Punished as deserter
13	Officer breaking prison or arrest	Cashiered
14	Officer or soldier misbehaving before the enemy or plundering	Death or punishment inflicted by General Court Martial
16	Officers refusing to surrender any officer, non-commission officer, or soldier accused of a Common Law crime or refusing to assist the civil magistrate	Pain of monarch's highest displeasure
19	Officer or soldier using provoking or reproachful speech to fellow officer or soldier	Imprisonment and asking pardon of offended party in presence of commanding officer
19	Officer or soldier issuing challenge to a duel	Officer cashiered, soldier suffer severe corporal punishment
19	Officer or non-commissioned officer commanding a guard permitting anyone to leave to duel, serving as a second, or conveying a challenge/duel communication	Punished as a principal to the duel
19	Officer or soldier duelist resisting arrest or confinement	Punishment inflicted by General Court Martial
19	Officer or soldier upbraiding another for refusing a challenge	Punished as a challenger
22	Officer making false muster certificate or return	Cashiered and punished according to Mutiny Act
26	Non-commissioned officer or soldier selling liquor or goods as a sutler	Punishment inflicted by a regimental court martial
26	Officer mustering a sutler as a soldier	Same punishment as making a false muster
27	Sutler selling liquor between 9 PM and reveille	Dismissed from all future sutling
28	Officer or soldier damaging civilian property	Punished according to degree of offense by Regiment or General Court

		Martial
29	Officer demanding additional billets, quartering women and children, accepting bribes from landlords for not quartering troops	Cashiered
30	Officer not paying for quarters for himself and troops	Cashiered
31	Officers impressing carriages without payment or otherwise offending against Mutiny Act provisions regarding carriages	Cashiered or punishment inflicted by a general court martial
32	Officer failing to maintain good order or refusing to redress crimes committed by his soldiers against civilians	Punishment inflicted by a general court martial as if he had personally committed the soldiers' crimes
33	Officer or soldier laying out of quarters or absent without leave	Punishment inflicted by colonel or regimental commanding officer
34	Officer or soldier drunk on duty	Officer cashiered, soldier riding the wooden horse, picketing, or other corporal punishment
35	Soldier leaving guard duty before relief or sleeping on guard duty	Tried by regimental court martial and sentenced to run the gauntlet
36	Soldiers hiring other soldiers to substitute for duty	Punishment inflicted by regimental court martial on both parties
36	Non-commission officer or officer conniving at the same	Non-commission officer reduced to the ranks, officer punished by a general court martial
36	Officer protecting indebted soldiers from their civilian creditors contrary to Mutiny Act	Cashiered
37	Officer or soldier raising alarm in camp	Punishment inflicted by court martial
39	Officer or soldier revealing the parole or offering anything other than the proper password	Punishment inflicted by court martial
40	Officer or soldier embezzling or destroying stores	Soldier to run the gauntlet, officer cashiered
41	Non-commission officer or soldier selling his equipment or stealing from his comrades	Weekly pay stoppages and corporal punishment as inflicted by court martial
42	Officer commanding a guard or provost marshal refusing to accept a prisoner, allowing a	Punishment inflicted by regimental or general court

	prisoner to escape, or failing to report prisoner's and arresting officer's name within 24 hours	martial according to degree of offense
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