The French Revolution and the Enlightening of Military Justice

Charles H. Hammond, Jr.
University of California, Davis

During late August 1790 a mutiny broke out at the army garrison in Nancy. The garrison, housing two French regiments and one Swiss regiment, had experienced rising incidents of insubordination due chiefly to suspicions among the enlisted that the officers were embezzling unit funds used to pay the men's salaries. On 9 August, the enlisted men from one of the French regiments demanded that the National Assembly conduct an audit and imprisoned several officers until a sum of 150,000 pounds had been paid for their release. The rest of the regiment's officers and city officials raised the money and paid it the next day. The enlisted of the unruly regiment released their captives, but this ransom payment only encouraged the other two regiments to attempt the same action. Friction continued to build until 16 August when the Assembly warned the troops at Nancy to end their insubordination. At the same time, the king appointed General Bouillé to march on Nancy with a force of several cannons and four to five thousand troops. Upon his arrival, General Bouillé demanded that the rebellious ringleaders surrender to stand trial before the Assembly. The Swiss Châteauvieux regiment decided to yield, yet on 31 August shooting broke out between this regiment, assisted by some of the townspeople, and Bouillé's forces. After three hours of fighting, all three of the Nancy garrison's regiments were forced to leave the city, and the conflict ended. Retribution followed.

* I would like to thank the History Department, University of California, Davis, for grants and travel allowances that have made this research possible.
The two French regiments were disbanded, and after a trial by Swiss officers in the Châteauvieux Regiment, there were twenty-three death sentences and forty-one condemnations to the galleys for thirty years. On 3 September, the Assembly issued approval and thanks to General Bouillé. Order prevailed.1

This serious incident in 1790 – one of many that year involving approximately one-third of France's army – contributed to what historian Samuel F. Scott has termed "a year of disintegration" for the military.2 Up to August 1790 the Assembly had been dealing with problems that its members considered more important such as giving the nation a new civilian legal system. The revolt at Nancy, however, brought the problem of discontent in the army to the legislature's attention and caused legislators to focus on the issue of military justice. Unfortunately, the Revolution was not completely successful in resolving the problems of military justice, failing particularly to institute a comprehensive military justice code. The Revolution did, however, bring enlightened rationalism, especially through new legislation, to what was a very tangled system under the Old Regime. Thus the Revolution advanced various elements of military justice – categorization of offenses, sentences that matched the gravity of a crime or misdemeanor, greater celerity in investigating and trying cases, and France's first military appeals courts – that were later incorporated into the nation's first comprehensive military justice code in 1857. The Revolution did not get to the bottom of jurisdictional problems, the composition of military courts, or the overshadowing role of commanders, but despite shortcomings, the 1857 Code of Military Justice owed much to the Revolution's enlightening work. The Revolution's reforms took place in three general phases: the adoption of a

---

2 Scott, 863.
cour martiale system through legislation enacted in September–October 1790 and late September 1791, a stricter system inaugurated through the Terror in 1793, and a more comprehensive military justice system, the conseil de guerre, put in place by the Directory in 1796.3

The revolt at Nancy in 1790, though dramatic, was not the first sign of discontent with military justice. By the end of the Old Regime a fractured justice system existed with four different types of courts. The lack of a unified and codified military justice system resulted in complaints in the Registers of Grievances. For example, the Perche nobility charged its Estates General deputy to "ask that a council be established, whose members would be selected by ballot from all regiments, to produce a permanent code."4 Likewise, the nobles of Troyes demanded that "the military code be invariably fixed in the spirit of the nation and that the punishments inscribed be in conformity with this same spirit."5 These requests in the Registers of Grievances demonstrated to the Estates General, soon to become the National Assembly, that expectations for change were high and the reform of military justice was one of the principal problems ripe for resolution.

The Nancy rebellion moved the Assembly to promulgate the Law of 22 September–5 October 1790, an early code that recognized the soldier as a citizen while comprehending that his military service involved a "sort of privation of his rights." The key to this code was the idea that "military subordination . . . must be passive for those who are subject to it . . . and made to

---

3 The terms cour martiale and conseil de guerre both refer to military courts. The former means literally "court martial," but the second is directly translatable as "war council" – a translation that is confusing and invokes images of military planners working on strategy or tactics. Yet both terms refer strictly to military courts, and therefore I have retained the French designations throughout this article in order to distinguish them.


5 Ibid., 6:76-7.
obey."

Though unofficial at this point, the concept of "passive obedience" would be an important factor in later French military doctrine and justice. The law imposed a series of disciplinary actions that were fairly light – extra duties or short brig or prison time – especially compared to the arbitrary and harsh punishments inflicted on soldiers during the Old Regime. Gone were such physical and dishonorable chastisements as the strappado or striking soldiers with the flat side of a saber. The new law also classified sentences with respect to type and duration according to the rank of the guilty person. Furthermore, the law prescribed penalties for commanders who wrongly punished subordinates.

More importantly, however, the new law attempted to establish a uniform military court organization and procedure, that is, a cour martiale with a double-jury system meant to parallel the procedures of the reorganized civilian courts. The Assembly granted a new competence for military judgments: "no soldier can be condemned to an afflictive or defamatory [sentence] except through a civil tribunal judgment or military [judgment], depending upon the nature of the offense for which he is found guilty." A salient aspect of this statement was a rigorous separation of justice through the principle of ratione materiae (a Latin term meaning "by reason of the matter"). Under this principle, a military person accused of an offense normally under the jurisdiction of ordinary civilian courts would be tried in those courts instead of a military court. However, for military offenses, a military person brought to trial under a cour martiale would appear before before two juries: a nine-member accusation jury that decided whether or not a case should be presented to a different nine-man jury of judgment that determined the guilt or innocence of the accused. More specifically, the jury of judgment determined if the alleged

---

6 Ibid., 18:751 (both quotes from report by M. Bouthillier of the Assembly's military committee).

offense was actually committed and if it was the accused who committed it. The two questions were necessary for the examination of motive, because it was possible for the jury to ascertain that, given the circumstances, the accused's intentions were not criminal. Thus the jury could render a judgment of "guilty, but excusable" or "guilty, but not criminal." For this former special judgment the accused would receive clemency, and in the latter case, the jury recommended the "King's mercy." The jury of judgment deliberated on its two questions, and a conviction required a minimum vote of seven to two in the affirmative on both questions. Though unwieldy, the two-jury system separated the investigative function from the actual determination of guilt. Yet no matter how the judgment jury decided on a case, it advanced to the three-judge panel of the cour martiale. This final court determined the sentence, which was imposed the same day with no appeal except in cases referred to the king. Though most sentences were by majority vote, all three judges needed to vote unanimously for a death sentence.

Though none of its judgments were recorded, the cour martiale represented a considerable advance in military justice from the pre-Revolution days. It replaced the more onerous disciplinary measures as well as a very fractured system of four different courts. However, the new law's nineteen articles were too general in nature and did not adequately address graver crimes. Moreover, military officers, who were still by and large

---

nobles, ran the system and were more likely to bring their enlisted men before a *cour martiale*, overlooking offenses committed by other officers. Nor were there yet effective defenders or appeals systems.\(^{10}\) Despite these problems, the law was a fine start, though difficulties continued to arise in the army that moved the National Assembly to refine the justice system.\(^ {11}\)

One such issue occurred in July 1791 when the Assembly became aware that the army was losing its officers. The king's attempted flight encouraged this desertion, and along with the normal desertion of enlisted, the overall effect was to produce indiscipline, insubordination, and disquiet in the ranks. The National Assembly did not wish to repeat the prior year's experiences, so the deputies worked on military justice articles to cope specifically with revolt. The debate in the Assembly on a new law became quite heated, particularly over the issues of the soldier's citizenship and the rights he should be accorded. On one side were those who favored increasing the control of commanders over their troops, while the other side was more lenient in this regard. Unfortunately for the latter group, a revolt during August of the Auvergne and Dauphiné regiments and one battalion of the Beauce regiment required forceful suppression.\(^{12}\)

The Assembly's mood was unyielding, and the seeming necessity

\(^{10}\) The accused was allowed counsel at his option, but what was meant by counsel was not specified in the law. *Archives parlementaires*, 18:762 (Article 45).

\(^{11}\) Bernard Schnapper has noted that the *cours martiales* had greater powers for mitigating punishments than ordinary courts. Due to the speed of judgment, the *cours martiales* did not allow appeals, which were normal in jury judgments though only on procedural grounds. Yet the practice of the courts, at least under Carnot, allowed some decisions to be reviewed and even overturned. Overall, Schnapper's assessment of the *cours martiales*, which he describes as "made for an army of citizens," is quite favorable because of the way the justice paralleled that of civilian courts and still treated the soldier as a citizen under the legal philosophy of *ratione materiae*. Bernard Schnapper, "Le Droit pénal militaire sous la Révolution: Prophétisme ou utopie?" in *Voies nouvelles en histoire du droit: La Justice, la famille, la répression pénale (XVIème-XXème siècles)* (Paris: Presses universitaires de France, 1991), 215-7.

\(^{12}\) *Archives parlementaires*, 29:255.
to use the ultimate penalty – death – loomed larger. The Assembly demanded that soldiers obey orders without any hint of resistance and that, in the future, any rebellious soldiers lay down their weapons immediately and surrender to authority. Those who refused would be subject to the reintroduction of summary proceedings as before the Revolution, though now with the aura of legislative legitimacy. As one of the members of the Military Committee, M de Wimpfen from Caen, stated about a soldier and his rights, "[He is a] being . . . in a state of dependence and not in a state of liberty." This "dependent being" was outside of the aggregate of society, so that "he does not have the same rights, and . . . does not live under the same laws as the individuals of society to which he belongs"; he "must only know passive obedience." The soldier was therefore a citizen of sorts but only in the sense of fulfilling the role society had given him. To Wimpfen, the keys to a successful army were the need for "difference and power," and therefore commanders needed authority to establish discipline within units even if it was arbitrary.

The Assembly's sympathetic response to these kinds of statements caused it, on 30 September, to adopt a new law that greatly increased command authority. The final code affirmed the authority of the superior over the subordinate because the law eliminated six proposed articles relating to offenses against subordinates. This change underscored the importance of hierarchy within the military by ensuring that lower ranks had no legal standing against their superiors. Unfortunately, no recourse appeared in the code for a subordinate to complain about treatment from his superiors other than appealing through the cour martiale system. This elimination emphasized the importance of "passive obedience." Hence the soldier, legally and rhetorically a citizen, simply served the best he could and tried not to single himself out for too much negative attention. Finally, the code remained severe: fifteen of twenty-three articles

13 All three quotes from Ibid., 31:637.
14 Ibid., 31:638.
dealing with specific offenses and penalties carried the possibility of a death sentence, though the means of carrying this out were no longer stated. In general, sentences for officers were more severe than for the enlisted grades. In the end, the new code, which was one of the last acts in formulating justice for the 1791 Constitution, did not necessarily mean that indiscipline in the ranks was over, but it certainly did not supply the soldier with any belief that his complaints or sense of injustice were a legal leg on which to stand if he contemplated rebellion.\footnote{Archives parlementaires, 31:680-3.}

As one might expect, the Terror moved the 1791 military justice system in an even more severe direction. The most important of the measures that instituted this shift was the Law of 12-16 May 1793. It expanded the 1791 law in one sense: that of offenses and penalties. In the 1793 law, these were divided into four sections: desertion, treason, theft, and insubordination. Also the law included instructions for carrying out the death penalty. This last speaks volumes because all the punishments were severe, and where the death sentence was not applied, the use of chains was. The section on treason offers a clear example of this severity. Article 1 simply states, "Any military person or other individual in the army, no matter what his status or grade, will be punished by death if convicted of treason." The second article – the only other one in this section – is a long list of treasonable offenses.\footnote{Commandant [Major] Augier and Gustave Le Poittevin, Traité théorique et pratique de droit pénal militaire (Paris: Librairie de la Société du recueil général des lois et des arrêts, 1905), 1:284-5.} As in the 1791 code, each crime only had one penalty. There was no range of punishments a tribunal could impose, nor was there a distinction of sentences between soldiers, non-commissioned officers (sergeants), and officers. Everyone received the same penalty for the same crime.

The 1793 law reflected France’s current war experience and made no provisions for peacetime. As a result, the court system it introduced was much more streamlined. The law replaced the cours martiales with military criminal tribunals composed of a
prosecutor, three judges, and a nine-member (all military) judgment jury. Bypassing the cour martiale's accusation jury, crimes were reported to a military peace judge approved by the Committee of Public Safety. This peace judge was a court investigator who, if he thought there was a basis for prosecution, called two other military members – one a superior to the accused, the other of the same rank – and formed a three-person accusation jury to determine if the case should proceed to judgment. The prosecutor, judgment jury, and three-judge bench then functioned similarly to a cour martiale, though the accused also had a voice through a defender and a conviction required at least a six-to-three vote. According to historian Alan Forrest, the severe revolutionary military justice under the guidance of Saint-Just meant that sentences were carried out swiftly – most often within hours of conviction – with no means of appeal. Executions were not only exemplary, especially discouraging desertion or pillage, but they also had a "highly moralistic streak." Under Saint-Just and the Committee of Public Safety, moral laxity called for the most severe repression. Lists of judgments were published in the camps and neighboring towns, and executions took place before the convicted man's assembled unit. Such a system could not endure for long without putting considerable strain on forces already engaged in combat for the defense of the nation.

This form of justice did not disappear immediately after July 1794 and the death of Robespierre. Still, military justice was in disarray after the Terror, and the Directory had much work to do. In this regard, the reforms of 1796 were instrumental in placing military justice on a firmer footing than it had known since 1791 – a footing that, unintentionally, would last until 1857. Of primary importance, the 1796 laws provided a definitive rupture between military and civilian justice, especially at a time when

---

17 Ibid., 2-3; Brosse, 11-2; Chénier, ii; Doll, 21; and Victor Foucher, *Commentaire sur le Code de Justice militaire pour l'armée de terre* (Paris: Firmin Didot Frères, Fils et Cie., 1858), 7.

18 Forrest, 118-20.

Proceedings of the Western Society for French History
the army was no longer composed of volunteers but of draftees held in military service indefinitely. This rigorous distinction between military and civilian justice developed because these laws were meant for the units in the field, by now in Italy and the German lands where they plundered due to poor logistical support from the government which therefore required a more streamlined justice system. As a result, the pre-Revolution principle of *ratione personae* – a Latin term that indicated by reason of the status of the soldier as a member of the army – came back into being. That is, the 1796 law reversed the earlier principle of trying "civilian" crimes in civilian courts without regard to the civilian or military status of the criminal (*ratione materiae*) in favor of a separate justice for those serving in the military. In practical terms this meant that a soldier, whether committing a military or civilian crime or misdemeanor (that is, one normally under common law) came under the jurisdiction of military courts. In particular, the Law of 3 November 1796 established one permanent military court, now called the *conseil de guerre*, in each division with the authority to try cases under the *ratione personae* principle, which extended even to the inhabitants of occupied countries. Each *conseil de guerre* had a bench of seven judges picked by the division commander who could change some or all the judges for the "good of the service." Normally, the bench consisted of one brigade commander who held the title of president, a battalion or squadron commander, two captains, a first lieutenant, a second lieutenant, and a sergeant.

Case investigation was the responsibility of a unit officer called the *capitaine-rapporteur* whose appointment and authority also originated from the division commander. Hence, the division commander held the real power to control military

---


20 Georges Michon, "La Justice militaire sous la Révolution," *Annales révolutionnaires* 14 (1922): 201. Another law – 21 Aug. 1797 – regulated the bench composition so that senior officers were not finding themselves tried by subordinates. Augier and Le Poiittevin, 4.
justice within his subordinate units.

To complement the reorganization of military justice, the Directory legislature enacted a new code, that of 11 November 1796, which served as the backbone of French military justice until 1857. This 1796 code was more refined than those of 1791 and 1793 yet retained aspects from both. Death sentences remained, but, for example, the crime of desertion distinguished between those individuals leaving "to the interior" (desertion within France, basically returning home) and those going over to the enemy. The former would spend time in chains, while the latter, if apprehended, faced death. This code therefore attempted to make a greater delineation among offenses, then pronounced sentences to match the crimes. In other words, military justice, like the civilian penal code, recognized that circumstances could make a difference, sometimes aggravating, sometimes extenuating.²¹

Overall, did this reorganization provide a better military justice system? Opinions vary. Certainly the conseil de guerre was more streamlined than its predecessor during the Revolution. Also the new system provided greater celerity with regard to investigating and trying each case – a priority when the armies were in the field. Finally, though still strict, the new code was much more discriminating than its predecessors; though broader in its scope, the code's distinctions better matched the sentence with the nature of the offense. On the other hand, serious flaws remained. The potential subordination of justice to division commanders could sustain an arbitrariness whose only difference from pre-Revolutionary days was that the new conseil de guerre had a legal sanction – what one member of the Directory termed a "regularized despotism."²² There was no form of legal training, and all of the judges were military men. These problems were not new, nor were they solved in 1857.

Finally there was the issue of appeal, which had been a weakness for a number of years. A law in March 1796 created

---

²¹ Augier and Le Poittevin, 289-98; and Michon, 203-5.
²² Michon, 203.
the first military appeals courts, called revision councils, which were composed of a general as president and three other senior officers under the president's orders. Like the conseils de guerre, there was little independence of decision. Furthermore, the revision council judges had no legal training either. As a result, the judges could initially only examine appealed cases in terms of their conformity to the law, particularly with regard to sentencing.\(^{23}\) This initial limited means of appeal gained a firmer footing through an October 1797 law that established a permanent revision council within each division. Though the division commander appointed its members, the revision council started taking more responsibility and examined whether the conseils de guerre had been formed according to the law, whether it had overstepped its jurisdiction or competence to try a case, and whether procedures had been incorrectly followed or the wrong sentence applied. Accordingly a second conseils de guerre had also been created within each division to retry any judgments the revision council overturned, but with the strengthening of the revision council, this second conseils de guerre began serving as a normal military court as well. Hence, both conseils de guerre in a division became regular courts as well as assuming the retrial function.\(^{24}\)

The Revolution's overall accomplishments were considerable, even pivotal, but as with many other aspects of the Revolution, military justice required much more refinement. Still, the tally sheet was on the positive side. The French military had a basic justice code that brought greater organization to what had been a chaotic series of military courts at the end of the Old Regime. Notwithstanding, issues remained. The conseils de guerre lacked truly independent decision-making capability, as did the revision councils. The problem of ratione materiae versus ratione personae had not been resolved and had seen considerable see-sawing throughout this period. Sentences

\(^{23}\) Brosse, 13.

\(^{24}\) Augier and Le Poitevin, 4; Brosse, 13-4; Chénier, iii; Doll, 22; Foucher, 8-10; and Michon, 205-7.
remained harsh, though even in this arena the Revolution had eliminated some of the most onerous punishments. Moreover, the conseils de guerre needed regulated court procedures to insure that each accused received a standardized trial and the services of a mandatory defender. Finally, the Revolution had attempted to extend to the soldier the legal status of a citizen. It had succeeded in this task far more than the Old Regime, but more work in preserving a soldier's rights in this regard would be necessary for the future.