

A SYSTEM OF EQUITY:  
JUDICIAL REACTION TO DESERTION  
IN REVOLUTIONARY VIRGINIA

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During the century preceding the Revolutionary War, political power in Virginia lay firmly with an entrenched county aristocracy. These well-educated, prosperous planters reviewed the laws of the House of Burgesses to ensure that local customs were not abridged. Written law was largely inconsequential; more significantly, an unwritten legal code based upon compromise and understanding between the elite and the small farmers regulated Virginia society.

Even though the elites controlled political power, their position was not invulnerable. Bacon's Rebellion in 1676 showed that the plight of the common man could not be neglected. Concern and compassion for the common man in his daily and seasonal rigors were essential. The elites did not enforce laws that required attendance at militia musters. The leaders understood that those who occasionally neglected their political or military duties harbored no ill will against the established order. Indeed, those elites who did insist on the strict observance of social obligations ran the risk of being turned out of office by the freeholders.<sup>1</sup>

As long as county court delegates or court martial officers understood that the freeholder's household obligations came before his obligations to the community, there was little class tension in Virginia society. The outbreak of hostilities with Great Britain, however, threatened the oral, personal nature of the social structure. An increasingly assertive government in Richmond sought to administer law in a uniform fashion throughout Virginia. But while the turmoil of the war and its six years of troop and supply requisitioning forced some

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1. Rhys Isaac, *The Transformation of Virginia, 1740-1790* (Chapel Hill: University of North Carolina Press, 1982), pp. 104-107.

fundamental and painful changes, the entrenched system of local tradition persisted. Nowhere was this more evident than in the Virginia militia.

In the early days of the colony, the militia served an immediate need for defense. Neighboring planters assembled or mustered in order to deter raids by the powerful Algonquin Indian tribes that inhabited the territory west of the settlement line. Typically, these early militia companies contained thirty-eight to sixty-four men who were prepared to fight on quick notice.<sup>2</sup>

By the early eighteenth century, however, the threat of Indian attack was virtually non-existent. Defense organizations were no longer necessary. The militia muster survived, but with an entirely new purpose: it was now a means by which the county elites could evaluate the conduct of the members of society.

In Virginia's society of display, militia drills confirmed the existing social order. White common freeholders held subordinate positions under elite commanders. Significantly, the muster was one of the few occasions that brought all recognized participants in society together. Here politicians courted voters by plying them with rum.<sup>3</sup> The elites garnered the allegiance of the citizenry by allowing the muster to become a festive occasion of sport and drink. If the muster confirmed the superior status of the elites, it also suggested that their privileged position depended on the support of the small landowners.

Strict enforcement of the muster law requiring the attendance of all the freeholders in the society could have antagonized the common man and put the elites in a tenuous position. The policies toward those landowners who missed the general muster shows the extent to which the county aristocracy was sympathetic to the common man's familial obligations. Delinquency was a frequent occurrence among Virginia militiamen. The court martial, which convened twice annually at general county musters, usually summoned the truant freeholder for an explanation at the next judicial hearing.<sup>4</sup>

The reasons for one's dereliction of duty were far less important than a willingness to comply with the court. Court martial officers consistently ignored the written laws ordering delinquents to pay a fine of three shillings and acquitted those offenders who explained their absences.<sup>5</sup> A man might miss musters for years at a stretch with complete impunity. The court martial officers discussed an individual's absence at each meeting of the court to confirm that he bore no resentment against either the court or the power structure which it symbolized. Delinquency occurred because farmers were working toward

2. John C. McBride, "The Virginia War Effort: 1775-1783," (University of Virginia: Unpublished Doctoral Dissertation, 1977), p. 44.

3. Isaac, *Transformation of Virginia*, p. 108.

4. *Augusta County Court Martial Records: 1756-1796* (Court Proceedings, September 26, 1760).

5. *Ibid.*

immediate economic stability, not because they questioned the legitimacy of the system.

Only those men who repeatedly refused to appear before the court martial incurred any legal trouble. Officers of the court felt that those individuals who failed to take advantage of this benevolent system of justice could be challenging the validity of their authority. In such cases, a sheriff would travel to the offender's homestead and demand payment of a fine.<sup>6</sup> If the individual still withheld payment the sheriff was to "levy by distress the sale of goods of the person refusing. . . ."<sup>7</sup> Yet the court remained lenient toward even the most disobedient freeholders. Rarely did the levy equal the maximum legal penalty.

An individual's military commitment depended on the relevance of such action to his family's well-being. Common farmers refused to serve unless they recognized a legitimate danger; a campaign launched by Governor Spotswood in 1713 against the Tuscarora tribes failed because too few militiamen participated.<sup>8</sup> Likewise, residents of all areas of the colony indicated their unwillingness to enter the French and Indian War. The narrow world view of Tidewater residents made forays to the Ohio Valley seem absurd, while frontiersmen claimed their families were vulnerable to attack if unguarded.<sup>9</sup> In response to this consistent disregard for military duty the House of Burgesses passed a law in 1757 which ordered "such able bodied men as do not follow any lawful calling or employment or have not some other lawful and sufficient maintenances" to serve in the war. All citizens who voted in the elections of the Burgesses were exempt.<sup>10</sup> A paradoxical policy had developed, as only those denied a full position in society were required to defend it.

Increasingly during the mid-1700s, the Virginia county elite saw Parliament's restrictive acts as a form of enslavement. Yet it remained for the elite to convince the common farmer of the need for action. This task was difficult, considering past reluctance to leave the homestead for any reason; a stronger stimulus to action had to be introduced. Passionate speeches and displays of martial spirit excited the small farmers, though they remained skeptical of claims of British tyranny. Most doubts vanished, however, with Lord Dunmore's attempt to seize the powder stored in the Williamsburg powder horn in 1775.<sup>11</sup> Governor Dunmore became a symbol of British despotism, and

6. *Ibid.*

7. William W. Henning, *The Statutes at Large* (Richmond: J. & G. Cochran, 1821), VI:535.

8. John Shy, *A People Numerous and Armed* (New York: Oxford University Press, 1976), p. 28.

9. M. Hayes Baker Crathers, *Virginia and the French and Indian War* (Chicago: University of Chicago Press, 1928), p. 78.

10. Hennings, *Statutes*, VII:70.

11. H.J. Eckenrode, *The Revolution in Virginia* (Boston: Houghton Mifflin Company, 1916), p. 54.

freeholders agreed with their leaders' call to arms. Liberty depended on preserving the existing social structure from outside interference.

The willingness of the militiamen to fight convinced the leaders of the people's support. Initial fears that they might not sustain the movement disappeared as hundreds of militiamen prepared to march against Lord Dunmore. Still the common farmers were operating under the old rules. Military skirmishes were of little importance compared to the upcoming fall harvest, and militiamen expected to be allowed to return home for pressing familial obligations. Thus absences from muster continued. There was no questioning of the elite's philosophy, and the judicial response to dereliction of duty remained lenient.

Even as the Revolutionary War began, the old county militia companies remained intact, and military organization revolving around the muster went unchanged. Now, however, absences from militia duty assumed the character of desertion. Yet a deserter was seldom a man who fled from battle under heavy attack. More often he was someone who failed to appear at an arranged rendezvous point, and who neglected to provide a white, able-bodied substitute. In addition, men who left the field before completing their tour of duty were classified as deserters. Most of the early offenders were men who remained in the fields on the day they were to depart for the Continental Army.

In 1776 mere county militia units were too localized for the war effort. If an individual were drafted into a company from another area of the county, composed of strangers, he was likely to desert. In Augusta County, fifteen of the first twenty-six men drafted deserted because they were being separated not only from their families but also from their company.<sup>12</sup> In May of 1777, the Virginia General Assembly, realizing this deficiency, modified the system of raising troops for the Continental ranks. First, ten equal-sized divisions were formed within each county. Second, following a chain of command from General Assembly to county colonel to division field officers, the appropriate number of men were selected in accordance with the quota Congress had determined for Virginia. If there were no volunteers in a division, men drew lots to decide who would serve. These divisions, composed of men who did not previously know each other, became a more effective tool for sustaining the war effort.<sup>13</sup>

Virginia's share of men for the Continental Army was relatively large. The colony was to produce fifteen regiments, containing approximately five hundred men each, while maintaining an additional three regiments for her own defense. By the summer of 1776, several of these regiments were formed, and the eighth

12. *Augusta County Court Martial Records: 1756-1796* (Court Proceedings, October 16, 1776).

13. Arthur J. Alexander, "Desertion and its Punishment in Revolutionary Virginia," *William and Mary Quarterly* (3) III:384.

Virginia regiment, under the command of General Muhlenburg, soon moved to New Jersey to join Washington's army. Almost immediately these green troops were thrown into battle, encountering heavy fighting at Harlem Heights in September of 1776, and at Trenton in December of that year.<sup>14</sup> The shock of the change from courthouse speeches to the battlefield was great, but most Virginia draftees managed to perform their military duties. Many who deserted their regiments in 1776 and 1777 returned after resolving domestic crises, and those who had chosen to remain at home continued to send substitutes.<sup>15</sup>

Still the years of constant battles with the British troops took their toll on Continental forces. Virginians saw heavy action in 1777 at Princeton, Brandywine, and Germantown, while pitiful letters from home, shortages of food and clothing, and non-payment of wages, convinced many not to re-enlist.<sup>16</sup> By January of 1778, only forty Virginians had re-enlisted for another tour of duty, while 950 went home.<sup>17</sup> The situation was especially exasperating for General Washington, who commented, "Our army is shamefully reduced by desertion and except the people in the country can be forced to give information when deserters return to their old neighborhoods, we shall be obliged to detach one half of the army to bring back the others."<sup>18</sup> The Reverend John Hurt, chaplain to the First and Second Virginia Brigades at Valley Forge, tried to reverse the trend by urging the soldiers to rejoice in their defense of liberty, but he was generally unsuccessful. Despite his promise that "the ill gotten wealth of a miser or dastardly security of a coward" would plague the consciences of the deserters, Virginians left the field.<sup>19</sup>

Those who avoided the destruction of war altogether and remained in their fields, were, almost to a man, those who had chosen to neglect their duty in attending musters in the years before the war. Nothing had changed. If these men could not spare a day for a private muster, twelve months of duty was simply unthinkable. Moreover, there is no evidence to suggest that draft evasion was viewed as being more serious than non-participation at musters. While almost twenty-five percent of those absenting themselves from musters in Augusta County before 1776 were fined, only sixteen percent of the men who

14. John Sellers, "The Virginia Continental Line, 1775-1780" (Tulane University: Unpublished Doctoral Dissertation, 1969), pp. 178-211.

15. Don Higginbotham, *The War of American Independence: Military Attitudes, Policies, and Practice, 1763-1789* (New York: Macmillan, 1971), p. 400.

16. Sellers, "The Virginia Continental Line," pp. 211-262.

17. *Ibid.*, p. 287.

18. Letter from George Washington to the President of the Continental Congress, January 31, 1777. Quoted in Arthur J. Alexander, "Desertion and Its Punishment in Revolutionary Virginia," p. 393.

19. Address of the Reverend John Hurt to the First and Second Brigade of the Virginia forces at Valley Forge, December 1777 (Manuscripts Department of the University of Virginia).

failed to join the Continental forces were fined by the court in 1776 and 1777.<sup>20</sup> In both cases officers of the court continued to be lenient toward men who evaded service due to personal hardship.

Government leaders, while aware of the fact that their regulations were being ignored, still attempted to toughen desertion penalties. In October of 1777 the 1775 ordinance "for raising an additional number of forces for the defense and protection of this colony," which called for the uniform punishment of "five pounds or ten lashes for all those harbouring deserters," was amended to fifty pounds except "in the case of a husband or wife, or of a child concealing a parent or a widow her son."<sup>21</sup> This loophole excusing relatives, however, meant that there was little real change.

Still something needed to be done. As the war progressed, tempers of the militiamen grew more volatile, and the 1778 draft was met with "much murmuring and uneasiness," including cases of armed resistance.<sup>22</sup> As Dr. Robert Honyman noted in March of that year, "the attention of the people of this state is very little taken up with the war at this time, or indeed, for a year or two past. . . . The greatest part of the people are entirely taken up in schemes of interest of several kinds. Immense fortunes have been made by trade or speculation."<sup>23</sup>

Throughout the war years, regular militia musters continued for those who were not drafted into either the Continental Army or the Virginia line. Approximately twenty percent of all men suspected of shirking duty received fines.<sup>24</sup> But again, the fines were proportionate to a citizen's ability to pay. One planter was fined twelve pounds for missing muster while a less wealthy militiaman received only a twenty-shilling levy for the same offense.<sup>25</sup>

The Augusta County Court Martial, though not an arm of the state government, enforced the draft desertion law more stringently from 1778 to 1781; even so, punishments exacted were not particularly harsh.<sup>26</sup> The court convicted only thirty-one of 184 Augusta County men who failed to appear at a rendezvous point; as specified by law, these men received a six-month sentence in the regular army. The court even allowed several to serve their original tour of three months in the state line. Moreover, the court summoned sixty-nine citizens

20. *Augusta County Court Martial Records: 1756-1796* (Court Martial Proceedings, 1776-1777).

21. Henning, *Statutes*, IX:344.

22. The Journal of Robert Honyman, February 2, 1778 (Manuscripts Department of the University of Virginia).

23. *Ibid.*, March 16, 1778.

24. *Augusta County Court Martial Records: 1756-1796* (Court Martial Proceedings, 1778-1781).

25. McBride, "Virginia War Effort," p. 57.

26. *Augusta County Court Martial Records: 1756-1796* (Court Martial Proceedings, 1778-1781).

to appear at the next court martial to explain their actions. The remaining eighty-four draft evaders were acquitted of the offense and allowed to return to their farms as respectable citizens.<sup>27</sup>

Field desertion from the Continental Army was a more serious offense. The laws were becoming proportionately harsher, but there was no corresponding strengthening of enforcement. By 1778 the Continental tribunal gave captured deserters a standard punishment of "one hundred lashes, well laid on."<sup>28</sup> Yet the officers of the Continental tribunals, even when they had no knowledge of an individual's reasons for dereliction of duty, were often merciful. Two Virginians convicted of desertion in 1781 were sentenced to receive only twenty-five lashes each, and to be demoted to the "foot service." Even that sentence was weakened, however, as the court remitted the corporal punishment in both cases.<sup>29</sup> In fact, it seems that the only unpardonable sin in the world of the Continental regiments was desertion to the enemy. Still this crime was so rare and so distinctive in motivation that it cannot be compared to common desertion.<sup>30</sup>

Since most field desertion trials were held back in the home county, the court was predictably lenient. The Augusta County Court ordered eighteen of forty-six alleged deserters to serve a new six-month tour in the Continental Army. While most of these convictions occurred because the deserter failed to appear at the semi-annual hearing, others arose from attempts to deceive the court. One man forged a discharge pass and claimed that his tour of duty was over. The court simply summoned thirteen of the delinquents to appear before the court martial and cleared the remaining fifteen of the charges. Included among these were men who became ill, others who received distressing news from home, and even a man whose fiftieth birthday put him over the age limit for draftees.<sup>31</sup>

Many governmental officers believed that as long as court martials remained lenient toward deserters, the problems of inefficiency plaguing the military effort would continue.<sup>32</sup> Yet little could be done. The County Lieutenant, the governor's agent in the county, was not a member of the court

27. *Augusta County Court Martial Records 1756-1796*. All information in this paragraph was taken from all Augusta County companies for the years 1778-1781. The Augusta County Records can be found in the Virginia State Library, Richmond, Virginia.

28. The Christian Febiger Papers, October 21, 1781, p. 19. (The Febiger Papers are located in the Virginia State Library, Richmond, Virginia.)

29. *Ibid.*

30. An example of desertion to the enemy can be found in the Wallace Family Papers, October 10, 1777 (Manuscripts Department, University of Virginia).

31. *Augusta County Court Martial Records: 1756-1796*. This information includes all Augusta County companies in the records for 1778 to 1781.

32. Virginia War Office Letter Book, January 18, 1781 (Virginia State Library, Richmond, Virginia).

martial. Consequently he could not intervene on behalf of the state in implementing stricter laws, and could only report on the legal proceedings.<sup>33</sup> Thus a fundamental gap existed between the legalistic mentality of an increasingly frustrated war government and the common-sense judgments of the court martial officers. These officers were being placed in an increasingly difficult position. They had to demonstrate their obedience to the growing demands of the government, without ceasing to look after the well-being of the soldiers.

If the old customs prevailed, they were strained by the mounting demands of the war. Orders from the war office in Richmond specified that county officers temporarily set aside their system of equity and enforce the law, but freeholders would not accede to this departure from tradition.<sup>34</sup> Draft dodging totalled at least twenty-five to fifty percent in almost every Virginia county.<sup>35</sup> Of the 3188 men requisitioned by the Continental Congress in October of 1780, only 773 ever reached the Continental Army.<sup>36</sup> By 1780, many men had already served a complete tour of duty. In addition, these men endured heavy tax burdens and livestock impressment. When the war office requisitioned two thousand men to join General Greene in South Carolina in 1780, violence erupted in several counties. On 5 December John Taylor, the county lieutenant of Lancaster County, informed Governor Thomas Jefferson that:

On the day appointed for the draft they assembled in a mob and disarmed the officers as they came to the field and took the papers relative to the draft . . . I had a court martial and many were condemned, but it has not been in my power to have them taken except for a few who have since made their escape.<sup>37</sup>

Sympathetic members of the county elite, in fact, understood the desertion of the freeholders. Colonel Charles Fleming told Governor Jefferson that "a considerable number have but just returned from their tour of duty and . . . were hurried precipitately away from here totally unprovided for and I cannot think their complaints entirely groundless."<sup>38</sup> Similar problems befell both small landowners and moderately well-to-do farmers who had been placed in positions of authority in the tumult of war; homesteads of all sizes required dutiful attention. Only a few planters did not themselves contribute to the labor

33. *Ibid.*, August, 1781.

34. *Ibid.*

35. Alexander, "Desertion and Its Punishment," p. 383.

36. Sellers, "Virginia Continental Line," p. 350.

37. Colonel Taylor to Governor Jefferson, December 5, 1780. In William P. Palmer, ed. *Calendar of Virginia State Papers*, Vol. I. (Richmond: Superintendent of Public Printing, 1875-1893), p. 343.

38. Colonel Charles Fleming to Governor Jefferson, January 17, 1781. In Palmer, *Calendar*, I:440.



force. Sizable bands of soldiers wandered home under the leadership of a captain or a lieutenant. Colonel Charles Dabney notified Jefferson of the mass desertion in Hampshire County: "I believe that the officers have been principally to blame. I have not reported the names of the privates."<sup>39</sup>

Even the appearance of the British Army on Virginia soil failed to compel the Virginians to mobilize, although they were by no means pleased to entertain the British troops. Periodic raids by the British in 1780 and 1781 had so frustrated Tidewater residents that "they became so harrassed and hindered from their farms that they often times will prefer not turning out to save the property of their neighbors rather than run the risk of a false alarm."<sup>40</sup> Virginians were willing to protect only their one true interest — their homestead. As the army of Lord Cornwallis invaded Tidewater Virginia prior to the battle of Yorktown, protection was best served by passivity. Most citizens simply identified with a planter who argued, "... the people of New England that stayed by their property rescued it, and those that flew into the county and took up arms lost it totally."<sup>41</sup> To hold on to his land, the Virginian remained on his homestead and made the least onerous agreement possible with the invading army.

Lack of military commitment, both in the local militia musters and in the Continental ranks, plagued Virginia's war effort. Yet if the Virginians' conduct was sporadic, it nonetheless confirmed the traditional social order of unwritten, personal interaction among elites and freeholders. Fully completed tours of duty and the toleration of crop and livestock impressment demonstrated the Virginians' fundamental acceptance of the war cause. But their support stopped short of jeopardizing the survival of the family homestead. When internal tensions erupted into violence, it was not the violence of social upheaval. Rioters were not trying to overturn the old social order nor were they trying to oust their leaders from power. Simply put, they were demonstrating to uphold the Virginia tradition of the integrity of the household and of the unwritten, compassionate cooperation of freeholders and elites.

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In the years after the war, there was a pronounced change in the county court's treatment of delinquent militiamen. Leniency of the court martial became a thing of the past. An investigation of four companies in Augusta County in 1784 reveals that sixty-eight out of eighty-one men were fined for

39. Colonel Charles Dabney to Governor Jefferson, March 23, 1781. In Palmer, *Calendar*, I:592.

40. McBride, "Virginia War Effort," p. 207.

41. Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Chapel Hill: University of North Carolina Press, 1942), p. 62.

failing to attend a muster. John Brownlee, who had been repeatedly acquitted of delinquency from 1779 to 1781, was fined for his absence at a general muster in 1784. Indeed, men who were once able to shirk their militia duty were now fined for appearing without arms.<sup>42</sup>

The new government seemed surprisingly harsh when compared to the former personal mechanisms of control. In the aftermath of the war, the written word took on added importance. In acts of the Virginia General Assembly, a freeholder's duties to society and rights in that society were spelled out and upheld in bold print. For elites, this marked the demise of the authoritative, paternalistic tradition. If their power was diminished, they nonetheless took solace in the fact that laws they themselves drafted took the place of county custom. For the freeholders, the new government added onerous extra burdens that took them from their household tasks. Yet in the broadened, more democratic world after the American Revolution, they gained an explicit, written, and respected legal freedom that would ensure that their voice would be heard in the new social order.

42. *Augusta County Court Martial Records: 1756-1796* (Court Martial Proceedings, 1784). Four companies of Augusta County were chosen because they are representative both in numbers of delinquents and in consistency of penalties. The four companies were: Captain Tate's, Captain Bell's, Captain Buchanan's, and Captain Given's.