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Toward A More Permanent Union

The Continental Army and the Creation of Congress

By Michael Toth

The previous essay addressed the role George Washington played in the creation of federal appellate courts. More than one decade prior to the ratification of the Constitution, General Washington saw the necessity of establishing federal courts to enforce federal law. As Commander in Chief during the Revolutionary War, Washington recommended, in particular, that Congress create federal courts to ensure that Americans followed the standards for commercial warfare set by the federal government.

Washington's efforts led the federal government to establish an appellate process for reviewing the capture of British prizes on the high seas. Throughout the war, however, Congress failed to grant the federal government an important power. It never established federal trial courts with jurisdiction over prize cases. As a result, the Revolutionary-era federal government had to wait for the state courts to act before it could exercise any authority over the distribution of enemy prizes.

Elsewhere the cause of independence led immediately to the creation of the federal trial courts. In 1775, shortly after organizing the Continental Army, Congress established military courts to try cases involving members of the federal armed forces. These military courts were the nation's first federal trial courts, established more than a decade before Congress created the first federal district courts.



"The Framers of the Constitution built upon the lessons they had learned from experience."

The Significance of the Military Courts

This essay examines two issues: first, the reasons why the judicial power of the federal government took shape rapidly in the realm of military justice. From the moment of General Washington's proposal, it took Congress nearly fifteen years to establish federal trial courts authorized to hear prize cases. By contrast, there was an immediate consensus behind the creation of military trial courts to settle disputes concerning the Continental Army. The political basis behind this consensus is set forth below.

But while the creation of the Continental Army showed that American's leaders were ready to accept federal trial courts as early as 1775, the experience also revealed a separate defect in the government: the limit of Congress's lawmaking powers prior to the Constitution, the second issue addressed below.

The First Federal Trial Courts

One month after the shots at Lexington and Concord brought Americans into armed conflict with Great Britain, the state delegations assembled at the Continental Congress agreed to raise a federal army of 15,000 troops. Two weeks later, the same assembly passed a series of provisions for "the due regulation and well ordering" of the Continental Army.

In enacting this code of military law, called the Articles of War, the early Congress took a step quite rare for it at the time. It passed a law.

Before the Constitution, Congress's actions typically came in the form of resolutions, not legislation. Throughout the Revolutionary War, for example, Congress routinely passed resolutions requesting supplies, troops, and money from the states.

The crucial difference between federal resolutions and federal laws was that the former applied only to the states. This meant that the federal government could not execute these orders by punishing private citizens who failed to follow them. Because the resolutions were directed to the state governments, it was left to provincial officials to enforce the federal policies contained in these mandates.

The Articles of War, however, were not the ordinary resolution. It was clear that Congress meant to lay down the law. The code's first article made it apparent that the provisions that followed thereafter applied directly to individuals, in this case to "every officer" and "every soldier who shall serve in the Continental Army." The code's substantive sections then set down that a member of the Continental Army could be punished if caught "drunk on his guard," "sleeping upon his post," or to have "behave[d] indecently or irreverently at any place of Divine Worship," among other acts of misconduct.

To be sure, a broad consensus backed Congress's bold action. For two decades, General Washington had believed that good order was "the soul of an army." Revolutionary patriots, on the other hand, were eager to establish civilian control over the Continental forces, which was also achieved through the enactment of the Articles. When Congress revised the Articles of War one year later, the often antagonistic political duo of John Adams and Thomas Jefferson notably spearhead the project.

Both sides of the early American spectrum also accepted that the federal military code needed to be enforced through federal tribunals. Although members of the federal forces were also citizens of their respective states, this did not stop Congress from requiring that the Continental Army's personnel be tried in separate military courts, entirely independent from the existing state judiciaries. To this end, the Articles of War specifically authorized the establishment of courts-martial where federal military law would be enforced.

The fact that by maintaining these military courts the federal government was operating its own court system was not lost upon the early nation's leaders. Nor again was the federal government's jurisdictional grab in this area considered controversial.

When the Constitution was under consideration, both critics and champions of the new plan of government acknowledged that through the creation of military courts one decade prior, the federal government was already exercising judicial power. Among the Anti-Federalist camp, the influential pamphleteer Federal Farmer, for example, conceded that "the administration of martial law in the army and navy" was one of the several areas where federal judicial power had been established.

Meanwhile, politically astute supporters of the new plan of government pointed to the military courts to make the further point that the federal government could exercise complete jurisdiction over certain areas without destroying the autonomy of the states. As one future United States Chief Justice put it: "In the time of the war, we had an army. Who made the laws for the army? By whose authority were offenders tried and executed? Congress. By their authority a man was taken, tried, condemned, and hanged, in this very city. He belonged to the army; he was a proper subject of military law; he deserted to the enemy; he deserved his fate. Wherever the army was, in whatever state, there Congress had complete legislative, judicial, and executive power."

The Trouble with the System

If Congress had developed an effective way to discipline the federal forces, paying them was another matter. At the time of the Revolutionary, Americans adhered to the political tenet that the legislature needed to control the power of the purse. This included the military's purse strings. For this reason, members of the Continental Army would have to rely upon Congress for their salaries.

Unfortunately for the nation's troops, Congress then lacked the power to tax Americans. At the onset of the Revolution, several factors kept the federal delegates from requiring Americans to pay for the new army. When the delegates raised the first federal forces, Congress was not operating under a formal constitution that set forth its powers, including any authority it might have to tax the American people. Attempting to tax Americans at this critical juncture, furthermore, would likely have jeopardized the emerging unity between the separate colonies. Finally, as a practical matter, the early Congress lacked the ability to collect taxes from Americans. There were, for starters, no federal revenue officers.

From the beginning of the Revolutionary War, therefore, the states were asked to fund the Continental Army. This became the early constitutional rule under the Articles of Confederation, which provided that all war-related taxes "be laid and levied by the authority and direction of the several states."

As the Revolutionary War ensued, the outfitting of the Continental Army through state requisitions was tested and found to be a failure. "With respect to supplies for the Army," one state official wrote Congress, "Experience has taught us that by calling on the several States ... for the specific Articles that are wanted, the Army has been fed from day to day & at some times almost intirely destitute of any provision at all."

The federal government paid the Continental troops by issuing them certificates. Printing the certificates was easy. The states were left with the hard part. It was for them to tax their citizens in order to maintain the exchange value of the certificates. When the states proved unable to raise the necessary revenue, internal strife rose both between federal and state officials, and residents of different states.

Wherever the blame lies, the arrangement showed itself not to work. One Virginia delegate summed up the crux of the problem. Congress was "throwing upon the States the exercise of powers they should have retained and to their utmost have exercised themselves." The federal government, in short, had taken the initiative to raise an army without having the power to support it. Congress's powers needed to be completed for the nation to have a reliable army.

The Constitutional Completion

The uneasy peace that followed the Revolutionary War led to the ratification of the Constitution. The new plan of government permitted Congress to conscript Americans into military service and to tax them directly. Together with the power over military law that was carried over, Congress was now permitted to control the size, salaries, and discipline of the federal forces.

Opponents of the Constitution smelled danger. Congress, they feared, could not be trusted with the power of the sword. Constitutional amendments were put forth that would have allowed the states to stand in the way of Congressional efforts to raise a peacetime army.

Throughout the 19th century, however, the federal government maintained a modest-sized military. This fulfilled the vision of the Constitution's leading advocates, who had promised that the new plan of government would not lead to an overbearing federal government.

Revisiting the historical experiences of the Framers helps unlock what appears to many as the Constitution's unanswerable question: how a plan to strengthen the government produced, in fact, a small government. In particular, the history of this period reveals the extent to which the nation's first leaders were focused on solving the particular problems that confronted them. Before the powers of Congress were defined, the early delegates made sure, for example, to raise an army to counter the British Red Coats encamped here.

The Framers of the Constitution, moreover, built upon the lessons they learned from experience. The first efforts at American unity, during the struggle for independence, showed the powers that the general government was lacking. In the case of the federal forces, Congress needed to be able to support the troops that it raised. In the case of the admiralty courts covered previously, the federal government needed to extend its judicial powers to the trial phase of this then important area of federal law.

At bottom, the history of early America explains what is meant by the grand language of the Constitution, which, we are told, was written to give the American people a "more perfect" union, one that improved through the wisdom and effort of its citizenry.