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## George Washington

### Founder of America's Courts

By Michael Toth

Of the accolades paid to George Washington, father of the nation's court system is not one often given. Unlike other leaders during the Founding era, Washington was not an attorney or legal scholar. During the Revolutionary War, however, General Washington played a leading role in the creation of the America's unique judicial system.

#### *The Commander in Chief as Constitution Statesman*

It was a storm and a shipment of wine that prompted Washington to take action. In the fall of 1775, a "Gale of Wind" sent a British ship carrying "120 Pipes of Wine" into an American port. This prompted the Commander in Chief of the Continental Army to dispatch a letter to the Continental Congress.

What to do with the British cargo was precisely what was on General Washington's mind. Ever the honest broker, Washington informed Congress that 118 bottles of the wine had survived the shipwreck. The exact accounting prevented the general from sharing the bounty from the accident with his troops, an indication that the nation's Commander in Chief did not view the war as an opportunity for personal benefit.

But it was not just to supply a wine inventory to Congress that Washington put pen to paper. The Commander in Chief included a specific request in his letter. He asked Congress to create a judicial system to determine what to do with the future booty that would fall into American hands. "These Accidents and Captures point out the necessity," wrote Washington, "of establishing proper Courts without loss of time for the decision of Property and the legality of Seizures." "Otherwise," warned Washington, "I may be Involved inextricable difficulties."



"George Washington provided an example for how America's future leaders might understand the unique features of the American government."

Throughout of the fall of 1775, Washington returned on various occasions to the need for creating "prize courts," the term for the types of courts that would enforce, among other things, a proper distribution of the wartime goods captured by Americans. As far back as the God of Israel instructed Moses how to allot the booty obtained in battle, the fair distribution of goods in wartime had been a topic of interest for honorable commanders.

At the time of the American Revolution, prize courts operated throughout Europe and Great Britain to settle such cases. Specifically, Washington urged Congress to create prize courts in America to resolve the ownership of goods captured by Continental forces in accordance with established legal customs. Three days after informing them of the wine now secure in the army's hands, Washington again wrote Congress. Again he implored the delegates that "a Court be established by Authority of Congress, to take cognizance of the Prizes made by the Continental Vessels."

#### *The Role of Congress*

When Washington wrote, Congress acted. Then as now, creating a committee was Congress's first step. Immediately after receiving Washington's correspondence, Congress called upon several of its leading figures to consider the General's request, including John Adams, Benjamin Franklin, and Virginian George Wythe, who had taught Thomas Jefferson as a law student.

Soon Congress had agreed to a plan. Like their Commander in Chief, the nation's delegates wanted to keep the conduct of Americans in wartime above board. This required the lawful distribution of captured goods, which, in turn, required the creation of a judicial process for this purpose. In particular, Congress worried that innocent property owners would be hurt "unless some laws be made to regulate, and tribunals erected competent to determine the propriety of captures."

To this end, Congress took two steps: it encouraged the separate states to establish prize courts and it provided for an appeal to Congress in the event that a party disagreed with the local ruling.

#### *Why Washington Worried*

Washington immediately saw the gapping hole in Congress's scheme. The delegates had failed, in short, to create any prize courts. They had asked the states to establish such tribunals. They had further resolved that parties in prize cases could appeal to Congress. But Congress had failed to create a single court under the control of the federal government authorized to try prize cases. If the Continental forces captured British cargo, their first stop would have to be a state trial court. This upset Washington.

One week after the delegates' initial foray, Washington implored Congress to finish the job by instituting "a Court for the Trial of Prizes made by the Continental Army." Later the same month, Washington again wrote Congress that "[t]he Resolves relate to Captures made by Continental Armed Vessels only want a Court Established for Trial to make them complete." Finally, he turned to personal lobbying, dispatching a letter to Richard Henry Lee. "I must beg of you, my good Sir," Washington wrote the fellow Virginian, "to use your influence in having a court of admiralty, or some power appointed to hear and determine all matters relative to captures."

#### *Inaction has consequences*

Washington would have to wait until he was President of the United States for Congress to create courts to distribute property seized by the federal government. The consequences of Congress's inability to follow Washington's instructions earlier had crucial consequences for the young republic.

The seeds of the conflict were present from the beginning. What Congress had done when it resolved that the states should try prize cases was, in effect, to ask officials who were not part of the federal government to enforce the resolutions made by the federal government.

Throughout the Revolutionary War, Congress had passed resolutions designed to regulate the conduct of the Continental forces during the war. It made sense that Congress, and not the individual state legislatures, regulate the Continental forces because the Continental forces, like Congress, represented all the states.

With respect to the prize courts, the problem that Washington wished to correct was that Congress had not created its own court system to enforce the capture rules that would apply to the Continental forces. The states had not made this same mistake. Many of them had their own navies. But when their navies captured enemy cargo, they could bring the booty to their own state's courts. A captain in the Continental navy, by contrast, had no such direct access to a federal prize court.

During the Revolutionary War, the lack of federal prize courts brought Congress into a celebrated conflict with one of the states. This occurred when Congress, hearing an appeal from a prize case brought in a Pennsylvania prize court, overturned the ruling below. The case, over the proper distribution of the sloop *Active*, made clear that more than just legal concepts that were at stake. The federal government ordered a sum of money to be paid to a different litigant than had prevailed at the trial. Officials from Pennsylvania were further upset by the suggestion that the federal judgment be paid from the funds that Pennsylvania contributed to the general government. Had Washington's instructions been followed, however, and a federal trial court created to hear the case from the beginning, the conflict over the proceeds from the sloop *Active* might have been averted.

#### *A More Perfect Union*

Although Congress did not initially implement his plan, the delegates moved closer to Washington's mark as the Revolutionary War continued.

The dispute between federal and state officials over the Active case, in particular, motivated Congress to strengthen the position of the federal government over prize cases.

Congress's first resolutions permitted parties to appeal suits brought in state prize courts to Congress. The early result of this arrangement was the formation of *ad hoc* Congressional committees to hear such appeals. The ad hoc committees were soon replaced by a standing Congressional committee, which eventually gave way to a permanent federal appellate court, comprised of judges who were not members of Congress.

But Washington's desire for a system of federal trial courts would have to wait until the ratification of the Constitution, which specifically empowered Congress to create "inferior Courts," authorized to enforce at trial the laws passed by Congress. One of the new Congress's first steps was to create a system of federal trial courts. Among other duties, the first federal district courts were empowered to hear prize cases.

#### *His Excellency's enduring example*

Despite Washington's repeated instance for federal trial courts as early as 1775, little credit has been given to him for their ultimate creation. To be sure, Washington did not offer a theoretical defense for the creation of federal courts.

But through his deeds, Washington provided an example for how American's future leaders might understand the unique features of the American government. Before the nation's government had three, independent branches, Washington showed that he understood the basic division between the executive, legislative, and judicial powers. As the Commander in chief, he took the initiative of an executive to suggest to the nation's legislature that a particular course of action -- the creation of prize courts -- should be taken. Washington saw that the proper place for the setting of national policy was the national legislature. In addition, Washington saw that in order for the nation's political will to be enforced, a court system was necessary.

Finally, Washington observed that certain issues needed to be settled at the federal level: namely those that could only be settled by the combined votes of the American people, through their representatives at the seat of the federal government. This principled understanding of the separate roles of the federal and state governments called "federalism" is another of the essential elements of the American system of government.

America's Constitution has been closely examined for more than two centuries.

The intricacies of this founding document are, indeed, much worth analysis. So also are the actions of those, who saw through experience, the reasons why America needed to form a more perfect union. In this regard, General Washington was, once again, the first among equals.

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