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# How the Federal Courts Were Given Admiralty Jurisdiction

HARRINGTON PUTNAM\*

Although maritime courts, and the general admiralty jurisdiction were more or less familiar during the colonial period, this subject when now viewed in the retrospect, received but scant attention in the deliberations of the Federal Constitutional Convention. In none of the three early programs or plans for the new government, viz. the Virginia plan; what was known as the Pinckney plan; and the New Jersey plan, is found any express reference to that jurisdiction. The greater differences in the Convention over State equality; the question of a single executive; and the difficulties of devising a system of legislative chambers fair to both the larger and smaller States occupied the Convention before the details involved in a judiciary article.

And yet admiralty courts had been long functioning in those States that bordered upon the sea.

Under the English Act of 1696, the Continental Colonies, for the purposes of admiralty jurisdiction, were first divided into two districts. The Northern included New England, New York, and, after 1702, New Jersey. Pennsylvania, and the colonies to the southward formed the other district. An admiralty judge was appointed to each district.<sup>1</sup>

Later the districts were changed with new boundaries. The authorities respecting these colonial courts are not uniform. In 1764, Dr. William Spry was said to hold the appointment of judge of the Vice-Admiralty Court for all America; and from Halifax issued a proclamation regarding the holding of terms of courts; but a few years later, being appointed Governor of Barbados, he sailed for that

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<sup>1</sup>Channing. *History of the United States*, Vol. 2. p. 277 (ed. 1918).

Before the year 1696, there had been little prize litigation in this country. It was a subject of special inquiry from England. This was the investigation in Virginia:—

“Inquiries propounded to the Governor of Virginia in the year 1760, and answered in 1761, while Sir William Berkeley was Governor:—

“Q. What courts of judicature are within your government, relating to Admiralty?

A. In twenty-eight yeares, there has never been one prize brought into the country, so that there is no need for a particular court for that concern.”

Hening, *Stat. at Large*, Vol. 2, p. 512.

island and died in 1772.<sup>2</sup> There is also some uncertainty regarding the jurisdiction of admiralty appeals from the colonies. In 1768, after the establishment of an American Board of Customs Commissioners, there were erected four new Vice-Admiralty Courts,—at Halifax, Boston, Philadelphia, and Charleston,—with both original and appellate jurisdiction. It is, however, probable that these courts had little, if any appellate functions, because of the ensuing revolt of the colonies.<sup>3</sup>

Even before the action of the Continental Congress in March 1776, which resolved that the inhabitants of the American colonies be permitted to fit out armed vessels to cruise on the enemies of the United States, some of the colonies had taken action to establish Maritime Courts. Virginia seems to have been the first to follow Massachusetts to establish Courts to deal with captures.

A Virginia Convention of 1775-6, which declared Virginia independent, on January 9, 1776, appointed a committee "to bring in an ordinance for establishing a certain mode of punishment for the enemies of America." This Committee reported a measure passed on January 20, 1776, in which is the following reference to an admiralty court:

"Be it therefore ordained that John Blair, James Holt, and Edmund Randolph, Esquires, be, and any two of them, be, and they hereby are, constituted judges to try and determine on all matters relating to vessels and their cargoes; which said judges shall have power to appoint an advocate, clerk, and such other person, as they may think proper to act as marshal, who shall, from time to time, execute all process of the said court, to be issued and signed by the clerk thereof."

An appeal from condemnations was given to the Committee of Safety.<sup>4</sup> In many colonies such a maritime Court was first called by different names. Apparently the title of Admiralty was then unpopular.

In October, 1776, there was passed

"An act establishing a Court of Admiralty, to consist of three judges to be chosen by joint ballot of both branches of Assembly and commissioned by the Governor, or any two of them, to make a court and to hold their office for so long a time as they shall demean themselves well therein."

"The court shall have cognizance of all causes heretofore of admiralty jurisdiction in this country, and shall be governed in

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<sup>2</sup>Washburn, *Judicial History of Massachusetts* (1840) p. 175.

<sup>3</sup>Andrews, *The Colonial Background of the Revolution* p. 155 (1924). *Acts of the Privy Council, Colonial Series* 1912, Vol. V, p. 151.

<sup>4</sup>Hening, *Stat. at Large*, Vol. 1 p. 101.

their proceedings and decisions by the regulations of the Continental Congress, Acts of Annual Assembly, English statutes prior to the fourth year of the reign of King James the First, and the laws of Oleron, the Rhodians and Imperial laws, so far as the same have been heretofore observed in the English courts of admiralty, save only in the instances hereinafter provided for."<sup>5</sup>

Jefferson, having resigned from the Continental Congress on October 7th, was at Williamsburgh on October 11, and moved for leave to bring in a bill for the establishment of courts of justice. This bill he drew, which was approved by the Committee, reported, and passed.<sup>6</sup> His provision for the Court of Admiralty as above quoted is in remarkable detail.—This act was again revised in 1779.<sup>7</sup>

The statute of Rhode Island of March, 1776, provided for a "court of justice, by and before such able and discreet person, as shall be annually appointed and commissioned by order of the General Assembly for that purpose, whose business it shall be to take cognizance of, and to try, any capture or captures, of any vessel or vessels, that may or shall be taken by any person or persons whomsoever and brought into said Colony."

The R. I. Act of July, 1780, is entitled "An Act establishing a Court of Admiralty in this State."

The statute of Maryland passed on May 25, 1776, was in more technical form. After reciting the late resolves of the Continental Congress regarding captures and seizures, it continued:

"Resolved, that a court of admiralty be established for the trial of such captures and seizures, with full power to take cognizance of all libels, on account of such captures and seizures, and to proceed to a final determination and decree thereupon, which court shall consist of a judge to hear and determine, a register to record the proceedings, and a marshal to call the said court and execute the several processes thereof."

Both before and after the Declaration of Independence the new Colonies or States had maritime courts, obviously for legalizing sea captures. As the port of New York was in the enemy's hands, that State had little occasion for a maritime court. However, following the lead of Congress, the New York Provincial Convention on July 31, 1776, authorized a Court of Admiralty for that State, with Robert Morris as judge.<sup>8</sup> He declined, and in August following,

<sup>5</sup>Henning, *Stat. at Large* Vol. 1. pp. 201, 202.

<sup>6</sup>Jefferson's Writings, Vol. 1. p. 29 (Randolph ed. 1830).

<sup>7</sup>Henning *Stat.* Vol. 10. p. 98.

<sup>8</sup>Legal and Judicial Hist. of New York, by Alden Chester, Vol. 1. p. 248.

Lewis Graham was appointed to that office. By the end of the year 1778 Admiralty courts were in the thirteen States.<sup>9</sup>

The method of appeal was not uniform. If the capturing vessel belonged to the State to which the captured property had been brought, an appeal only was provided to the highest court of that State. But if the captor's vessel had been fitted out, at the charge of the United States, or by citizens of another State, then the appeal could go to the Congress, or to the committee appointed by Congress for that purpose. This was specifically provided under the statutes of Massachusetts and of New Hampshire.<sup>10</sup> Apparently the civil juris-

<sup>9</sup>Maritime Courts were established in the Colonies and States, as follows:—

Massachusetts, Nov. 1, 1775, Virginia, January 20, 1776, Rhode Island, March 18, 1776, So. Carolina, April, 1776.

Connecticut, May, 1776, which authorized the County Courts to try captures, "that have, or shall be taken, and brought into said respective Counties."

Maryland, May 25, 1776, New Hampshire, July 3, 1776, New York, July 31, 1776.

No. Carolina, June 22, 1776, establishing Maritime Courts at the parts of Edenton, Bath, New Bern, and Wilmington.

Georgia, September 16, 1776, New Jersey, October 5, 1776.

Delaware, May 20, 1778.

Pennsylvania, September 9, 1778, establishing a Court of Admiralty for the part of Philadelphia, (which the British had held until June 18, 1778.)

See J. C. Bancroft Davis, Appendix XIX, to 131 U. S. Reports "Federal Courts, prior to the adoption of the Constitution"; also Jamieson, "Essays in Constitutional History", p. 10.

The British occupation of New York City prevented any captures from coming to this State Admiralty Court (as no appeals therefrom were ever taken to Congress.) After the adoption of the first New York Constitution in 1777, the State legislature provided in 1784 for a final court of appeal, formed with the President of the Senate, senators, chancellor, and the judges of the Supreme Court, or the major part thereof. This Court of Errors could hear appeals from the judgments of the Court of Probates or Court of Chancery "or of the Court of Admiralty, except in cases of captures." Act of November 23, 1784, Chap. XI, Section 10. Later the common law practitioners were inclined to curb this admiralty jurisdiction, which had acquired special odium, from having been the British tribunal for enforcement of its revenue laws in America. The legislature enacted for the State of New York a restrictive measure that closely followed the Statute of Richard II (1389). This measure, passed on February 14, 1787, was entitled—"An Act to prevent encroachments of the Court of Admiralty." It declared "That the Court of Admiralty of this State shall not meddle or hold pleas of anything done within this State, but only of things done upon the sea, as it hath been formerly used; and further that of all manner of contracts, pleas and quarrels, and of all other things done arising within the body of any county of this State, as well by land as by water, and also of wreck, of the sea, the Court of Admiralty shall have no manner of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas, and quarrels and all other things arising within the body of any county of this State, as well by land as by water, as aforesaid; and also all wreck of the sea shall be tried, determined, discussed and remedied by the laws of the land, and not before, nor in, or by, the Court of Admiralty."

A penalty of ten pounds was laid upon any "pursuer", who should carry his case into admiralty; but from this statute was excepted, libels, informations, or suits, concerning forfeiture of goods for nonpayment of duties. Laws of N. Y. 1787, Chapter 24; Vol. 2, Reprint of N. Y. Laws [1785-1787], p. 394.

<sup>10</sup>The New Hampshire Act for fitting out armed vessels "to defend the sea-coast, and erecting a court to try and condemn enemies' property", appears to have been very carefully drawn. It was not only to adjudge captures at sea, but provided that captures "on the high seas, or between high water and low water

diction of admiralty, so far as concerned appeals, was not included in these local statutes, which seem to have regulated prize causes only.

The Articles of Confederation of 1777 did not confer on the Continental Congress the power to create new courts in the Colonies, but the authority to make rules and to establish courts of final appeal. Article IX gave the power:—

“of establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated, of granting letters of Marque and reprisal in times of peace, appointing courts for the trial of piracies and felonies committed on the High Seas, and establishing courts for receiving and determining finally, appeals in all cases of captures.”

For the hearing of such appeals in prize causes Congress appointed a committee, which, as originally organized, consisted of James Wilson of Pennsylvania, Jonathan D. Sergeant of New Jersey, William Ellery of Rhode Island, Samuel Chase of Maryland and Roger Sherman of Connecticut.

Later in 1780, an act created what was termed “The Court of Appeals in Cases of Capture”, to which was given the jurisdiction formerly exercised by Congress, or its committee. It was also then enacted “that the mode of trial therein should be in accordance with the usages of nations, and not by jury.” If, in some States admiralty jurisdiction was exercised on the instance side in civil causes, there was no appeal to any common tribunal; so that at the time of the Federal Constitutional Convention, variances must have arisen between rulings in these different State tribunals. It does not appear that State admiralty judges were disqualified from holding other

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mark, and being brought into or lying within the colony aforesaid since the date aforesaid [April 19, 1775] shall be deemed and adjudged lawful prize.” It set up a court “by the name of the Court Maritime” to be held in the town of Portsmouth, or some town or place adjacent in the County of Rockingham.

Inasmuch as the Council both in Massachusetts and New Hampshire were then divided, the Council of the colony *or the major part of them*, were empowered to issue commissions with letters of marque and reprisal. Both in Massachusetts and in New Hampshire in about 1776 nearly all commissions purport to be by the “major part of the Council.”

The disposition of the proceeds of vessels, cargo or other property retaken from the enemy was minutely regulated.

“If they have been in the possession of the enemy less than twenty-four hours, then one-eighth part shall go to the use of the recaptors; if more than twenty-four and less than forty-eight hours, then one-fifth part shall go to the recaptors; and if more than forty-eight and less than ninety-six hours, then one-third part; and if more than ninety-six hours, one-half shall go to the recaptors; and in every case the residue to the owner or owners, unless such vessel or vessels shall after being so brought in be legally condemned as a prize, in which case the recaptors shall have the whole.”

Act passed July 3, 1776. Original Acts, of New Hampshire vol. 7, p. 11. Recorded Acts, vol. 3, p. 255.

judicial offices. Francis Hopkinson, when judge of the Court of Admiralty in 1787, also sat for five days in January of that year in the "High Court of Errors and Appeals of Pennsylvania," for which he received one pound *per diem* additional to the stipend of £500 per year as judge of the Court of Admiralty!

In 1846 the Supreme Court of the United States had before it the issue whether admiralty jurisdiction extended to a collision in the Mississippi River far above New Orleans. Being within the body of the county, it was sought to apply the later English rule, which had denied such jurisdiction over inland waters. After a historical review, beginning with the Colonial Vice Admiralty Courts before the revolution, Mr. Justice Wayne's learned opinion then referred to the proceedings in the Constitutional Convention of 1787, in which he said no trace of such a limitation of the admiralty appeared, and further remarked:—

"Besides nothing can be found in the debates of the Convention, nor its proceedings, nor in the debates of the Conventions in the states upon the Constitution, to sanction such an idea. It is remarkable that the words 'all cases of admiralty and maritime jurisdiction', as they now are in the constitution, were in the first plan of government submitted to the Convention, and that, in all subsequent proceedings, and reports, they were never changed."<sup>11</sup>

In the year 1846, when this dictum was uttered, many details of the Convention had not become public. When in September 1787, the Convention closed, its Secretary, William Jackson, made a holocaust of the papers on his table. The daily deliberations over the formation of the Constitution did not all come to light from journals and private memoranda for almost another century.

It was on May 29th, 1787 that the Constitutional Convention first received the plans or outlines for the organization of the New Government. Governor Randolph, of Virginia, first presented what was called "the Virginia Plan", and later on the same day, Charles Pinckney of South Carolina, laid before the Convention a draught, that was distinguished as the "Pinckney Plan." Pinckney had served as a delegate in the Continental Congress, as chairman of a subcommittee to report amendments to the Articles of Confederation, from which experience he was well equipped to offer proposals to this Convention. His draught in Article X had a clause:—

"S. and H. D. in C. ass. [an abbreviation for Senate and House of Delegates in Congress assembled] shall have the exclusive right of instituting in each State a Court of Admiralty, and ap-

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<sup>11</sup>Waring v. Clarke, 5 Howard, 441, 16 Dec. of S. C. U. S. 456 at p. 462.

pointing the judges, etc. of the same, for hearing and determining all maritime causes, which may arise therein respectively."<sup>12</sup>

It will be seen, that this went but little beyond what was already an established procedure under the Articles of Confederation.

The original document of the Virginia Plan has not been preserved. But in Madison's records for May 29, 1787 this judiciary article presented by Randolph was taken down as follows:—

"9. *Resolved*, That a national judiciary be established to consist of one or more Supreme Tribunals and of inferior tribunals to be chosen by the National Legislature to hold their office during good behavior, and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution; that the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the Supreme Tribunal to hear and determine in the *dernier resort*, all piracies and felonies on the high seas, captures from an enemy, cases in which foreigners or citizens of other states applying to such jurisdictions, may be interested, or which respect the collection of the National Revenue, impeachments of any national officers, and questions which may involve the national peace and harmony."<sup>13</sup>

On June 13th the committee of the whole reported on the propositions of Mr. Randolph. In such report the following changes appear:—

"12. *Resolved*, That the National Legislature be empowered to appoint inferior tribunals.

13. *Resolved*, That the jurisdiction of the National Judiciary shall extend to cases which respect the collection of the National revenue impeachments of any National officers and questions that involve national peace and harmony."<sup>14</sup>

On June 15th Governor Patterson reported the resolutions of the "New Jersey Plan." The fifth resolution provided for a supreme tribunal:

"That the judiciary so established shall have authority to hear and determine in the first instance on all impeachments of Federal officers, and by way of appeal in the *dernier resort* in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts

<sup>12</sup>The Records of the Federal Convention of 1787, edited by Max Farrand, 1921, vol. III, p. 608.

<sup>13</sup>I Farrand Records, p. 21.

<sup>14</sup>I Farrand Records, p. 231.

for the regulations of trade or the collection of the Federal Revenue."<sup>15</sup>

On June 18th Hamilton made his famous speech, in which was an outline of eleven articles; of these the following concerned the judiciary:—

“VII The Supreme judicial authority to be vested in judges, to hold their office during good behavior, with adequate and permanent salaries. The Court to have original jurisdiction in all cases of capture, and an appellate jurisdiction in all cases in which the revenues of the General Government, or the citizens of foreign nations are concerned;

VIII The legislature of the United States to have power to institute courts in each state, for the determination of all matters of general concern.”<sup>16</sup>

Later in the Convention, the further development of these proposals was referred to the Committee of Detail. This Committee first reported on August 6th.

An interesting discovery within the last forty years was a manuscript among the papers of George Mason which appears as an out-

FACSIMILE OF THE ARTICLE

Art. The jurisdiction of the supreme tribunal shall extend

- 1. to all cases, arising under laws, passed by the general legislature.
- 2. to impeachments of officers; and
- 3. to <sup>such</sup> other cases, as the national legislature may assign, as involving the national peace and harmony;

in the collection of the revenue,  
in disputes between citizens  
of different states; off

in disputes between different  
states; and

in disputes, in which sub-  
jects or citizens of other  
nations are concerned.

in Cases of Admiralty Jurisdiction

- But this supreme jurisdiction shall be appellate only; except in those instances, in which the legislature shall make it original and the legislature shall organize it

in disputes between State  
a Citizen or Citizens  
of another State.

[From the Growth of the Federal Constitution," by William Montgomery Meigs Esq., published by Messrs. Lippincott & Co., Philadelphia, 1900; here reproduced by kind permission of Mr. Meigs, and the courtesy of Messrs. Lippincott, the publishers.]

<sup>15</sup>I Farrand Records, p. 244.

<sup>16</sup>I Farrand Records, p. 292.

line of the proposed Constitution, mainly in the handwriting of Randolph, in which was a revised judiciary article. It makes clearer the steps in the process of forming the completed measure. This paper bore marginal notes and insertions by another hand.

The late Moncure Conway, biographer of Edmund Randolph, who first studied this document of nine folio pages, originally attributed these notes to Dr. McClurg, Randolph's colleague;<sup>17</sup> but Paul Leicester Ford, after examination of this added writing, pronounced it "to be by Edward Rutledge"<sup>18</sup>—obviously a slip, confounding the two brothers, as Edward Rutledge, though a leader in the Continental Congress, was not a member of the Constitutional Convention. These notations were by John Rutledge, one of the Committee of Detail, who later succeeded Jay, as Chief Justice.<sup>19</sup>

Such additions were probably made in committee. The interlineation "& in Cases of Admiralty Juris<sup>dn</sup>." is so fine and minute between the original lines, that the circumstance of a different hand escaped Mr. Conway's notice. Referring to this article, he stated:—"To this Rutledge adds:—'In disputes between State and Citizens, or citizens of another State.'" It will be seen that those words are boldly set out in the margin; while the interpolation as to admiralty jurisdiction was so obscurely placed, that Mr. Conway took it as written by the author of Randolph's draught.<sup>20</sup>

How then did it happen, that Mr. Justice Wayne, whose opinions on this subject of admiralty have a deservedly high repute, should have erred in this point, on which his argument so strongly relied? This brings us to the sources available in the period of 1846. In 1819, when John Quincy Adams was engaged upon a publication of the proceedings of the Constitutional Convention, he wrote to Pinckney for a copy of the Pinckney Plan. Pinckney replied:—"At the distance of nearly thirty-two years it is impossible for me now to say which of the four or five draughts I have, was the one; but enclosed I send you the one I believe was it. I repeat, however, that they are substantially the same, differing only in form, and unessentials."<sup>21</sup> This enclosure Adams printed; but Rufus King and Madison, then living, privately declared that that document then published, was not the same as that which Pinckney had presented to the Convention.<sup>22</sup> Later criticisms by Professor Jamieson in his *Studies of the History of the Federal Convention* (pp. 117, 120); and Professor

<sup>17</sup>Scribner's Magazine, September, 1887.

<sup>18</sup>Life of Edmund Randolph, by Moncure D. Conway, p. 75 (N. Y. 1888).

<sup>19</sup>"The Growth of the Constitution", by William M. Meigs, Phila. 1900.

<sup>20</sup>Life of Randolph, p. 82.

<sup>21</sup>III Farrand, Records, p. 595.

<sup>22</sup>III Farrand, Records, pp. 601, 602.

McLaughlin have clearly established that this draught published by Adams had "many afterthoughts", and did not represent this original plan.<sup>23</sup> In Paragraph 9 of this supposed Pinckney draught, was this summary of a judiciary article:—

"One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States or affecting ambassadors, other public ministers, and consuls. To the trial of Impeachments of Officers of the United States. *To all cases of Admiralty and Maritime jurisdiction.*"<sup>24</sup>

Naturally, on the appearance of this Convention record, edited by the authority of one who was soon to be President of the United States, its accuracy was not questioned; so that Mr. Justice Wayne could well believe that the words "All cases of Admiralty and Maritime jurisdiction, as they now are in the Constitution", had actually been in the first plan of government that Pinckney had submitted to the Convention. If it be suggested that the report of the Committee on Detail presented on August 6, 1787, might be what Mr. Justice Wayne had in mind, then attention must be directed to the use and significance of the expression "plan of government" in the convention proceedings. As pointed out, there were three quite different "plans." The report of the Committee on Detail was not regarded or called a "plan," but a resulting revision and formulation from the earlier proposals or plans.

Considering the present importance of a federal admiralty system, we should expect that some member in the Convention would have formulated an admiralty clause, early enough to figure in a proposed plan, or article to define the Federal judiciary.

But from study of all the records and private journals that have come down to us, it must be admitted that this initiative was by Rutledge, probably when nearing the last work of the Committee of Detail; so that when he inserted these words "In cases of Admiralty jurisdiction", evidently his associates accepted them, without controversy, as a needed addition. The importance of the civil jurisdiction, including "all cases", was not then perceived. Yet the experience of prize appeals, and the conflicts in the separate State courts, had prepared the Convention to accept a uniform Federal system, as essential to maritime commerce. Hamilton in the *Federalist* found it sufficient to say that cases of admiralty and maritime

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<sup>23</sup>American Historical Review, vol. IX, pp. 725, 741. But see "the Mystery of the Pickney Draught" by Charles C. Nott, N. Y. (1908).

<sup>24</sup>III Farrand, Records, p. 600.

jurisdiction are "the fifth of the enumerated classes of causes proper for cognizance of the National Courts."<sup>25</sup> It was a quarter of a century later, that Story showed the wide extent of this Federal commercial jurisdiction, in *De Lovio v. Boit*.<sup>26</sup>

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<sup>25</sup>The *Federalist*, No. 80 (Ford's ed. 1908) p. 537.

<sup>26</sup>2 Gallison reports, 398; Federal Cases, No. 3776.

In research into Colonial records of Admiralty Courts in America, I am glad to acknowledge great aid from the learned investigations of Hon. Frederic Dodge of Boston.