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PRIVATEERING IN THE COLONIAL CHESAPEAKE

A Thesis

Presented to

The Faculty of the Department of History
The College of William and Mary in Virginia

In Partial Fulfillment

Of the Requirements for the Degree of

Master of Arts

by

David Lester

1989

APPROVAL SHEET


This thesis is submitted in partial fulfillment of
the requirements for the degree of

Master of Arts



Author

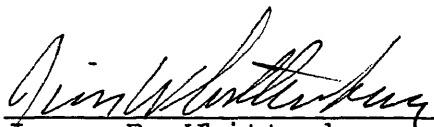
Approved, August 1989



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TABLE OF CONTENTS

	Page
ABSTRACT	iv
INTRODUCTION	2
CHAPTER I. THE ECONOMICS OF PRIVATEERING	4
CHAPTER II. THE REGULATION OF PRIVATEERING	24
CONCLUSION	50
BIBLIOGRAPHY	57

ABSTRACT

This study focuses on the economic and legal aspects of the involvement of privately owned vessels from the Chesapeake Bay region in maritime warfare from their first use through the Revolution.

The goals of the nation-state in instituting privateering are outlined and military, social, and economic goals are shown to be interrelated.

The blurred distinction between piracy and privateering is viewed as a result of the amount of the prize-ship's value claimed by the government as court fees and royal droit.

Examples of privateers and prizes through the Seven Years' War are given, illustrating the cyclical nature of privateering during a conflict. American resources on the eve of the Revolution, including the types of vessels used in privateering, are discussed.

The average values of recorded prizes taken by Chesapeake privateers during the American Revolution and the division of prize money among crews are combined and compared to merchant seamen's wages. Given a successful voyage, privateering held a three-to-one economic advantage for the common sailor over merchant service. Relative risks of the professions are weighed with little to choose between the two.

The regulation of privateering is traced from the earliest English admiralty courts, through the colonial vice-admiralty system. Conflicts between non-jury admiralty law and English common law led ultimately to colonial grievances concerning abridgement of right to jury trial.

American efforts during the Revolution to redress this situation by using juries in admiralty prize cases proved abortive. Eventually, all American admiralty courts reverted to non-jury trials. The first federal court was convened to try interstate prize cases and admiralty appeals.

PRIVATEERING IN THE COLONIAL CHESAPEAKE

INTRODUCTION

Privateering developed as a means for nation-states to fulfill three interrelated goals. The legitimization of piracy through state regulation was intended to: 1) co-opt pirates who were indiscriminately draining national economies for individual gain, 2) provide a cheap means to deplete an enemy's maritime wealth, and 3) increase national wealth through a governmental claim to a share of the value of captured commerce. The common factor tying the three goals together was economic. From the simple sailor to state policy-makers, economic considerations were the driving forces behind privateering. Unfortunately, the economic advantages could only be realized during a period of formal armed conflict. While the second goal became irrelevant in peacetime, the first and third were continually active factors in policy formation and would often weigh in declarations of war.

The destruction of commercial shipping was second nature to American seamen by the time of the Revolution because of the long tradition of privateering in the New World. The granting of "letters of marque and reprisal," which commissioned privately-owned ships to prey upon vessels and property of an enemy state, had been used since the days of Drake. During the American Revolution it was

the predominant manifestation of colonial sea power, having a far greater impact on British shipping than the few ships of Paul Jones's Continental navy.

While never as prevalent as in New England, privateering in the Chesapeake was extremely important to the economy of that maritime region. When virtually all other forms of economic stimulus were cut off by blockade, privateering became the one investment available to Chesapeake merchants. It was also the only source of employment for the mariners of the region. This group (and the social effects of privateering) cannot be separated from society as a whole because many landsmen were attracted to the sea for the first time as privateers. The political, economic, and social forces drawing these men into the dangers of the profession can be approached through the questions of who became privateers and why they did so. The answers provide a clearer picture of the social context in which they lived.

Beyond the military, social, and economic effects of privateering, important legal issues include international law and the role of commerce destruction in the escalation of disputes into outright warfare, admiralty law (which determined the distribution of prize vessels and goods), and constitutional law. The latter involved a debate over the sovereignty of the State of Virginia in the taxation of prizes and the creation of the first federal court of appeals to review admiralty cases.

CHAPTER I
THE ECONOMICS OF PRIVATEERING

Considering the impact of privateering on the eighteenth-century Chesapeake, it is not particularly well studied. At least one of the reasons for this is the understandable confusion between piracy and privateering. While privateers were subject to regulations concerning the nationality and type of vessel they could take and the admiralty court's condemnation of the capture as a legal prize, it was common for these legalities to be ignored, especially at the end of a war when increased piracy accompanied the legal termination of privateering. Instead of returning to life on land or as merchant seamen, many privateers whose livelihood had been taken away by peace crossed the fine line into piracy, attacking vessels regardless of nationality.¹

The famous case of Captain Kidd illustrates the confusion. He sailed from Plymouth, England in 1696 with a letter of marque, one-tenth of his profits to go to the crown. Evidently, he considered this too large a cut, for he cruised the Indian Ocean for the next three years plundering the vessels of any nation. His subsequent capture in Boston and trial and execution in England will forever blur the distinction between piracy and

privateering.² Kidd notwithstanding, the vast majority of privateers did not become pirates and obeyed all regulations.³

One of the motivations toward piracy was the high percentage of the value of privateers' prizes which went to the officers of the courts. As of 1708 the judge's fee was 7 percent, the advocate general's 5 percent, the marshal took 1.5 percent, and the appraiser and vendue master each received 2.5 percent. Some courts began remitting fees when they recognized that inflated court costs were increasing the temptation to turn pirate or to send prizes to less expensive courts.⁴

The primary reason for a lack of privateers or for those commissioned to turn pirate was the share of a prize claimed by the crown. The beginning of each conflict required the renewal or modification of the droit legislation. Before 1702 the royal droit was one-tenth the value of the prize. In 1702 a need for more revenue or a decision that privateers were not needed in great numbers led to the droit's being raised to one-fifth. Likewise in 1705 it was raised to one-third. Including customs duties and court charges, the government's share could total as much as 60 percent of the value of the prize.

In 1708, with Queen Anne's War, the droit was waived completely. The total prize value to be divided between the owners, captain, and crew of a privateer was thus immediately increased by one-half. With Keynesian logic,

the third economic goal of increasing the national wealth was forsaken in favor of the second, that of depleting the enemy's wealth, as the incentive to fit out vessels as privateers and to actually deliver any prizes to an admiralty court was strengthened.⁶ By 1715 the excessive court costs were addressed by royal instructions sent to Virginia which limited the charges levied by the officers of the colony's admiralty courts to ten pounds per prize.⁷

On August 20, 1739, on the eve of King George's War, William Byrd II wrote to Sir Robert Walpole urging the crown to again waive its droit. He also argued against the reestablishment of a Prize Office, citing the "exorbitant fees" charged by the "Vultures which hovered for prey about the Office" during the reign of King William. Byrd then charged some politicians with being apprehensive about the encouragement of privateering against Spain lest they bring the French "upon our backs." Byrd hoped that this would happen, because "if they do not, their Privateers both in Europe, and America will take Spanish Commissions, & so annoy our commerce as much, as if we were in actual War with them." He ended his correspondence with the exhortation to "trust altogether to our Wooden Walls."⁸ Accordingly, Parliament enacted legislation in 1740 that waived the droit except for the normal customs and duties and the fees of the judges and officers of the prize courts.⁹ From King George's War through the Revolution the total cost of disposing of a prize was about 10 percent of its value.¹⁰

At the time Byrd was writing, the activities of the privateers themselves were increasing international tension to the point of war. In 1739 the Spanish refused to reimburse the British £95,000 for vessels "unjustly seized." Governor William Gooch of Virginia was therefore authorized to grant commissions of marque and reprisal against the Spanish in the West Indies.¹¹ On June 10, 1741 the Virginia Council authorized the impressment of two vessels to be outfitted as private sloops of war to defend the colony from Spanish privateers rumored to be in the area. These colony-sponsored privateers were to be commissioned for three months and to carry sixty-to-seventy men each. The sailors were to be paid forty shillings per month and the owners of the vessels compensated at the rate of fourteen shillings per ton burthen per month.¹²

On September 26, 1745 the Virginia Gazette carried an advertisement announcing the completion in Norfolk of the Earl of Stair, a snow privateer of 150 tons burthen, with eighteen carriage and thirty swivel guns (large blunderbuss-type weapons mounted in swivels on the bulwarks and mast tops and used against the enemy crew at short range), and a crew of 150.¹³ It is significant that this was a new vessel built as a privateer, while the vast majority of such vessels were modified merchantmen.

In the same year a French prize, the Elizabeth, was condemned by the admiralty court in Williamsburg. Her cargo included 282 hogsheads of sugar, 4,000-5,000 weight of

indigo and a parcel of choice mahogany planks. The prize money was shared by two privateers who were sailing in consort, for any vessel within sight of the prize at the time of its capture was entitled to a share under admiralty law.¹⁴ Presumably, even the appearance of another vessel over the horizon would influence the surrender of the prize. One of the responsibilities of the prize court was to determine the percentage of influence and the corresponding share due each vessel.

Also in 1745, American privateers were beginning to cruise the waters of the West Indies and to send their prizes into ports there. A Spanish ship worth £100,000 was sent to Jamaica, and a Swedish ship carrying 300,000 pieces of eight was taken by the privateer sloop Henry and sent to Barbados in that year.¹⁵ The use of the West Indies as a rich cruising territory became almost as important as during the American Revolution, when prizes were sent to French and Dutch ports there.

In April 1745 the privateer Raleigh sent a French prize valued at £5,000 into St. Kitt's.¹⁶ However, a possible drop in the profitability of privateering toward the end of King George's War is suggested by the advertisement for sale of both Raleigh and Earl of Stair in August, 1746.¹⁷ Also, only one prize appears in the Virginia Gazette after 1745.¹⁸ As enemy merchant shipping was captured in the first months of war, insurance costs would rise and merchants would be more reluctant to send their ships to

sea. It seems likely, then, that the number of possible prize ships dropped off considerably after the first year of war and subsequent privateering cruises took fewer prizes and were less profitable.¹⁹

Prior to the outbreak of the Seven Years' War the presence of privateers again strained international relations. In 1755 a letter from London, reprinted in the Virginia Gazette, claimed that French privateers would be met by the same from England and that such proceedings might be looked upon as open hostilities, occasioning a "Rupture between the principal Powers."²⁰ The rupture occurred, but French privateers were met with few from the Chesapeake during the Seven Years' War. Prizes are scarcely mentioned in the Gazette for 1756-63. One privateer was advertised as fitting out for sea in the summer of 1756. Four prizes were listed, three taken in 1757, quite early in the war; the fourth details a second distribution of prize money in 1766, the capture date is not given.²¹

This dearth of prizes notwithstanding, by the eve of the Revolution the Americans had the experience and resources necessary to mount a successful privateering campaign. One-third of all vessels in British trade at the time were American-built. The same proportion of British seamen were American, many of whom had seen action on colonial privateers or naval vessels.²²

A few privateers were built for the job. Most, however, were hastily converted from merchant ships to

capitalize on the opportunity for a different kind of profit. Colonial merchant vessels were particularly well-suited to such conversion. The avoidance of British duties through smuggling was widespread before the Revolution. While smuggling honed American seamanship skills useful in privateering, American shipbuilders began to sacrifice cargo capacity for the speed needed to outrun the revenue cutters. American merchant vessel hulls were V-shaped rather than the traditional U-shape, and carried oversized masts to carry extra sails.²³

Chesapeake shipyards had built 12.5 percent of the total tonnage of shipping in the colonies by 1769.²⁴ Among these were found the types of vessels most useful and successful in privateering. Between 1756 and 1775 386 vessels were built in Maryland. Schooners represented the largest group of these - 111. There were 98 ship-rigged vessels, 74 sloops, 66 brigs, and 37 snows. The Virginia Gazette carried advertisements for 100 Virginia-built vessels between 1736 and 1766. Of these, 38 were sloops, 24 were brigs, 20 were schooners, 12 were snows, and 6 were ships.²⁵

A ship was a three-masted, square-rigged vessel up to 250 tons burthen, carrying up to 100 hands. It was not the most desirable vessel because its square-rig required too many crewmen to handle and it was not as nimble as a fore-and-aft rig. An example was the Buckskin, out of Maryland, with a crew of 100 and twenty-eight carriage guns,

making her the largest privateer out of that colony.

The brig was a smaller two-masted vessel of square rig, eighty of which were commissioned as privateers by Virginia and Maryland. An example is the Sturdy Beggar with a crew of 80 and fourteen guns. A popular variant was the brigantine, which had a gaff-rigged fore-and-aft mainsail replacing the brig's square mainsail. Virginia and Maryland also commissioned eighty brigantines during the Revolution.

The snow was a small brig with a trysail mast behind the mainmast. It was not a particularly popular vessel. A sloop was a small single-masted vessel, handy and shallow of draft with a removable centerboard, it was popular for evading heavier enemy ships in the shallow waters of the Bay. The Baltimore Hero sloop was just fifty tons burthen.²⁶ Small galleys, barges, and whaleboats, known as "spider chasers" were used in the more protected waters of the Bay and its tributaries. These could carry a light carriage gun as well as swivels in the bow, and often four or five boats would work in consort to take an anchored ship of larger size.²⁷

The most popular type of vessel among Chesapeake privateers was the topsail schooner; 40 percent of Maryland commissions were for this type of ship.²⁸ Fore-and-aft rigged on both masts, the schooner's sails could be trimmed from the deck, and she could sail closer to the wind than any square-rigger. The schooner thus needed to make fewer tacks when sailing to windward, and she had the agility to

come about quickly when the tack was made. These qualities, plus the ability to set a square main-topsail for additional speed when running before the wind, often meant the difference between a prize-winning cruise and coming home empty-handed. The schooner Harlequin, with only six swivel and no carriage guns and a crew of just twenty-one, was able to take a £20,000 prize in December 1776.²⁹ The topsail schooner was the immediate ancestor of the Baltimore Clipper, famous for its speed as a merchant vessel. The average crew size for a topsail schooner privateer in the mid-eighteenth century was fifty-four.³⁰

The division of prize money among the crew was made according to an agreement signed by the owners, captain, and each crew member. The percentage retained by the owners varied from one-third to one-half of the proceeds, depending on whether or not seaman were in demand and whether the owners provisioned the vessel at their own expense rather than on credit to be paid out of the prize funds. A surviving crew agreement of 1762 for the privateer Mars provides that one-half of the prize money was to go to the owners, for they completely provisioned the ship. The rest was divided into shares as follows: the captain received six full shares; the lieutenants and master, three shares each; captain's clerk, mates, steward, prize-master, gunner, boatswain, carpenter, and cooper, two shares each; gunner's mate, boatswain's mate, doctor's mate, carpenter's mate, and cooper's mate, one and one-half shares each. The doctor

received three shares plus an allowance to keep the medicine chest filled. The remainder of the crew received one share each. Provision was made for the shares of any man killed to be paid to his executors, and those who lost a limb were entitled to the equivalent of 600 pieces-of-eight at six shillings each before the division of the prize money. A bonus of 40 pieces-of-eight was won by the crewman who first sighted a vessel later taken as prize.³¹

For the common seaman, then, the motivation toward privateering was strongly, though not completely, economic. His chances for profit rode solely on finding and capturing prizes, but his risk involved not merely his livelihood but his life and limbs. The chances that a privateering voyage was successful appear good. Between two and three thousand American privateers are estimated to have sailed during the Revolution.³² The records of the Virginia admiralty courts were burned, but trial libels published in six other states list over twenty-one hundred prizes.³³ Not all privateers were as successful as the Enterprise of Baltimore which had taken a total of eight prizes by the end of 1776, or the Marquis Lafayette which took a single prize worth \$350,000 in 1781.³⁴ Some were taken by the Royal Navy or run aground, some fought pitched battles with British or Tory privateers, or returned empty-handed, but the aspiring privateersman could reasonably expect to share in at least one prize.³⁵

The Virginia Gazette cites fifty-one prizes taken by

Virginia and Maryland privateers during the Revolution. Of these, thirteen were valued by estimate or by the actual sale price of the condemned vessel and cargo. The values range between £2400 and £100,000, with an average prize value of £21,600. These figures do not, of course, take into account prizes taken by Chesapeake privateers and sent into ports in other colonies. While it is presumed that prizes would, if possible, be sent into the home port for condemnation, this was not possible when the British fleet closed the Bay. Also, the French West Indies ports were "crowded with cruisers and merchantmen belonging to these states," and American prize agents sold many condemned vessels there.³⁶ Given the incompleteness of the data, then, the total value of the fifty-one prizes at just over £1,100,000 is a conservative estimate.

Following the Mars agreement and taking the average prize value of £21,600, the owners and crew would each share £9,720 (allowing for 10 percent court costs). Division of the prize money among a fifty-four-man topsail schooner crew would require seventy-nine shares, each of which would be valued at about £123.

At the time of the American Revolution an able seaman could make five pounds per month and an experienced mate seven pounds in a merchantman.³⁷ Over a seven-month period, the average length of a cruise, a common privateer would have made three and one-half times the pay of a merchant sailor.³⁸ Balanced against this is the estimate that

one-half of all those actively engaged in privateering were killed, injured, or captured.³⁹

The life of a privateer was not much more hazardous than a merchant seaman's, however, for merchantmen were also shot at and captured. In fact, privateers took pains to avoid situations which might lead to casualties. Privateers avoided gun duels because their great advantage in capturing an enemy vessel was not their cannon, which could badly damage a valuable prize. They carried lighter cannon than a warship of comparable size because they tended to be broad in the beam. Warships were built narrower in the beam at the gun deck level to keep the weight of the heavy guns centered. The typical Chesapeake-built ship had the low freeboard used in calm southern seas; a very heavy weight of guns run out to leeward in a strong wind would have likely driven the ports under. A privateer was topheavy in spars already and, in any case, her light timbers would not have stood the recoil from heavy cannon.⁴⁰

Capturing a prize by fouling and boarding was not favored by privateers either. Boarding was a dangerous procedure in the calmest of seas, collisions were uncontrollable and spars and rigging (the bread and butter of the privateer) could be fouled and lost. It was not the business of the privateersman to get himself killed in a heroic charge across blood-spattered decks. Rather, the privateer used his superior manpower to wear down his opponent in a long chase and overawe him with a few

well-placed near-misses into lowering his flag. Merchantmen were notoriously short-handed; owners were loath to pay for more than the minimum eight crewmen per mast necessary to sail a square-rigged vessel. Thus, the privateer crew generally held a five-or-six-to-one advantage over their adversaries.⁴¹ Merchant crews, exhausted by the constant hard work of a long passage, would have been hard-pressed to work a defensive gun or two and to continue to sail the ship.

Large crews made for light work aboard privateers, and the fact that only a fraction of the crew was needed to work the rigging and sails led the Continental Congress to spread the wealth among non-seamen by requiring that one-third of all crewmen be landsmen with no seagoing experience.⁴² Apparently, the fresh air of a sea voyage, coupled with financial opportunity, was too good to pass up. Virginia soon had to enact legislation forbidding the distribution of prize money by admiralty courts to privateers whose crew included known deserters from the state or Continental armies, charging the owners a £500 fine.⁴³

In October 1775 Silas Deane, the American representative in Paris, succinctly stated the economic basis of privateering: "At least Ten Thousand Seamen are thrown out of employ...these with their owners...cannot possibly long rest easy...their ships rotting and their Families starving...they will pursue the only method in their power of indemnifying themselves, and Reprisals will

be made."⁴⁴ This establishes the growth of privateering as primarily defensive in nature, a reaction to the loss of other means of survival. The capitalist impulse to reap windfall profits was balanced by high risk.

Because the Chesapeake was so easily blockaded, the region's shipping was reduced by 75 percent by 1777.⁴⁵ By 1779 the merchants of Baltimore decided to lay up all of their vessels due to British privateers.⁴⁶ A picture emerges of the large fleets of merchantmen sitting at anchor, unable to move their goods, until some owners realized that the only way to save their investments was to outfit them as privateers. Not only were the ships idle, but the capital to fit them out and the sailors to man them were also. A letter from a citizen of the British trade port of Liverpool reprinted in the February 26, 1779 Virginia Gazette illustrates the case. After claiming a clear profit of £3,000 for each owner of the forty-seven privateers sent out by the city, he wrote: "The privateering trade is the best trade going on at this time, for we have but little other. Half the people must have been bankrupt, had it not been for the great success our armed ships have met with."⁴⁷ One month later, the total profits of Liverpool's privateers (then numbered at fifty-seven) was put at £1,200,000 sterling.⁴⁸

The growth of privateering was probably cyclical during any conflict. The vast majority of prize citations in the Virginia Gazette are for the year 1776, when British

merchant shipping was most vulnerable. After suffering large losses, British merchants would have laid up their vessels as Baltimore's did and eventually turned to privateering themselves. Thus, the boom in Liverpool privateering occurred in 1779. By September of that year, however, a British army official was quoted as saying that privateering from the British islands was almost at an end.⁴⁹ That this was true was due more to the lack of potential American prizes than to an effective American naval defense. Military circumstances did have an effect on economic cycles, however. Chesapeake privateering ceased during the British fleet's stay, but revived at a reduced level with the arrival of the French.⁵⁰

It appears that the total profits of Chesapeake and Liverpool privateers cancel each other out, and indeed this was probably true of the total profits of the privateers of each country.⁵¹ On the smaller scale, however, the flow of capital caused by privateering kept the otherwise stagnating American economy and the ship owners, builders, riggers, sailors, and admiralty judges alive. The case of Liverpool notwithstanding, the British economy, not subject to blockade, would have survived merely through the use of convoys of merchant vessels. British insurance rates rose to 30 percent for vessels in convoy and 50 percent for those sailing alone by 1776, but the losses would be made good.⁵² For the Americans, under blockade, privateering became a major method of bringing goods and capital into the country.

In this sense, it aided the Americans more than the British.

The question remains as to the significance of privateering in the Revolution. It is estimated that 58,400 Americans served on privateers during the war.⁵³ That the British were reluctant to include them in prisoner exchanges and shipped them to prison hulks in England indicates the importance attributed to them.⁵⁴ Privateers themselves took 16,000 prisoners and well over \$12 million worth of goods and shipping.⁵⁵ Chesapeake-based privateers contributed their share; of the 1,697 American privateers listed in the Naval Records of the American Revolution, Virginia alone had commissioned 64 by 1783.⁵⁶

All of these accomplishments were probably cancelled out by British privateers and the presence of the Royal Navy. The real progress which privateering made toward the American victory was in the disruption of the British line of supply, the economic stimulus through both outlet for investment and input of goods, and in showing the flag to the world. The British were undertaking an offensive land campaign over a huge continent and thousands of miles from home. The fact that a shipment of musket flints did not arrive on time may have had an impact far greater than the value of the cargo in dollars and cents. That France and Spain could clearly see the little ships harassing the British everywhere may have played a role equal to the victory at Saratoga in convincing them of the Americans' will to go the distance.

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54. Walter Drew McCaw, "Captain John Harris of the Virginia Navy," Virginia Magazine of History and Biography 22 (January 1914): 161.

55. Maclay, A History of American Privateers, p. ix.

56. Campbell, "The Case of the Three Friends," p. 193.

CHAPTER II
THE REGULATION OF PRIVATEERING

The legislation and jurisprudence which governed privateering can be viewed in terms of the three economic goals of the nation-state. The first, the subordination of pirates to a national objective, involved the legitimization of privateering and its clear distinction from piracy. This distinction allowed the sponsoring state to offer legal status to those who would restrict their captures to enemy vessels and fulfill the requirements of the prize courts. The advantages to the privateers of being legally recognized rather than hunted outlaws were balanced against the narrowed range of potential prizes, the necessity of returning the prize to a friendly port, the time and money required by the court to condemn the prize as legal, and the share of the prize claimed by the sponsoring government. In many cases the costs and benefits did not favor the legal practice and the privateers reverted to piracy. Laws were also modified over time according to the perceived need of the sponsoring country to encourage large numbers of privateers by reducing the governmental claim to prizes.

The first step in the legitimization of privateering was the assumption that the right of war is exclusive to the sovereign state and the corollary that private citizens are

under no legal obligation to weigh the justice of a war. Thus, the private citizen could not lawfully commit hostile acts, such as commerce raiding, except under the commission of a sovereign nation, but could do so with a safe conscience under such commission. Laws formalizing these assumptions were first passed by France, Spain, and England in the fifteenth century.¹

The right to seize hostile property in self-defence eventually became regulated through the issuance of letters of marque and reprisal. These were originally intended for merchants who were authorized to fit out privateers in reprisal for specific losses to enemy vessels or debts owed by enemy merchants. Later, the reprisal reference was forgotten and the term "letter of marque" (or "mart") came to be associated with armed merchantmen authorized to take prizes they might encounter en route. Technically, letters of marque were distinct from cruising privateers, but even contemporaries used the term for both, as well as for the actual commissions they carried.²

The development of admiralty courts in England pre-dated the codification of privateering. The admiral as fleet commander had administrative and disciplinary control over those under his command, but until the second half of the fourteenth century he had no judicial authority. Port or marine courts administered maritime law among merchants and seamen. A court of admiralty first appeared between 1340 and 1357 to deal with the many piratical acts which had

been charged against English vessels by foreign merchants.³

In 1357 the king-in-council refused to interfere with the admiral's sentence in a prize case concerning captured Portuguese property. Precedent was thus set of admiralty jurisdiction in prize cases and of appeal from the admiralty court to the king in council.⁴

Almost from the beginning, a distinction developed between English common law and admiralty law procedure, which was based on foreign civil law which did not try by jury. The Black Book of the Admiralty, a virtual handbook of court practice, substantiates this orientation for the admiralty's jurisdiction in cases of piracy, royal fish, navigational obstructions, shipwreck and salvage, shipping, mercantile and criminal cases. All of these areas had previously been under the jurisdiction of the common law courts. There was, understandably, a good deal of opposition by these courts to giving up their jurisdictions, as well as from citizens involved with the new admiralty courts who claimed their rights under Magna Carta were being violated. In 1371 a petition to Parliament complained of people being forced to answer charges in an admiral's court without benefit of a common law jury.⁵

In 1389 and 1391 Parliament attempted to distinguish more precisely between admiralty and common law jurisdiction. The first statute commanded that the admiralty not meddle in "anything done within the realm" but only in "a thing done upon the sea." The second provided

that all contracts, pleas, and quarrels rising within the counties (land or sea) would be dealt with by the common law system, and only death or mayhem upon ships at sea or at anchor in great rivers would be adjudicable in admiralty court. These attempts to restrict the admiralty courts' encroachment on the jurisdictions, franchises, and profits belonging to the king and the lower courts were largely ignored because of the expeditious nature of the non-jury admiralty courts. Admiralty law had the further advantage of using the process in rem by which the plaintiff had a double chance of satisfaction by litigating against both the defendant and the vessel and cargo in question; if the pirate was not caught, the vessel was impounded; if he was, he could not divest himself of such property.⁶ In 1450 Parliament finally imposed fines on those who continued to take civil suits to admiralty courts.⁷

In 1536 Henry VIII created the office vice-admiral and with it the jurisdiction of vice-admiralty courts. Appointed for maritime counties, the vice-admirals of the coast were commissaries under patents issued by the lord high admiral. They were to check the salvaging activities of coastal inhabitants, arrest vessels and inventory the cargoes of ships subject to litigation, examine witnesses and execute sentences in cases of wreck, fisheries, and local maritime business. These offices, seen mainly as sources of profit for their holders, became the prototypes for the American colonial vice-admiralty courts.⁸

In practice, the vice-admiral traveled his county, holding court at various locations as cases arose. At each stop he would call a jury of twenty-four men from the ports of the district. This "grand jury" made presentments to the vice-admiral of wrecks to be salvaged in the district, of dead men found, and of felonies committed or broken customs regulations. A common court was also held to try civil suits. A deputy was provided for in the vice-admiralty instructions in case the commissioner himself was not familiar with the law. The vice-admiral collected all monies due the king and admiral accruing from flotsam and jetsam, royal fish, and fines and fees taken in court. Profits for the commissioner came from a share of fines, fees and sale of flotsam. These were quite small and varied considerably from year to year. The large, sure profits for the vice-admirals came from the sale of wrecks and pirate ships and their goods. Because of the inherent temptation, all vice-admirals provided a bond to insure that they would carry out their duties faithfully.⁹

When Englishmen transplanted themselves in America, they brought provision for admiralty jurisdiction. The charter for the Virginia Company provided for no special court, but an admiral or vice-admiral was to be one of the chief executive officials. His duties were the protection of the colony from attack by sea, the visitation of every ship which called, and the protection of the company's monopoly of trade by seizure of offending vessels. The

close relationship between privateering and the admiralty is foretold by the case of Sir Samuel Argall, who, while serving as both governor and admiral, took to privateering against the Spanish under a commission from the Duke of Savoy. Prizes taken under such foreign commission would not be upheld in British vice-admiralty courts, but it would serve to keep him from hanging as a pirate.¹⁰

Under the Charter of 1632, the Lord Proprietor of Maryland held the title of High Admiral with the authority to convene admiralty courts in his colony.¹¹ Such a court was approved by the Assembly in 1638, but, as in Virginia, admiralty laws were not in general use. The county or general courts reviewed any such cases which arose without reference to specialized admiralty precedents or procedures.¹² In fact, the need for admiralty courts was so small that when asked by the Lords Commissioners of Plantations in 1671 what admiralty courts existed in Virginia, Governor William Berkeley replied that such courts were not needed because not one prize had been brought to the state for condemnation in the last twenty-eight years.¹³ Such a dearth of prize cases as Virginia exhibited would definitely have put an English vice-admiralty court out of business. Although the 1638 Maryland law had required trial by jury in all criminal cases in admiralty court, trial in both civil and criminal cases in county or provincial court was without jury except when required by either party.¹⁴ This is remarkable considering both prior and subsequent

vehemence in both England and the colonies over the constitutional right to jury trial.

In 1660 a second struggle between common and civil law saw the parliamentarians prevail over James I. This victory over civil law and the autocracy it upheld meant the restriction of admiralty jurisdiction to little other than prize cases in England.¹⁵

Admiralty courts had appeared in virtually all of the colonies by the latter half of the seventeenth century, but they were little used. The king's brother, James, Duke of York, was already serving as Lord High Admiral of England in 1661 when he received a special patent as Lord Admiral of New England, Virginia, Bermuda, and Jamaica. The governor of the latter received, in turn, the first patent from James to establish a colonial vice-admiralty court. In Jamaica, where piracy was the greatest problem, the court was used mainly in cases of prize because the distinction between privateering and piracy was particularly tenuous at this time.¹⁶

After 1689 all royal governors were appointed vice-admirals and commissioned to oversee all maritime matters of the crown. They were to delegate this authority through the appointment of judges of colonial vice-admiralty courts.¹⁷ Authority was not exercised with any consistency, however. Judicial powers for the most part continued to be in the hands of the county and provincial courts.

The need for an invigorated admiralty court system on

both sides of the Atlantic came in 1696 with the codification of the Acts of Trade. The enforcement of these acts was the main reason for an improvement in the admiralty system, but the increased capacity for prize adjudication made necessary by the privateering flourishing during the wars of William and Mary was an added bonus. Unfortunately, while Americans made great use of the admiralty system and reaped the benefits of the prize courts, the attempt to enforce stricter trade regulations through the admiralty courts was resented. By the Revolution it was seen as an extension of "a jurisdiction foreign to our constitution."¹⁸

The 1696 Navigation Act for "Preventing Frauds, and Regulating Abuses in the Plantation Trade" was aimed at tightening the regulations which were being abused at the cost of the English government. Foreign vessels were restricted in their participation in colonial trade, English-built vessels had to be used to carry goods into or out of the colonies, customs officers were entitled to use writs of assistance to search vessels suspected of violations of trade regulations, and captains had to post bonds to insure that their papers were genuine. The act was contradictory in specifying the jurisdiction of courts. One clause stated that offenses could be reviewed in the admiralty where the violation occurred, while another explicitly required trial by jury. This would have excluded all admiralty courts at the time. The official

interpretation of the act was to allow concurrent jurisdiction in vice-admiralty courts and common law courts at the choice of the plaintiff. Admiralty courts thus were given instance jurisdiction (which was over civil or commercial cases) including seamen's wages, bottomry bonds, charter parties, salvage of wrecks, and collision, as well as jurisdiction over enforcement of the Acts of Trade. Under the new law, a special commission from the Lords Commissioners of the Admiralty empowered the vice-admiralty courts to hear prize cases in wartime.¹⁹

Further evidence of the overriding concern of the British government with increasing its income by tightening controls over the colonial trade system is found in a July 6, 1704 communication from the queen to Virginia's governor Francis Nicholson. The letter cautions him to be careful that prize goods not be hidden or embezzled from the crown. Complaints of abuses of the colonial admiralty courts had been received by the government, and the precaution of assigning special prize officers to vessels awaiting condemnation or sale was to be taken to prevent any portion of the ship or its cargo from being removed. A general lack of confidence that the officers of the courts had only the interests of the royal treasury at heart was implicit.²⁰

In addition to the royal droit, the tariffs applicable to prize goods in accordance with the new trade laws came to as much as half that assessed against imported foreign merchandise. By 1708, government charges could total 60

percent of a prize's value.²¹ It is no wonder that the government worried about embezzlement at a time when privateers' profits were being so sharply cut.

Admiralty judges were not salaried until after 1708. They did, however, completely control the admiralty courts. They could schedule cases for early trial or wait if they thought their fees could be enhanced. Because high legal fees could be an inducement to dispose of a prize illegally, judges often made it a practice to partially remit their fees in order to draw a larger number of prizes to their particular port.²² With this sort of competition between admiralty courts the judges were not getting wealthy from their benches. Many continued the private practice of law; Peyton Randolph of Virginia was attorney general as well as vice-admiralty judge.²³

With the outbreak of Queen Anne's War in 1708, the economic forces swung away from high fees and droits and toward the promotion of privateering.²⁴ The "Act for the Encouragement of Trade to America" waived the royal droit and eased regulation of privateering by empowering colonial governors to issue letters of marque, and specifically giving prize jurisdiction to colonial vice-admiralty courts.²⁵ The appeal process was modified so that a select group of privy councilors, the Lords Commissioners for Prize Appeals, was created to render final decision, rather than the king-in-council or the High Court of the Admiralty, as had been the practice. The statute also outlined trial

procedures for use in prize cases which differed from other cases - a realization of the difficulty of finding lawyers (not to mention judges) with any experience in such a peculiar area of the law.²⁶

By the beginning of King William's War the regulations of 1708 had lapsed, and new legislation continued to waive the royal droit.²⁷ In addition, the crown, wishing to tighten control over the smaller privateers who more easily avoided regulation, voided the commissions of all raiders of less than 100 tons or carrying fewer than ten three-pound guns or fewer than forty crewmen. The first salary for judges was instituted at £200 per year in peacetime, to be paid from the royal droit on salvage or the sale of old naval stores.²⁸ High costs of administration of admiralty justice were cited when the officers of the Virginia court were reminded in 1715 to comply with the new law and not exact a fee of more than £10 from each prize condemned.²⁹

Excepting minor changes, the colonial vice-admiralty administration remained in the same form through 1763. At that time there were eleven courts in North America, the same number as at the turn of the century. Vice-admiralty courts were located in Newfoundland, Nova Scotia, Massachusetts, Rhode Island, New York, Maryland, Pennsylvania, Virginia, Georgia, and North and South Carolina. The courts could convene wherever the judge pleased, and deputies were often appointed (and paid with a percentage of the judge's fees) to take the courts to

isolated areas. Besides the judges (who were political appointees of the governor), the officers of the court consisted of the registers, who were the court clerks and kept records and issued citations and orders, and the marshals, who served processes and took custody of goods or people and executed decrees. Marshals and registers were also appointed by the governors, except in Maryland and North Carolina, where the judges appointed them themselves. By the end of the Seven Years' War virtually all colonial vice-admiralty court officers, including judges, were provincial-born.³⁰

The jurisdiction of the courts was threefold. Their original function in England was to settle disagreements over seamen's wages and problems between merchants and seamen or officers and crew. These, along with cases of shipwreck and salvage, charters, bottomry, and collisions at sea, remained the most numerous in the colonial courts. The second area of jurisdiction was added by the 1696 navigation laws and involved the enforcement of earlier laws and the prosecution of offenders. About one-third of all colonial vice-admiralty court cases from 1702 to 1763 were prize cases in time of war.³¹

A prize case was initiated by the party making the capture, who filed a declaration or "libel" (indictment) with the court against the prize vessel, which included a stylized "complaint" and a prayer to the court for relief. The judge then ordered the marshal of the court to take

custody of the vessel and/or cargo and to give public notice of this action. This usually meant a short advertisement in the local newspaper. A proclamation stating the complaint was issued by the judge and repeated at the following session of the court. At the second reading of the proclamation the claimant or respondent filed his answer to the libel. He was allowed three sessions to appear and answer. If the respondent did not answer the libel, a decree or judgement by default was issued. If answer was filed, the issue was joined and a trial proceeded. Both parties were required to stipulate securities (bonds) that they would appear for trial. The opposing proctors (lawyers) examined witnesses outside of court, testimony was taken in writing in the form of answers to interrogation and cross-interrogation. At a further session of the court the proctors presented the witnesses' statements and recited their arguments. If more than one claim against the vessel was pending or if any prior liens applied the court heard them at this time. The most important aspect of this discovery phase, in terms of the court's determination of fact, was the yielding of the prize's papers stating the country of registry and the origin and destination of the goods carried. The judge delivered his decree based upon this evidence, and the marshal then executed it. The judge could issue an interlocutory decree postponing his final judgement until a later time, pending further disclosure.³²

Prize appeals usually went to the Lords Commissioners

for Prize Appeals. Instance appeals (cases from the first category of admiralty jurisdiction) went to the Privy Council, but navigation act cases could go to either the High Court of Admiralty or to the Privy Council. Decrees from the High Court of Admiralty could be carried on further appeal to the Lords Commissioners, but a decision by the king in (Privy) council was final.³³ Needless to say, colonial judges were often confused as to where to send a particular appeal.

The provincial judge executed the provisions of the appeal decision, whatever body issued it. If a libel was successfully prosecuted, appraisers evaluated the vessel and/or goods and the marshal sold them at public auction. Any failure to meet a judgement (usually in a non-prize case) meant fine, attachment, or imprisonment.³⁴

Over the half-century of colonial vice-admiralty court jurisdiction, certain differences developed between the way the law was perceived and enforced in England and in the colonies. These discrepancies arose as much out of the conditions acting upon the courts and what they were expected to accomplish as from the fact that American barristers and judges had much less experience than their English counterparts in the subtleties of maritime law. In the American experience, the admiralty courts had been given steadily increasing power since 1696. American jurisprudence had also not benefitted from the power struggle between the common law and the civil courts, which

had resulted in the restriction in authority of the latter in England.

The primacy of the common law was upheld in England by the use of the writ of prohibition, issued by the common law court to stop proceedings in the civil admiralty court. Colonial common law courts assumed this power over the vice-admiralty courts but did not exercise it to the same extent, resulting in its de facto abrogation. Royal customs officials, realizing that American juries were reluctant to condemn the property of their neighbors under what were seen as onerous trade laws, began to exercise the clause in the Navigation Act of 1696 granting the equal jurisdiction of admiralty and common law courts in trade and revenue cases. The choice of a non-jury court at the discretion of the plaintiff allowed better enforcement of trade regulation, but also increased American resentment of such taxation without the representation of a jury of one's peers.³⁵

In addition to the legislative increase in admiralty court power, practical factors tended to increase the use of such courts at the expense of the common law. The relative speed of admiralty proceedings (a common law court could take up to six months to condemn a seizure), and the advantages of the process in rem more than compensated for the high cost of admiralty justice in all but the least valuable cases where the percentage of fees charges was prohibitive.³⁶ After the high percentage fees were repealed during King William's War, admiralty court costs were

normally 2.5-3.5 percent of the prize value. Additional legal costs realized in the form of attorneys fees ran 1.5-2 percent. The high number of captures declared unlawful, and the resulting appeals were the major factors cutting into privateering profits.³⁷ During King George's War (1739-1748) the cost of admiralty justice was about 15 percent of the total value of all prizes taken. For the Seven Years' War the figure dropped to 10 percent.³⁸ Because the judge's fee was set by law, he had an interest in keeping total costs in his court low and in the timely disposal of cases in order that his might be seen as a favorable court to a privateer with a choice of ports to which prizes could be sent. The judge could thus increase his fees through volume.

Legislation, rigid enforcement of the navigation acts, the advantages of quick proceedings and the in rem process, and the falling costs of admiralty courts all contributed to a greater concentration of power in the colonial vice-admiralty courts than in the English admiralty court system. The resulting abridgement of rights under the common law as perceived by the Americans was not apparent to the British who lived under the same laws and suffered no such loss.

In fact, differences in procedural law in the colonial courts served to increase American ambivalence. Because American lawyers and judges were virtually all provincial-born and had no experience in English admiralty

court procedure, certain practices evolved which had no basis in the English system but which appeared when appeals were carried to the high courts. First, colonial courts routinely admitted evidence of a questionable nature. The use of interrogatories which were prepared by the captors or taken from persons not even aboard the vessel in question, as well as the submission as evidence of papers not found on the prize at the time of capture were fairly common practices. While there were no clear rules of evidence to aid the judge in determining the facts in the face of contradicting testimony or possible forgeries of ships papers, American courts were less likely to declare a prize illegal based on the questionable conduct or even obvious forgeries of the captors. In general, colonial vice-admiralty courts used a system loosely based on a combination of admiralty instance (non-prize) procedure and common law in deciding prize cases.³⁹

English courts clearly separated instance and prize jurisdiction as set forth in the prize acts (specific laws for their procedure enacted in 1708 and amended thereafter). Prize jurisdiction was seen as specially granted in time of war, with procedures which were entirely under control of Parliament. American judges and lawyers did not comprehend the distinction; the same procedures were followed as in any other vice-admiralty case.⁴⁰ The nature of this different attitude to prize jurisdiction imparted a sense of independence, of irresponsibility, to elected authority in

the vice-admiralty courts which added fuel to American dissatisfaction with British rule.

British attempts at rebuilding the treasury through various trade acts at the end of the Seven Years War were accompanied by modifications in the vice-admiralty system aimed at increasing the efficiency of customs collection. In 1764 the earl of Northumberland was created "Vice Admiral over All America." William Spry was appointed judge of a court convened in Halifax and was given jurisdiction over all America. This is somewhat confusing because the court was co-equal in jurisdiction with the provincial courts and had no appellate jurisdiction. Spry's annual salary of £800 paid from fees from condemned seizures was protested by colonial merchants, who argued that he would always condemn seizures as legal prizes in order to insure his wages. Provision was made for the payment of Spry's salary out of admiralty reserves if his condemnations were insufficient. Moreover, provincial vice-admiralty judges had always depended on their own actions in condemnations as the only source of their income. The new court at least made an attempt to remove any conflict of interest. Colonial protests really stemmed from the fact that the new court was created in order to try the unpopular new trade laws, which in England were tried in common-law Exchequer courts with juries.⁴¹

In 1768 the Halifax court was deemed too remote from most of the colonies and was replaced by district courts in

Boston, Philadelphia, Charleston, and a new one in Halifax, each with a regional jurisdiction. These courts were also to supplement the provincial courts, but were also given appellate power over them. The judges' salaries were £600 per year.⁴² This was the last major modification of the colonial vice-admiralty system before the Revolution.

The irony of the American experience with the vice-admiralty courts was that the colonists needed them and used them to their great advantage in trying prize cases, at the same time they were decrying them as unconstitutional and tyrannical. The Americans had four main objections to the courts. The judges' salaries were seen to be exorbitant and the method of payment conducive to conflict of interest. For the most part, however, the vice-admiralty judges were men of integrity, and salaries were fixed to end economic temptations. Colonists were concerned that many judges received their appointments as reward for loyalty during the Stamp Act crisis. This was, on the whole, a reaction to the legislation, for the judges proved competent and tended to stay above the conflict. The British were accused of extending the jurisdiction of the courts beyond traditional limits in enforcing imperial trade and navigation laws. While it is true that trade laws such as the Revenue Act of 1764 and the Townshend Acts allowed prosecution in vice-admiralty courts, the most onerous Stamp Act did not. The heart of the dispute was the alleged denial of the right of trial by jury. Non-jury vice-admiralty courts never had

sole jurisdiction under the law. However, when colonial trade officials realized that juries would not bring in verdicts against their neighbors, the vice-admiralty courts had sole jurisdiction in practice.⁴³

Before the Continental Congress declared independence from England, the international legal implications of fitting out privateers was weighed. Because the granting of commissions was the preserve of a sovereign state, such an act could be construed as one of independence. Those in the Congress who were not yet ready to take that step toward a complete break opposed privateering commissions.⁴⁴ By the fall of 1775, however, Washington had warships which were capturing prizes. He wrote to Congress urging the establishment of admiralty courts to dispose of these seizures.⁴⁵ Congress ordered research on the subject and the first report on privateering was placed before the body on November 25, 1775. This paper advocated a halfway measure of legalizing the capture of warships, troop transports, and vessels carrying arms and ammunition, and recommended that the individual colonies set up prize courts.⁴⁶

In December 1775 Virginia commissioned John Blair, James Holt, and Edmund Randolph as judges of prize cases. At least two of the three could convene a court with jurisdiction over "all matters relating to vessels and their cargoes." Provision was made for fining witnesses who did not appear fifty shillings. Appeals were to be heard by the

state committee of safety upon receipt of a bond of £20 securing the due prosecution of the appeal within thirty days. The judges' salaries were set at twenty-five shillings per day while the court was in session.⁴⁷

After the British "Prohibitory Act" forbade all trade with the colonies, Congress passed a much stronger resolve on March 23, 1776, which declared all British vessels fair game.⁴⁸ The British, realizing that any acceptance of the legality of American privateers meant recognition of the rights of Congress as government of a sovereign nation, referred to them as pirates and shipped their prisoners to England to be tried as such.⁴⁹

Congress left the issuing of commissions to the individual colonies, but printed up blank commission forms with the names of the owners, commander, vessel, type, tonnage, number of guns, and crew to be filled in.⁵⁰ On April 3, 1776 Congress issued its "Instructions to the Commanders of private Ships or Vessels of War," which was intended, given the British propaganda, to draw as great a distinction as possible between American privateers and piracy for the world at large. Paragraph IV stipulated that all legal interrogatories and documents be delivered to the proper court. Paragraph V insured that a captured vessel be kept intact until condemnation, while paragraph VI prohibited torture of prisoners, and paragraph IX insured against the piratical practice of the ransoming of prisoners at sea (thus avoiding taking any vessels to court).⁵¹

Later, American privateers were required to pay the captured crew's normal wages out of the prize money distribution, and commanders were made liable to the owners of captured vessels in case of damages incurred during seizures not upheld in court.⁵² A \$5,000 bond was required by all privateers up to 100 tons burthen, \$10,000 if larger, to insure compliance with these regulations. In May 1780 the bond was increased to \$20,000.⁵³

Congress also left the administration of admiralty justice to the individual colonies. In reaction to the vice-admiralty courts' violation of the right to jury trial, however, Congress instructed each colony to institute jury trials in prize proceedings. In May 1776 the Virginia assembly upheld Congress' April 3rd resolution by appointing a new admiralty court, requiring trial by a jury of freeholders. James Hubbard, Joseph Prentis, and John Tyler were appointed judges. Again, any two could convene a court.⁵⁴

In the April 3rd resolution, Congress decreed that it would hear all appeals in general session. The first of these appeals was heard on August 5, 1776, and was so complex and time-consuming that Congress referred the matter to special committee. A standing committee for appeals was established the next year.⁵⁵

In October 1776 Virginia enacted Thomas Jefferson's "Act for establishing a Court of Admiralty." This third version kept to the three-judge format, but they were now to

be chosen by joint ballot of both houses of the assembly. This court was to be governed by "the regulations of the Continental Congress, the acts of the Virginia general assembly, English statutes prior to the fourth year of the reign of James I, and the laws of Oleron, and the Rhodian and Imperial laws so far as they have been observed in the English courts of admiralty."

The judges were to appoint an advocate for the state, a register, and a marshal. Court procedure called for a libel to be filed, and if the owner of the prize vessel could not be found, an advertisement was to be published in the Virginia Gazette for three weeks. If no owner appeared (it was not likely that any British merchant ship owners would), the libel was accepted as confessed and the court condemned the vessel. A decree of the court's findings was also published in the Gazette for three weeks, but if the prize's owner appeared within one year his defense would still be heard. The Virginia law allowed for the fees of the register and marshal to be set by the court. If the libellant desired, the marshal was authorized to order the sale of the condemned vessel at auction. Congressional jurisdiction of appeal was also upheld.

All matters of fact were tried by jury, except in cases of capture from an enemy, which were tried by the court or jury as Congress directed. The distinction thus finally began to be made in an American admiralty court between instance and prize practice. The rights of the individual

in non-prize cases were protected by jury trial, but British prizes were not automatically afforded the same safeguard.⁵⁶

Prize law was so complex and the facts often so unclear that the jury trial system proved disastrous in the few months following its inception in May 1776. Local juries were commonly overruled by the appeals committee because they had no knowledge of sea law or custom.⁵⁷ The October court was only a partial remedy, for in May 1779 the law was again changed to call for jury trial only when both parties were citizens of Virginia.⁵⁸

The problem of keeping soldiers and sailors in the service of the Continental and Virginia army and navy was approached in two ways. On February 6, 1777 Virginia conformed to the regulations of Congress in reducing its droit in the capture of English merchant vessels by naval ships to one-half of their value. The entire value of captured British warships went to the the crew of the captor. This provided some incentive for the regular navy seamen, since it was comparable to the privateers whose crews received the whole value of any prize taken.⁵⁸ In October of the same year Virginia state naval crews also received the whole value of any prize taken.⁵⁹ In May 1780 Virginia dealt with the problem of army deserters by withholding prize money and a £500 fine from any privateer with deserters in its crew.⁶⁰

As seen in the retreat from the use of juries, instructions from the Congress were not always carried out

by the states. In May 1781 Virginia authorized the Congress to levy a duty of 5 percent on certain goods including prize goods and prizes. By November Virginia legislators realized that several other states had not enacted the law and decided to suspend it pending such enactment. In 1782 letters of complaint were sent to the governors of Massachusetts, Rhode Island, and Maryland which cited the growing public debt and asked why they did not comply with the law. Apparently, no answer was received; Virginia finally repealed the law, claiming that it was injurious to state sovereignty.⁶¹

A Pennsylvania admiralty court judge, George Ross, proved particularly recalcitrant in dealing with the Continental Congress. A complex case came before him in 1777 in which he awarded a one-fourth share in a prize to captain Gideon Olmsted and his crew of the sloop Active (who actually captured the vessel) and three-fourths to two ships who were in sight at the time. This was common in admiralty practice at the time because the ships not actually engaged would still presumably weigh in the decision of the captain of the prize to surrender. Olmsted appealed his case to Congress, however, and was awarded the whole value of the prize in December 1778. Judge Ross refused to distribute the prize money, stating "Congress had no right to try a case settled by the court of admiralty of Pennsylvania."⁶² A thirty-year battle began involving states rights and the creation of the first federal court in 1779.⁶³ Congress

provided for a three judge court of appeals, the first such federal court, to hear such complex, inter-state cases and those not satisfied by the state courts' decisions.⁶⁴ The system proved quite satisfactory for of the thousands of admiralty cases heard in the state courts, only 114 were appealed.⁶⁵ By the end of this court's life in 1786 federalism was more secure, but Olmsted did not receive his prize money until 1809.⁶⁶

CONCLUSION

By the eighteenth century, the period when privateers from the Chesapeake Bay region were becoming active, the great age of privateering was long past. Hawkins and Drake had plundered the Spanish Main in the 1560s and 1570s, and Henry Morgan capped his career with the sack of Panama in 1671. Chesapeake privateers could hold no hope of being made admiral of the fleet, or of retiring in knighthood to a Jamaican plantation. Military and naval forces operating in the Chesapeake privateers' waters had become too strong to allow for the bold successes of earlier times. Improved laws and regulations governing the "letters of marque" restricted adventuring for personal profit.

Some of the conditions which made the earlier Caribbean privateering so profitable were still prevalent in the eighteenth century, however. Colonial settlements were still distant from the mother countries, requiring large shipments of goods over long sea routes. Sail-powered naval forces, while able to make life much more difficult for privateers, were as yet too slow and thinly distributed to protect all commercial shipping. The growing wealth of the colonies increased the value of the prizes, and continuing conflicts provided the opportunity to be legally commissioned to attack the enemy's shipping.

As before, merchant seaman traded their relatively safe positions for the promise of many times their normal pay during a voyage, while poor landmen suffering increased hardships during the frequent wars flocked to the privateers. The permanence and scope of the social changes brought about by this exodus have yet to be studied.

The opportunity for these men to share in the prize wealth depended upon the owners and financiers of the privateer vessels, and with the latter group's motivation lies the great difference in the two eras of privateering. Chesapeake privateer owners were almost invariably merchants who were put out of business by naval blockade or enemy privateers. This defensive response to adverse economic conditions was not exhibited by the earlier generations who were basically opportunists and adventurers. While the earlier privateers brought great wealth to their patrons, especially in the Elizabethan era, the smaller returns of the Chesapeake privateers were more crucial to the survival of that region's fragile, isolated economy.

On the surface, the regulation of privateering and prize courts in America seems firmly grounded in the English legislation, precedent, and custom which had been evolving before Drake's time. The unique conditions and requirements of admiralty jurisdiction in America, however, produced a system quite different from that in England. The fact that neither colony nor mother country recognized the differences accounted for much of the tension derived from the

Americans' perceptions of the abuse of their rights. Attempts to avoid the abuses seen as inherent in the English admiralty system through the grafting of common law jury trial onto admiralty courts proved abortive. Largely because of the privateers' need for prize courts and specialized admiralty laws and procedures, Americans found themselves ultimately instituting the type of system which they had so vehemently fought as a tyrannical extension of imperial power.

Notes for Chapter II

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27. J. Cowley, The Sailor's Companion and Merchantman's Convoy (London: T. Cooper, 1740), pp. 110-116.

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30. Ubbelohde, The Vice Admiralty Courts, pp. 5, 9-11.

31. Ibid., p. 12.

32. Ibid., 13, Booker, "Privateering from the Bay," p. 263, and Bourguignon, The First Federal Court, p. 139.

33. Bourguignon, The First Federal Court, p. 27, and Ubbelohde, The Vice Admiralty Courts, p. 13.

34. Ubbelohde, The Vice Admiralty Courts, p. 14-15.

35. Ibid., pp. 15, 18-19.

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37. Howard M. Chapin, Privateer Ships and Sailors, 1625-1725 (Toulon: Imprimerie G. Mouton, 1926), p. 15.

38. Carl E. Swanson, "The Profitability of Privateering: Reflections on British Colonial Privateers During the War of 1739-1748," American Neptune 42 (January 1982): 49, and Lydon, Pirates, Privateers, and Profits, pp. 123-125.

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