



# YES? NO? MAYBE SO?

## FEDERAL CONSTRAINTS ON PORT CHARGES AGAINST VESSELS

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# ▶ DISCLAIMER

The views expressed are my personal impressions of the moment shared with an audience of very astute colleagues. They are not necessarily the views of Thompson Coburn LLP or any of its clients.



# ▶ GEORGE WASHINGTON







# SOURCES OF FEDERAL PROHIBITION OR CONSTRAINT ON PORT CHARGES

- Tonnage Clause (Art. I, § 10, cl. 3)
- Commerce Clause (Art. I, § 8. cl. 3)
- Rivers and Harbors Act (33 U.S.C. § 5(b))
- Supremacy Clause (Art. VI)



# ▶ TONNAGE CLAUSE

- “. . . No State shall, without Consent of Congress, lay any Duty of Tonnage . . . .”



# ▶ TONNAGE CLAUSE

- Note location in Article I, section 10
- What else is expressly prohibited to states?
  - Maintenance of troops
  - Warships
  - Entering into war
  - Compacts with other states or foreign countries
  - Imposts on imports or exports
  - Grant letters of marque or reprisal
  - Coin money
  - Grant titles of nobility



- All these activities were deemed toxic to the “more perfect Union” sought to be achieved by the Framers.
- Why Tonnage Duties?
- What is a “Tonnage Duty”? (1780s/2010s)





# ▶ WHAT IS A TONNAGE DUTY?

- “Tonnage” was a “well-understood commercial term signifying the internal capacity of a vessel.”
- “Duties of Tonnage” were known to commerce as levies upon the privilege of access by vessels or goods to the ports or territorial limits of a state.
  - *Clyde Mallory Lines v. Alabama ex rel. State Dock Comm’n*, 296 U.S. 261, 265 (1935)





# ▶ WHY THE PROHIBITION?

- Would not Commerce Clause do the job?





- At Constitutional Convention, Maryland delegation proposed that “No state shall be restricted from laying duties of tonnage for the purpose of clearing harbors and erecting lighthouses.”
- Debate as to whether Commerce Clause would forbid such duties; result was Tonnage Clause.



- Point of this history is that Tonnage Clause is not just an appendage of the Commerce Clause – it has its own purpose and its own criteria by which we measure lawfulness of state (or any other non-federal) charges against vessels.
- Quaere: Could a vessel charge that violates Tonnage Clause be lawful under Commerce Clause? Vice Versa?



# WHAT ARE THE CHARACTERISTICS OF A TONNAGE DUTY?

- Does not have to be based on weight or displacement of vessel
  - Courts early on short-stopped evasion by holding that the Clause prohibits any duty charged “for the privilege of entering, lying in, or trading in a port.”
    - *Polar Tankers v. City of Valdez*, 557 U.S. 1, 9 (2009)
  - any graduated duty charged “to raise general revenues, to regulate trade, or to charge for the privilege of entering, lying in, or trading in a port.”
    - *New Orleans S.S. Ass’n. v. Plaquemines Port, Harbor & Terminal District*, 874 F.2d 1018, 1023 (5<sup>th</sup> Cir. 1989)



## ▶ DEFENSES?

- Invariably, defendants cite services to vessels or vessel interests as justification for fees/levies that have Tonnage Duty attributes.
- Court(s) has not been model of clarity, but certain principles emerge:





# ▶ DEFENSES?

- Compensatory charges for services rendered the navigation, operation, security, of vessel are not within flat prohibition of Tonnage Clause
  - Examples – wharfage, pilotage, quarantine inspection, fire/emergency response, lock tolls
  - Theme seems to be that Court(s) reluctant to forbid State or municipality from recovering for a service that private provider would be able to assert.



# EXCEPTION OR DEFINITIONAL EXCLUSION?

- Are permitted fees exceptions to the prohibition, or are they definitionally outside boundaries of a Tonnage Duty?
- My own view today (Thursday), this morning (just before lunch) is that permitted fees are best regarded as definitionally outside Tonnage Duty definition because the language of the Tonnage Clause is so flatly and clearly prohibitory that courts should not lightly imply exceptions.



# ▶ WHAT IS NOT PERMITTED?

- Ad Valorem property taxes on vessels
  - *Polar Tanker v. City of Valdez* (2009)
- Taxes on Arriving Passengers
  - *The Passenger Cases* (1849)
- Fees to Offset Costs of Port Commission
  - *Steamship Co. v. Portwardens*, 73 U.S. 31 (1867)
- Fees to fund general government operations
  - *Inman S.S. Co. v. Tinker*, 94 U.S. 238 (1876)



## ▶ 33 U.S.C. § 5(B)

- 2002 Amendment to Rivers and Harbors Appropriation Act of 1884
- Prohibits non-federal interests from levying or collecting “taxes, tolls, operating charges, fees, or any other impositions whatever” from “any vessel or other water craft, or from its passengers or crew . . . .”



# EXPRESS EXCEPTIONS TO 33 U.S.C. § 5(B)

- “reasonable fees charged on a fair and equitable basis that –
- (A) are used solely to pay the cost of a service to the vessel of water craft; (B) enhance the safety and efficiency of interstate and foreign commerce; and (C) do not impose more than a small burden on interstate or foreign commerce. [emphasis by Benner]



## RELATIONSHIP OF 33 U.S.C. § 5 TO TONNAGE ▶ CLAUSE AND OTHER CONSTITUTIONAL CONSTRAINTS

- Some courts have opined that statute is a synthesis or codification of Tonnage Clause jurisprudence.
- Private right of action issue.



## ► CURRENT CASES

- *L'il Man in the Boat v. City and County of San Francisco (N.D. Cal)*
  - Challenge to landing fee. Tonnage Clause RHAA, Commerce Clause
- *Cruise Lines Inter*
- *Cruise Lines International et al. v. City and Borough of Juneau (D. C. Alaska)*
  - Challenge to per passenger fee on cruise vessels arriving in Juneau



# Questions?





# ▶ THANK YOU



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