

BENEDICT'S MARITIME BULLETIN

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OFFSHORE WIND & THE HISTORY OF CABOTAGE LAW

By Kristina Prete*

According to the Merriam-Webster dictionary, cabotage is the “trade or transport in coastal waters or airspace or between two points within a country.”¹ In Black’s Law Dictionary, cabotage is defined as the “carrying on of trade along a country’s coast; the transport of goods or passengers from one port or place to another in the same country.”² Additionally, cabotage is the theory of retaining a “nation’s maritime and shipping trades, services and activities for its citizens.”³ United States “[m]aritime cabotage laws govern the transportation of goods and people between two [U.S. ports], which generally restricts such transportation to U.S.-flagged, U.S.-crewed, U.S.-built, and U.S.-owned vessels.”⁴ Cabotage objectives include “maintain[ing] national security, promot[ing] fair competition, develop[ing] human capacity, creat[ing] jobs, promot[ing] shop ownership, increas[ing] safety and security of ships in

* Kristina Prete is a New Mexico attorney. She graduated from the University of Massachusetts School of Law in 2018. Since becoming licensed to practice law, she has gained an interest in maritime and admiralty law and her goal is to become a maritime and admiralty attorney. Kristina originally presented this paper at the meeting of the Offshore Industries Committee of The Maritime Law Association of the United States on November 2, 2020.

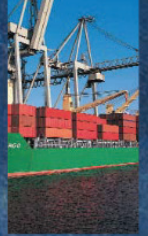
¹ <https://www.merriam-webster.com/dictionary/cabotage> (last visited January 19, 2021).

² 8th ed., at p. 605.

³ Cabotage Laws of the World, Seafarers’ Rights International, 2018, p. 23.

⁴ CabotageLawsOftheWorld,AmericanMaritimePartnership, Sept. 25, 2018, <https://www.americanmaritimepartnership.com/studies/world-cabotage-study/> (last visited January 19, 2021).

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Matthew Bender®

MANAGING EDITOR'S INTRODUCTORY NOTE

We begin this edition with an article by Kristina Prete on cabotage laws and their impact on the off-shore wind industry, including a detailed summary of the history and development of U.S. cabotage laws.

Our next article, by Shari Friedman, discusses chartering and provides a very informative view on how courts look at the criteria for determining whether a charter is a bareboat charter. In summary fashion, Shari reviews the recent case law that provides guidance on the issue.

In this edition's "Window on Washington" column, Bryant Gardner provides a look at the Consolidated Appropriations Act, 2021, and summarizes its key provisions affecting the maritime industry.

We are very pleased to follow with two articles by Caroline T. Bones and Elizabeth D. Barras in our "Future Proctors" section.

Caroline gives us a comprehensive review of The Maritime Drug Law Enforcement Act. She describes the history of the Act and through it, how courts have stretched traditional notions of due process inherent in the jurisdictional requirements of federal law in an attempt to punish drug movers the world over and police the global drug trade. She concludes that the Act needs to be repealed and replaced with a clearer maritime drug enforcement law that does not leave courts guessing inconsistently at where jurisdiction may lie over defendants, but instead spells out the requirements for jurisdiction.

Elizabeth gives us a detailed analysis of the history of the Limitation Act and its application to pleasure vessels. She concludes that "[t]he overly broad application of the Act can be corrected by limiting its application in cases of personal injury or death. Commercial shipping was the lifeblood of the economy in the 1800s, but even with globalization, this is no longer the case. The draconian protections provided by the Act are no longer necessary for the stability of the U.S. economy. The pendulum needs to swing back to protect individuals who suffer injury or worse, even if it occurs on navigable waters."

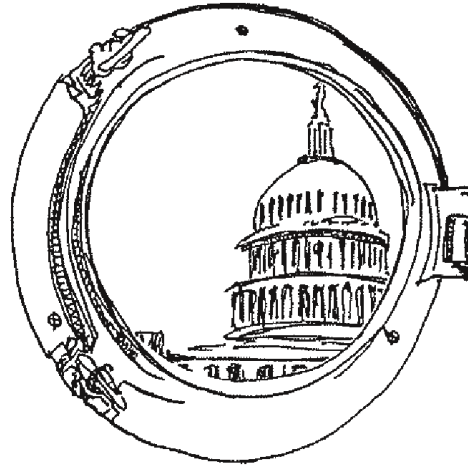
Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

WINDOW ON WASHINGTON



Home for the Holidays

Bryant E. Gardner

Thanks to King Corona, most of us were probably home for the holidays as 2020 drew to a close. In some ways, it has been nice spending more time with the family in 2020, “under the Yellow Jack” as we published in April 2020. The holidays are different for regulatory and legislative lawyers in D.C., and not just because of the pandemic. Many transactional lawyers know well that the Thanksgiving-Christmas-New Year’s holiday slalom can be like obstacles on the bumper course to multiple end-of-the year deal close targets. While the regulatory bar often gets to be a part of those transactions, the Federal Government is also prone to exhibit a flurry of activity during the closing days of the year, even more so when the Congress is ending and there is a transition of power at the other end of Pennsylvania Avenue to boot. Agencies have been known to tuck unpopular or controversial notices and proposals into Federal Register publication dates like the day after Thanksgiving, or somewhere along that lonely stretch of highway between Christmas Day and New Year’s Day. It is not unheard of for agency leadership on the way out to do favors for new friends or act against old foes. Sometimes, as political appointees depart for new pastures in the closing days of an administration, the career bureaucrats are given the rare opportunity to fix things.

During the final days of 2020, a grand showdown among the Democrat-controlled House, the Republican-

controlled Senate, and President Trump culminated in the passage of several significant pieces of legislation. For one, the 116th Congress passed the National Defense Authorization Act for Fiscal Year 2021 by voting the first override of a Trump veto on New Year’s Day and locking in a sixty-year streak for passage of the nation’s key defense bill, the maritime provisions of which we reviewed in the 2020 Fourth Quarter *Window on Washington*. In his veto statement, the President called the Act “a ‘gift’ to Russia and China,” and proclaimed “[n]o one has worked harder, or approved more money for the military, than I have—over \$2 trillion. During my 4 years, with the support of many others, we have almost entirely rebuilt the United States military, which was totally depleted when I took office.”¹

Secondly, Trump signed an omnibus and emergency relief funding bill, keeping the Government open and extending relief for millions of Americans still suffering under the pandemic.² On the Tuesday before Christmas,

¹ President Donald J. Trump, *Presidential Veto Message to the House of Representatives for H.R. 6395* (Dec. 23, 2020).

² Consolidated Appropriations Act, 2021, H.R. 116-133, signed by the President on December 27, 2020 (the “Act” or the “Consolidated Appropriations Act”).

the President posted a Twitter video threatening to veto the bill on the ground that the bill's \$600 stimulus checks are insufficient—with the House offering to support the proposition. The President also took aim at a slew of appropriations prioritized by the Republican Chairman of the Senate Appropriations Committee, Richard Shelby of Alabama, including development of a Federal Bureau of Investigation Facility in Huntsville, Alabama, Gulf Coast reef fish management funding, Asian Carp mitigation in the Mississippi River Basin, and research grants for Auburn University. Ultimately the President capitulated with the promise to send back a rescissions package redlining the items he found most objectionable.³ In signing the bill (and thereby avoiding a “pocket veto”), President Trump announced “[a]s President of the United States it is my responsibility to protect the people of our country from the economic devastation and hardship that was caused by the China Virus.”⁴

The Consolidated Appropriations Act, 2021 weighs in just short of 5,600 pages and includes \$1.4 trillion to fund all of Government for fiscal year 2021, including all 12 traditional appropriations bills, in addition to the latest \$900 billion installment of pandemic relief funding. The largest portions of pandemic relief payments—\$286 billion and \$325 billion—fund the individual direct payments, or tax rebates, and a new round of Payroll Protection Program (“PPP”) loans for small businesses, respectively.⁵ The bill includes \$15 billion to extend payroll support for passenger airlines, \$14 billion for transit, \$10 billion for state highways, \$2 billion for motor coaches, \$2 billion for airports and concessionaires, \$1 billion for airline contractor payroll, and \$1 billion for Amtrak.⁶ The Act also includes \$300 million to remain available until September 20, 2021 for the National Oceanic and Atmospheric Administration’s (“NOAA”) “Fisheries Disaster Assistance” program,⁷ with amounts allocated to coastal fisheries states in amounts ranging from 1% of overall Fisheries Disaster Assistance to the State’s average annual revenue from fishing and aquaculture activities, with some funds reserved for tribal and Great Lakes non-tribal communities.

³ Under the Congressional Budget and Impoundment Control Act of 1974, a rescissions message puts a 45-day hold on targeted funds while Congress weighs legislation to approve the President’s request. 2 U.S.C. § 683.

⁴ President Donald J. Trump, *Statement from the President* (Dec. 27, 2020).

⁵ Consolidated Appropriations Act, Division N.

⁶ Consolidated Appropriations Act, Division M, Title IV.

⁷ Consolidated Appropriations Act, Division M, Title I.

MARAD Programs

U.S. Maritime Administration (“MARAD”) programs generally received robust funding, with overall funding at \$1.2 billion, \$122 million above fiscal year 2020. The Act provides full funding of \$314 million for the 60-ship Maritime Security Program and \$10 million for the new Cable Security Fleet, both administered by MARAD.⁸ Additionally, the U.S. Merchant Marine Academy receives \$80 million for operations and \$5 million for facilities maintenance and repair. The State Maritime Academies receive \$433 million, primarily for the construction of the National Security Multi-Mission Vessel Program school ships, but also for maintenance and repair of existing vessels, mariner training, direct payments, and student incentive programs. Additionally, MARAD received \$11 million for Short Sea Transportation Program (America’s Marine Highways) grants, \$20 million for small shipyard assistance grants, and \$230 million for the Port Infrastructure Development Program,⁹ with \$205 million of that designated for coastal seaports or Great Lakes ports, with amounts to be made available as discretionary grants to port authorities and similar entities. Eligible projects include port gates, road and rail improvements, berth improvements, fixed landside improvements in support of cargo operations, and utilities upgrades, with Federal share capped at 80%. The Department of Transportation’s National Infrastructure Investments (“TIGER/BUILD”) also receives \$1 billion, on par with the 2020 level and the President’s request.¹⁰

Jones Act Waivers – Strategic Petroleum Reserve

The Homeland Security funding division of the Act establishes a safety lock on waivers of the Jones Act cabotage law for the purpose of transporting cargoes from the Strategic Petroleum Reserve.¹¹ It prohibits the issuance of such waivers, other than those requested by the Defense Department, until the Secretary of Homeland Security, after consultation with the Secretaries of Energy and Transportation and representatives from the U.S.-flag maritime industry, takes adequate measures to ensure the use of U.S.-flag vessels. Furthermore, the provision requires notice to Congress within two business days of any request for a waiver.

⁸ Consolidated Appropriations Act, Division L.

⁹ 46 U.S.C. § 50302.

¹⁰ Consolidated Appropriations Act, Division L.

¹¹ Consolidated Appropriations Act, Division F, Title II, Section 206.

Coast Guard and Shipbuilding

The Coast Guard and defense shipbuilding also fared well. The Act provides \$12.845 billion to the Coast Guard, which is \$879 million more than last year and \$739 million more than the President's budget request. The bill includes increases for Coast Guard retention, recruitment and training, deferred maintenance, cutter upgrades, cybersecurity, and childcare, as well as \$2.264 billion for major acquisitions—\$1.530 billion for vessels, \$312 million for aircraft, and \$363 million for shoreside upgrades. The Act provides \$23.3 billion to procure 10 Navy ships: two DDG-51 guided missile destroyers, two SSN-774 attack submarines, one Columbia class submarine, one frigate, two towing-salvage-rescue ships, one Expeditionary Fast Transport, and one LPD, in addition to \$500 million in incremental funding for the LHA 9, and \$73 million in advance procurement for an Expeditionary Sea Base.

Water Resources Development Act of 2020

The Consolidated Appropriations Act also includes within its folds the Water Resources Development Act ("WRDA") of 2020.¹² This law reverses the long-running diversion of the Harbor Maintenance Trust Fund ("HMTF") to priorities unrelated to harbor maintenance. Specifically, Section 101 of WRDA 2020 changes the budget enforcement rules applicable to the HMTF. Because of pay-go budget rules, Congress has been limited in its ability to fund new line items without cutting others, and consequently the HMTF has regularly been raided to pay for other items while remaining under the caps—to the detriment of the harbor improvements that were supposed to be funded with the Harbor Maintenance Tax deal in the first place. The CARES Act¹³ passed earlier in 2020 provided that HMTF funds for harbor projects in amounts up to the prior fiscal year's HMTF collections would not count against annual discretionary spending budget limits.¹⁴ WRDA 2020 alters the HMTF adjustment to the sum of the amount of deposits into the HMTF two years prior (\$1.8 billion in FY2019) plus the specified annual amount beginning at \$500 million stepping up to \$1.5 billion. The estimated balance of the HMTF at the start of FY 2021 was roughly \$9.2 billion. Section 102 of WRDA 2020 also authorizes HMTF expenditures for a broader set of activities and provides direction on uses

of funds; for example, not less than 13% of funds for Great Lakes Navigation system projects, and minimum funds for energy transfer ports, commercial strategic seaports,¹⁵ and "donor" ports (ports which generate a surplus of HMT funding).

The American Association of Port Authorities ("AAPA") hailed the changes as one of its "long-sought reforms to more fairly allocate and spend revenues from the Harbor Maintenance Tax (HMT)" and as "historic, landmark legislation...at the forefront of AAPA's advocacy efforts for decades to improve America's economy, infrastructure and competitiveness."¹⁶ The change was driven in large part by Rep. Peter DeFazio (D-Ore.), long a champion of maritime priorities and current Chairman of the House Committee on Transportation and Infrastructure. The 2020 WRDA bill also authorizes a wide variety of much-needed navigation improvement and flood control projects, and authorizes aquatic invasive species research, risk assessment, and management including programs aimed at Asian Carp spread among the Upper Mississippi and Ohio River Basins and the Cumberland and Tennessee Rivers. Additionally, Section 109 of WRDA 2020 increases the Federal general fund share of inland waterways projects from 50% to 65%, reducing reliance on the Inland Waterways Trust Fund by 15% for inland waterways projects.

Under the Consolidated Appropriations Act, the U.S. Army Corps of Engineers will receive \$7.8 billion, \$145 more than fiscal year 2020 funding, which the Senate Committee on Appropriations Vice Chairman Patrick Leahy (D-VT) lauded as "the highest-ever level of funding for the Army Corps' Civil Works program."¹⁷ The Act provides \$38 billion from the Harbor Maintenance Trust fund for operations and maintenance on the Saint Lawrence Seaway, including not less than \$14.5 billion for the seaway infrastructure program.

The maritime industry has been tested during the pandemic, and risen to the occasion. Certain sectors, such as passenger vessels, have been hit hard with no-sail orders still in place. Crew changes have been

¹² Consolidated Appropriations Act, Division AA.

¹³ Pub. L. No. 116-136, § 14003.

¹⁴ Discretionary spending refers to appropriated spending, in contrast to entitlements such as Social Security, Medicare, etc.

¹⁵ See U.S. Maritime Administration, National Port Readiness Network, <https://www.maritime.dot.gov/ports/strong-ports/national-port-readiness-network-nprm>.

¹⁶ Jim Myers, WRDA Included in Massive Funding Package, *Waterways Journal* (Dec. 23, 2020) (quoting AAPA President and CEO Christopher Connor).

¹⁷ Press Release, Vice Chairman Patrick Leahy, *Committee on Appropriations, Summary Energy and Water and Related Agencies Fiscal Year 2021 Appropriations Bill* (Dec. 21, 2020).

such a problem that they now rise to the level of a humanitarian crisis. Still, the industry has sailed on and managed record cargo volumes as tectonic shifts play out in the global economy. The U.S. maritime industry's programs remain solidly funded in the Consolidated Appropriations Act for Fiscal Year 2021 and water infrastructure funding appears to be on the right track, but the industry has to date received little in the way of emergency relief associated with the pandemic—certainly nothing like the kind of aid targeted to the airlines, and to a lesser extent transit and passenger rail,

and highways. The industry at large pushed for fiscal year 2021 funding of the Maritime Transportation System Emergency Relief Program newly authorized in the National Defense Authorization Act, but because of the extremely tight timing the Program remains unfunded. Maritime Security Program carriers also looked likely to receive some relief under House proposals, but in the end no additional funding was made available. As the pandemic wears on into Spring, the maritime industry will continue to deliver, but whether it will receive targeted relief funding remains to be seen.

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