

The Birth of the Lighthouse Service...

The Ninth Act of the First U. S. Congress

By Wayne Wheeler

Based on an Article by Adam S. Grace published in the *Albany Law Review*.

In developing our Constitution the representatives of the new government were separated into two distinct camps. The Federalists who wanted the central government to have certain powers, and the anti-federalists camp who wanted almost all power to rest within individual states.

After much wrangling it was decided that the federal government would print a national currency, devise and maintain a postal system, maintain a military, act on behalf of the states in foreign and Indian matters, collect custom dues on imported goods and, through the Commerce Clause "regulate" and "facilitate" commerce. And, the first area the new government was to "facilitate" regarded lighthouses. When we were colonies "light dues" were collected by the individual colonies, much like England and other countries. However, the First Secretary of the Treasury, Alexander Hamilton, thought that mariners should not be charged for the use of aids to navigation and said to President Washington, "...they [lighthouses] should be free as the air..."



Portland Head Lighthouse, the first constructed under the Ninth Act. Note the vent atop the lantern. Pyramid shaped bell house at right. From an 1870 stereopticon card courtesy of Tim Carr.

The Ninth Act of the first Congress (the first public works act) states:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all expenses which shall accrue, from and after the fifteenth day of August, one thousand seven hundred and eighty-nine, in the necessary support, maintenance, and repairs of all light-houses, beacons, buoys and public piers, erected, placed or sunk, before the passing of this act, at the entrance of or within, any bay, inlet, harbor, or port of the United States, for rendering the navigation thereof easy and safe, shall be defrayed out of the treasury of the United States: Provided, nevertheless, That none of the said expenses shall continue to be so defrayed by the United States, after the expiration of one year from the day aforesaid, unless such light-houses, beacons, buoys and public piers shall, in the meantime, be ceded to, and vested in, the United States by the State or States respectively in which the same may be, together with the lands and tenements thereunto belonging, and together with the jurisdiction of the same.

Sec. 2. And be it further enacted, That a light-house shall be erected near the entrance of Chesapeake Bay at such place, when ceded to the United States in manner aforesaid, as the President of the United States shall direct [this was the original Cape Henry light-house, the first erected by the federal government].

Sec. 3. And be it further enacted, That it shall be the duty of the Secretary of the Treasury to provide by contracts, which shall be approved by the President of the United States, for the building of a light-house near the entrance of Chesapeake Bay, and for rebuilding when necessary, and keeping in good repair, the light-houses, beacons, buoys and public piers in the several States, and for furnishing the same with all necessary supplies; and also to agree for the salaries, wages, or hire of the person or persons appointed by the President for the superintendence of the same.

Sec. 4. And be it further enacted, That all pilots in the bays, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.

Approved August 7, 1789

This Act passed without much controversy, but in the years that followed there would be plenty of controversy regarding this precedent from both the federalists and the anti-federalists members of Congress. The States wanted the federal powers to be limited to the agreed upon areas of postal service, armed forces, printing currency, collecting impost dues (custom houses) and international treaties and agreements. Yet the Commerce Clause (enacted to bring aids to navigation under the control of the central government) [Enclave Clause as it became known] opened the door for the federal government to have a hand in other areas. The idea was that light-houses were necessary to safe guard both foreign and domestic commerce and perhaps our aids system should be standardized. Aids to

navigation would promote commerce as well as protect it.

In 1789, when the first Federal Congress first sat, it would not have been clear to everyone that (1) the federal government had the power to construct lighthouses, and (2) the power to "regulate" commerce included the power to "facilitate" commerce by constructing such internal improvements. Nevertheless, the Commerce Clause precedent created by the Lighthouse Act remained virtually unquestioned, even while power to "construct" improvements and "facilitate" commerce would be debated for decades in relation to proposed road and canal programs. Whether the lighthouse precedent was to be accorded broader application was heavily debated, but the precedent of federal lighthouse building was never overruled.

Congress OF THE United States,
begun and held at the City of New-York, on Wednesday the fourth of
March, one thousand seven hundred and eighty nine?
An Act for the establishment and support of Light-houses, Beacons, Buoys, and public Piers.

BE it enacted by the **SENATE and HOUSE of REPRESENTATIVES** of the United States of America, in Congress assembled, That all expenses which shall accrue from and after the fifteenth day of August, One thousand seven hundred and eighty nine, in the necessary support, maintenance, and repairs of all Light houses, beacons, buoys, and public piers, erected, placed, or sunk before the passing of this Act, at the entrance of, or within any bay, inlet, harbor, or port of the United States, for rendering the navigation thereof easy and safe, shall be defrayed out of the Treasury of the United States: Provided nevertheless, that none of the said expenses shall continue to be so defrayed by the United States, after the expiration of one year from the day aforesaid, unless such Light houses, beacons, buoys, and public piers shall in the mean time be ceded to, and vested in the United States, by the State or States respectively, in which the same may be, together with the lands and tenements thereto belonging, and together with the jurisdiction of the same:

AND be it further enacted, That a Light house shall be erected near the entrance of the Chesapeake Bay, at such place when ceded to the United States in manner aforesaid, as the President of the United States shall direct.

AND be it further enacted, That it shall be the duty of the Secretary of the Treasury, to provide by contracts which shall be approved by the President of the United States, for building a Light house near the entrance of Chesapeake Bay, and for rebuilding when necessary, and keeping in good repair the Light houses, Beacons, Buoys, and public Piers in the several States, and for furnishing the same with all necessary supplies, and also to pay for the salaries, wages, or hire of the person or persons appointed by the President for the superintendence and care of the same.

AND be it further enacted, That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the United States, in such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.

Frederick Augustus Muhlenberg *Speaker of the House of Representatives.*
 John Adams, *Vice President of the United States, and President of the Senate.*
 George Washington *President of the United States.*

Approved August the 7th 1789

Facsimile of the original Ninth Act signed by Speaker of the House of Representatives, Frederick Augustus Muhlenberg; Vice President of the United States and President of the Senate, John Adams; and President of the United States, George Washington. From the size and position of the signatures one wonders if Washington was originally intended to sign. Of course, today, an act is not law until signed by the President, but what were the rules in the beginning?

One Senator (Timothy Pickering of Massachusetts) said, "Commerce was carried on by land as well as water, and if Congress, under the clause for regulating commerce, could rightfully do, what, from the formation of the government, they had been doing and without a single objection – erecting light-houses, beacons and piers, to give facility and safety to commerce by water; why should they not exercise the power to facilitate, secure and render less expensive, by means of road and canals, the commerce by land?" He was playing the devil's advocate. In other words, if the government pays for aids to navigation, where will its involvement stop, canals?, roads? factories?

This was countered by the fact that the government, after formation, was now collecting taxes on imports (tonnage duties), pre-

viously collected by the individual colonies, and for a short period the states, and using some of the funds to construct and maintain lighthouses and other aids to navigation.

At the Constitutional Convention the question of federal control over lighthouses was not debated. Delegate James McHenry, of Maryland, considered a motion for such power, but on the last day of debate – the day after the convention rejected a motion by Benjamin Franklin for the power granted to the federal government to cut canals – McHenry moved instead for a clause preventing Congress from restraining states from laying "duties of tonnage" for erecting lighthouses and clearing harbors. In response to the motion the convention decided to treat tonnage duties the same way imposts and duties on imports and exports were treated; that is, the States would

be restricted from laying them without the consent of Congress. Thus, the Constitution left a significant potential lighthouse funding mechanism to subsequent political resolution, and said nothing explicitly regarding state or federal power to construct or operate lighthouses.

Throughout the ratification period, and even after Congress sat, states continued to plan and construct new lighthouses (the Cape Fear and Ocracoke lighthouses), in addition to maintaining existing structures. By 1789, the state-built lighthouse system was functional and in the capable hands of state-appointed keepers. The states feared that should the federal government take over the aids to navigation system, it would also take over the source or sources of funding, taxes. In the past this had been tonnage dues or "light money."

Twin Lights, Baker's Island, Salem, Mass.



Baker Island Light Station as it appeared circa 1907. It was one of the lighthouse sites intended as part of the Ninth Act. Note the lady gathering flowers in the left foreground and the kids in front of the front steps.

There has been some debate as to whether the federal government wanted control of lighthouses so that it could claim the right to assess and collect tonnage duties to construct and maintain them, or because the federal government collected duties it was required to maintain the aids system. The latter seems the most reasonable.

The anti-federalists were reluctant to cede to the federal government all tonnage duties. Early on it appeared that the states could maintain their own lighthouses, at the same time that the federal government constructed and maintained lighthouses, individual states could opt out of the federal programs, but they couldn't collect tonnage duties unless permission was granted by the federal government. As the law was enacted the federal government would, without the need for a specific state request, pay for the support, maintenance and repairs" of all lighthouses: however, all payments would cease after one year unless the state ceded jurisdiction over the lighthouse

lands. If the government wanted full control and exclusive federal jurisdiction over any lighthouse lands, instead of just title, then the Constitutions "Enclave Clause" would require state consent. That clause provides that Congress shall exercise "exclusive legislation...over all Places purchased by the Consent of the Legislature of the State in which the Same shall be. For the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings."

It's interesting to note the word "piers" in the Lighthouse Act of 1789, "...support, maintenance and repairs of light-houses, beacons, buoys and public piers..." The word 'piers' was added after the first draft when a group of Philadelphia merchants lobbied for their inclusion based on the fact that the Philadelphia port wardens had commenced construction of piers that [after passage of the Lighthouse Act] would be left without funding for completion or maintenance by virtue of the Tonnage Act, which took away their ability to assess tonnage fees.

As mentioned above, the states were provided funding for their lighthouses for one year and

that they should cede them to the federal government if they wished to continue to receive funds. Samuel Adams of Massachusetts saw the Lighthouse Act as giving the states no choice. If the states didn't cede the structures and the land at the end of a year, there would be no federal funding and the lighthouses would cease to operate, they would be of no use to the states. He considered the federal government's behavior "unseemly" and that it was trying to govern too much. But the various states fell into line and gave up their lighthouses fairly promptly (nationally there were twelve), the only holdout was, not surprisingly, Rhode Island. It didn't cede its Beavertail Lighthouse until 1793. Rhode Island didn't lose funding during this period as the government passed a series of one year extensions.

Interestingly, the Lighthouse Act didn't provide Congress with a specific power to construct lighthouses. It spoke of assuming control of existing lighthouses and maintenance of them and other aids to navigation. Yet, soon after the Act was passed a Massachusetts merchant wrote President Washington requesting that a light-

house be constructed on Seguin Island (Maine was part of Massachusetts in that era). The first lighthouse, other than the Cape Henry Lighthouse, mentioned in the Act, constructed by the government was Portland Head in what is now Maine.

The Lighthouse Act was debated at various times (from its passage in 1789) for the next 40 years. Jefferson once questioned how the Commerce Clause could justify creation of coastal navigation aids. He could see no distinction between building such aids and building factories to "facilitate" commerce (which he deemed unconstitutional). He felt that an Amendment to the Constitution was necessary to allow the federal government to operate an aid to navigation system among the various states. Yet, he continued to sign lighthouse-related bills, deciding to "let sleeping dogs lie." Madison, during his presidency, concluded the same thing. One of the final vetoes of Madison's last term of office rejected the so-called Bonus Bill which, using the Lighthouse Act as precedence, attempted to cause federal funding for canals and roads. Madison placed his logic on the fact that lighthouses had received "a positive sanction and general acquiescence" since the beginning of the federal government, and canals and roads had not. Yet it would seem logical that improving navigation on rivers like the Mississippi and construction of certain canals could facilitate foreign and domestic commerce, and road improvements could facilitate the movement of troops in military operations. Interestingly, in the 1950s President Eisenhower created the Interstate Highway System based on the government's authority to maintain a military. He reasoned that a secure and modern highway system might be needed to move troops around the country in time of war or national emergency. In recent years funding for federal highways in a particular state have been threatened to be withheld if the particular state refused to comply with some other federal program.

Today 33 CFR 62 states that the government shall maintain aids to navigation "...in support of substantial interstate commerce." Waterways that allow vessels engaged in commerce to navigate from one state to another can be marked with aids to navigation by the Coast Guard. Even small harbors with commercial fishing boats qualify. Marinas with only pleasure craft don't. Landlocked lakes bordering two states (Lake Tahoe for instance, with passenger vessels plying its waters) also qualify.

But the Commerce Clause has allowed legislators to stretch the Clause to cover items not envisioned by the Founding Fathers. As an example the Endangered Species Act stems from the Commerce Clause. If a species exists in at least two states, or could have a monetary value if transported between states then the Act's provision apply. Recently a developer in Southern California was seemingly stopped because his project was endangering a rare type of toad. He brought suit stating that the animal had no commercial worth and existed wholly in California, thus the endangered Species Act did not apply, he won.

Another result of the Lighthouse Act was our Eminent Domain Law. During the 1790s several lighthouses were constructed on land ceded to the government by the States. But the question arose, what if the land on which the government wished to construct a lighthouse was not owned by the state, but a private party? This raised two questions. If a private land owner refused to transfer his property and, did the federal government have the power to obtain the land through condemnation? And if it did, could a state affect the federal government's rights by refusing to cede jurisdiction over the property in question?

The possible precedent setting case may have stemmed from 1797. On September 6 a group of men met at Webb's Tavern in Salem, Massachusetts. They were about to take a boat out to Baker's Island in northern Boston Harbor. The group consisted of the Superintendent of Lighthouses for Massachusetts, an attorney for the owner of Baker's Island and a committee appointed by a state court judge. Their mission was to "...view, set off, and appraise..." ten acres of land on the island to be used for a light station. Inclement weather thwarted their mission that day, but a week later they were able to view the island and recommend an appraisal of the property. The next month a state court accepted the appraisal. This action, the federal taking and the state accepting, may well be the first incidence of the taking of private land.

This action, as later history unfolded, bore two aspects that would be repeated for decades: 1) the valuation process was overseen by a state court, and 2) it was authorized by a state court and not by an Act of Congress. The Statute reads, in part, "...That the United States of America may purchase or take as is hereinafter provided, and tracts of land which shall be found necessary and convenient for the light-

house authorized by Congress to be erected on Baker's Island, and upon Cape Cod... And be it further enacted, that the agent... employed by the United States... and the owner... of any tracts of land... which shall be found necessary and convenient for said light-houses, cannot agree on a sale and purchase thereof, such agent or person employed may apply to any Court of General Sessions of the Peace... who shall and may appoint a committee of three freeholders, impartial men, to determine a just equivalent to the owner... of such land..."

This Statute also, as noted above, involved land for the Cape Cod Light Station at Truro, Mass. Which began operation in 1797, Baker's Island twin towered station first went into operation in 1798.

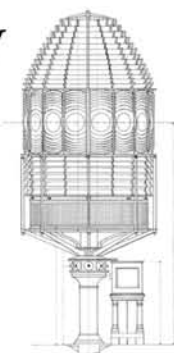
In the 1790s, when the federal government obtained existing lighthouse lands or property for new construction, it always sought 'permission' for such lands from the state. In the case of the Baker's Island taking, the state said "...purchase or take [land on Baker's Island] as hereinafter is provided..." One would view that as a grant of takings power to the federal government by the state. Massachusetts was not granting power to the United States, but limiting it, by perpetuating the policy that the state's permission was needed before the land could be transferred. The state included a requirement that all charges related to the appraisal be paid by the United States.

When Tench Coxe, Commissioner of Revenue (in charge of lighthouses) set out to acquire the Baker's Island property, he was not eager to have the property condemned. He told his superintendent for lighthouses in Massachusetts, "It will be much more agreeable to procure the land by treaty and ordinary purchase than to adapt the mode of valuation or condemnation for the public use, for an appraised consideration as authorized by the State law." Coxe was interested in maintaining good relations between the federal government and private citizens. Coxe was always interested in keeping costs down, including acquiring lands by gift if possible. He didn't want the government to appear unfair when dealing with the public.

The government continued to obtain permission from states regarding instances of eminent domain until 1875. In that year, the Supreme Court, in *Kohl vs United States*, ruled that the federal government had the power to take private property, provided that just compensation was made in accordance with the Fifth Amendment.



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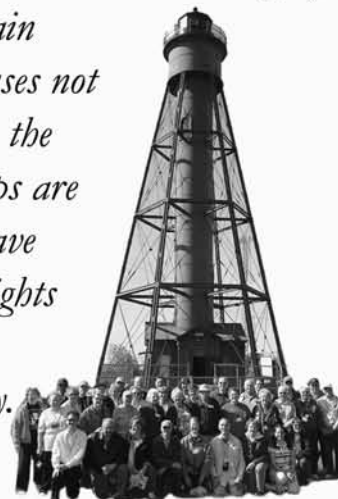
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